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# REPORTS OF CASES

ARGUED AND DETERMINED IN

# THE SUPREME COURT OF SOUTH CAROLINA

COVERING

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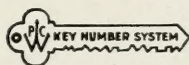
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REPORTS  
OF  
CASES IN EQUITY

ARGUED AND DETERMINED IN THE  
COURT OF APPEALS AND COURT OF ERRORS  
OF SOUTH CAROLINA

VOLUME VI  
FROM NOVEMBER, 1853, TO MAY, 1854, BOTH INCLUSIVE

BY J. S. G. RICHARDSON  
STATE REPORTER

CHARLESTON, S. C.  
McCARTER & CO., BOOKSELLERS AND STATIONERS  
1855

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ANNOTATED EDITION  
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# CHANCELLORS

DURING THE PERIOD COMPRISED IN THIS  
VOLUME

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HON. JOB JOHNSTON,  
“ BENJ. F. DUNKIN,  
“ GEORGE W. DARGAN,  
“ F. H. WARDLAW.

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# CASES IN EQUITY

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA, NOVEMBER AND  
DECEMBER TERM, 1853

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CHANCELLORS PRESENT:

HON. JOB JOHNSTON.  
“ BENJ. F. DUNKIN,  
“ GEORGE W. DARGAN,  
“ F. H. WARDLAW.

---

6 Rich. Eq. \*1

\*ANDREW MAYER v. JOSEPH GALLUCHAT and Wife and Another.

(Columbia. Nov. and Dec. Term, 1853.)

[*Equity* ⇨185.]

Defendant, in answering a bill, is not bound to respond to an allegation as to his own insolvency.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 428; Dec. Dig. ⇨185.]

[*Trusts* ⇨227.]

A trustee cannot charge the trust estate with a counsel fee paid to himself.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 324; Dec. Dig. ⇨227.]

[*Husband and Wife* ⇨151.]

Husband being insolvent, and wife entitled to a separate trust estate, they with their child and servants board with the plaintiff. The debt for board is a legal demand against the husband, and the trust estate is not liable for it.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 592; Dec. Dig. ⇨151.]

Before Dunkin, Ch., at Lancaster, June, 1853.

This petition was filed for payment out of the separate trust estate of Rebecca, wife of

\*2

Joseph Galluchat, of certain demands \*of the petitioner for board furnished them, their child and servants. The petition alleged that Joseph Galluchat was insolvent as well when the board was furnished, as at the filing of the petition; and the answer contained no response to this allegation. The trust estate was held under two instruments. First, under an ante-nuptial contract, to which there was no trustee; and, secondly, under a settlement, to which the defendant,

William M. Moore, was trustee, made by order of the Court, of property which accrued to Mrs. Rebecca after the marriage.

The petitioner excepted to the answer for insufficiency, because the charge as to the insolvency of Joseph Galluchat was not answered.

Dunkin, Ch. Before considering the merits of this case, it is proper to dispose of the exceptions to the answer. Strictly, the plaintiff is only entitled to a discovery from the defendant, as to matters within his own knowledge, and which cannot be established in the ordinary mode—such is not an interrogatory as to the defendant's insolvency. That is a fact to be proved in the usual way. The return of a *fi. fa. nulla bona*, or a discharge under *ca. sa.*, would entitle the plaintiff to any advantage he might derive from shewing the insolvency of the defendant. The answer seems to the Court sufficient in form.

As a preliminary, or rather incidentally, the Court would remark, that a trustee cannot charge the trust estate with a counsel fee paid to himself. This has been repeatedly ruled. An executor cannot charge for overseer's wages allowed to himself nor for professional services as a physician, (see *Reed v. Stoney*, Ap. Charleston, Feb. 1851). In other words, he can make no contract with himself. He may employ another overseer, another physician, another lawyer, and pay them for their services, which payment will be allowed him. But he can make no bargain with himself. Exhibit (B) dated 3d February, 1853, filed with defendants' answer, will shew to what the remark is appli-

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⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

cable, and which can be corrected by the Commissioner in the next annual return of the trustee.

\*3

\*It seems that the plaintiff keeps a tavern in the village of Lancaster, and that the defendant, Galluchat and his family boarded with him for about a year prior to March, 1848; that he owed him \$45 58 cts., for which he took his note and obtained judgment in March, 1848, and the execution was returned nulla bona March, 1849. From December, 1849, to October, 1850, they again boarded with him, and the whole amount due is about \$264. It is alleged that the husband is insolvent, and this is an application to subject the trust estate of the wife to the payment of the plaintiff's demand. The trust estate was derived entirely from the wife's interest, as distributee of her father and mother. Her interest in her father's estate was secured by an ante-nuptial settlement in 1846—that in her mother's by the decree of this Court, made in 1850, while the parties were boarding with the plaintiff.

The demand of the plaintiff is a plain legal demand against the husband, Joseph Galluchat. Neither he nor his wife had any authority to bind the trust estate; and there is no evidence that either of them made the attempt. As I have said in *Adams v. Mackey* [6 Rich. Eq. 75], parties must look to those with whom they contract. The trustee is the legal owner of the estate. If persons are unwilling to give credit to the *cestui que trust*, they must contract with the trustee, or refuse the credit altogether. If they contract with the trustee, it is still a legal demand, for which they have a legal remedy, and the trustee may reimburse himself from the income, provided the charge be proper. The principles are very familiar, and it is not deemed necessary here to review them. The Court is unable to recognize any ground which would authorize the relief asked. The petition is dismissed.

The petitioner appealed on the grounds:

1. Because it is submitted that the Chancellor erred in not sustaining the exception to the answer, which was, that they did not confess or deny that the husband was insolvent, as the petition alleged.

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\*2. Because, as there was no trustee under the ante-nuptial agreement with whom to make a legal contract, and as the board and services were beneficial to the trust estate, the decree should have made it chargeable in the same way as if the trustee was applying in the first instance for leave to use so much of the trust estate as would be sufficient to board the wife, child, and servants of the wife, as charged for in the petition.

3. Because the wife's portion of her mother's estate was settled, after the board and services were rendered.

4. Because, it is submitted, the Chancellor erred in not ordering a reference to ascertain the necessity and benefit of the board and services rendered, which was moved for on the part of the petitioner.

Caston, for appellant.

Moore, contra.

PER CURIAM. We concur in the decree; and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

### 6 Rich. Eq. \*5

\*BRANDON & NETHERS and Others v. CHARLES GOWING and Others.

(Columbia. Nov. and Dec. Term, 1853.)

[*Creditors' Suit* ⇨19.]

A creditor under whose *ca. sa.* the debtor has been arrested and is an applicant for the benefit of the insolvent debtors' Act, may join other creditors in filing a creditors' bill for the purpose of enlarging the fund for the payment of their claims and excluding a fraudulent creditor from any share.

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. § 88; Dec. Dig. ⇨19.]

[*Judgment* ⇨800.]

Where one is arrested, under a *ca. sa.* the lien of the judgment is gone, but not the debt.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1419; Dec. Dig. ⇨800.]

[*Discovery* ⇨4.]

The creditor of an applicant for the benefit of the insolvent debtors' Act may file a bill for discovery against the debtor as ancillary to the proceedings upon his application.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 5; Dec. Dig. ⇨4.]

Before Dunkin, Ch., at Union, June, 1853.

The bill was filed by James K. Brandon and French T. Nethers, partners trading under the style of Brandon & Nethers, Benjamin H. Rice, executor of Sarah Rice, and John North, survivor, on behalf of themselves and all other judgment creditors of Charles Gowing, who shall come in and contribute to the expenses of the suit: and alleged that the said Sarah P. Rice, in her lifetime, and in the year 1846, recovered two judgments in the Court of Common Pleas against the said Charles Gowing, which judgments remain unsatisfied: that on or about the 19th day of February, 1829, North & Rowe, of whom the plaintiff, John North, is survivor, recovered a judgment in the same Court, against the said Charles Gowing, for over one thousand dollars, which judgment was revived in 1850, by *scire facias*, by North, as survivor, and is unsatisfied.

That in the year 1841, Charles Gowing purchased from John J. Pratt a lot in the village of Union, known as the Tan Yard



Lot, together with a large stock of shoes and leather, some tan vats, &c., for about three thousand dollars—to secure the payment of which, mortgages were taken for the premises about the eighth day of February, 1842, and not recorded until the 26th day of January, 1846, during which time Charles Gowing was making large sums of money; that he paid considerable sums of the purchase money to Pratt; and that in the years 1843 and 1844, the debts were contracted to the said Sarah Rice, for the hire of her boy Eli,

\*6

a shoe-maker, who worked in \*the shoe shop of Charles Gowing, and whose earnings were applied in part towards the payment of the mortgage debt.

That about the first of October, 1849, the whole estate of Charles Gowing was sold under an order of foreclosure and sale, and bought in principally by John J. Pratt, the mortgagee, far below the market value, owing to the uncertainty of title, as plaintiffs believe, in consequence of incumbrances in the nature of mortgages and judgments, which were well calculated to deter strangers from bidding liberally; and the plaintiffs submit that the mortgage of the personal property of Gowing was void, for want of recording in time, and that the plaintiffs' liens attached in preference.

That within four days after said sale, to wit: on the 4th October, 1849, Charles Gowing, by a voluntary deed, assigned and conveyed to his son, Rodney Gowing, the whole of his debts, deeds, judgments, books of account, and choses in action, to pay certain preferred debts: that amongst his preferred creditors was his son, the said Rodney Gowing, to the amount of over two thousand dollars—first as assignee of James S. Brooks & Co., and second, upon a debt due by Charles Gowing to his son, amounting to above eleven hundred dollars. That the second preferred creditor is John J. Pratt, for about two thousand dollars, which the plaintiffs suppose to be the balance of the mortgage debt, but which they charge has been fully paid and satisfied by the re-sale of the estates of Charles Gowing, by Pratt to Rodney Gowing, under some arrangement, understanding and agreement between Pratt, Charles Gowing and Rodney Gowing, made either before or after said assignment, which agreement, the bill charges, was to the effect that if the said Charles Gowing would pay, or secure to be paid, to Pratt, the balance due or amount preferred under said assignment, Pratt would allow to Charles Gowing the whole and full advantage of his purchase, which was sufficient to pay the said preferred debt to Pratt. That on the 4th day of November, 1849, a reconveyance of the estates aforesaid was made by Pratt to Rodney Gowing, for the purpose and to the intent that Charles

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\*should have the benefit of Pratt's purchase

of his property, which advance did discharge the aforesaid debt. The bill further alleges that the assignment of the judgment of James S. Brooks & Co. is fraudulent and void, as there is no such judgment on record. That the execution set up as evidence of the debt assigned to Rodney Gowing, by the said James S. Brooks & Co., is false and pretentive, and intended to hinder the plaintiffs in the collection of their debts, and that if any money was paid for the purchase of the said assignment, the whole or a great part was furnished by Charles Gowing, which did not exceed the amount of two hundred dollars, and that the other preferred debt of Rodney Gowing is without consideration, and that plaintiffs believe that they can shew, from the habits of Rodney Gowing, that it would be unreasonable he could have bona fide demands against his father to the amount of his preferred debts; and they charge a combination between the said assignor and assignee in this respect, to defraud the creditors of the assignor, and to hinder and defeat them in the collection of their debts. That Rodney Gowing, at the request of Charles Gowing, accepted the said assignment, and took upon himself the execution thereof, and promised to pursue the directions of the said deed, according to the provisions of the Statute in such cases made and provided; and that Rodney Gowing continued to collect, and has collected large sums of money, without the assistance of an agent, and without ever calling the creditors together, or giving them notice of the assignment, that they might appoint an agent, according to the provisions of the Statute; that Rodney Gowing, instead of paying out the money collected under said assignment, has applied it to the payment of his own debts. The amount collected is unknown to plaintiffs. They believe it to be considerable. Nor do they know the amount assigned; but think it some six or eight thousand dollars. That Charles Gowing is now and has been in the possession of the house and lot, and other articles formerly owned by him, and purchased by Pratt, as hereinbefore stated, ostensibly as the agent of Rodney Gowing,

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but really as the owner him\*self. That Rodney Gowing, for a greater part of his time, since his appointment as assignee, has been absent from the district, leaving his father in possession of the assigned effects, to collect and use as convenience or necessity might require. That Charles Gowing has had the whole management of the assignment, paying his own liabilities, and those of his son, and especially the debt due to Pratt, for the purchase money of the property re-conveyed to Rodney Gowing.

The bill further alleges that the said Charles Gowing, being in the custody of the Sheriff of Union district, under a *capias ad satisfaciendum*, at the suit of the plaintiffs,



Brandon & Nethers, has filed his schedule with the Clerk of the Court of Common Pleas, with a petition to the said Court, praying leave to assign his said schedule, and be discharged from his confinement under the insolvent debtors' Act; that all the creditors of said Charles Gowing are summoned, by publication in the Unionville Journal, to shew cause why he should not be discharged; and that among the judgment creditors of said Charles Gowing, is the said Rodney Gowing as the assignee of one Hiram Baker, the brother-in-law of the said Charles Gowing—that this debt is in the form of a judgment, confessed some time in the year 1826, and assigned to the said Rodney Gowing, 22nd day of June, 1849, and revived by consent on the seventh of September, 1849. That the said assignment was made without consideration, and at the request of the said Charles Gowing, and that if any money was paid for the said judgment to the said Hiram Baker, it was paid by the said Charles, or out of his money. The bill charges that no money was paid by either of the Gowings—that the assignment is voluntary and fraudulent, and submits that the renewal of said judgment, after a lapse of twenty-two years and upwards, from the time of the rendition, is void as to creditors, and that the lien is lost, except as between the parties, and that the said Rodney Gowing ought not to be allowed a distributive share of Charles Gowing's effects with the other creditors, if they should prove insufficient to pay in full all of his debts.

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\*The bill further charges, that if the preferred debts which have been paid off and satisfied, and others to the assignee that are without consideration, shall be postponed, there will be an amount in the hands of the assignee, sufficient to satisfy the plaintiffs' demands, which will appear if the said assignee will set forth a full account of the amounts collected by him, and the sums to be collected—and the plaintiffs submit that the preferred debts ought to be postponed, and the assignee required to account for the whole of the said assignment, and that the deed should be declared void and set aside, and a receiver appointed to receive all the monies from Rodney Gowing, collected by him, and also all sums due Charles Gowing, comprised in said assignment—and that an injunction be granted to restrain Rodney Gowing from receiving and collecting and getting in the debts, dues, judgments, choses in action, &c., mentioned in said deed—and that Charles Gowing may be enjoined from moving his discharge in the Court of Common Pleas, under the insolvent debtors' Act, until the matters complained of shall be heard and determined, and for other and further relief, &c.

To this bill the defendants demurred.

Dunkin, Ch. "A demurrer," says Mr. Jus-

tice Story, § 442, "may be to the whole bill, or to a part only of the bill; and the defendant may therefore demur as to a part, plead as to another part, and answer as to the rest of the bill." Again, § 443, "if a demurrer is too general, that is, if it covers or is applied to the whole bill, when it is good to a part only, it will be overruled." This is, in the strictest sense, a general demurrer, according to the approved forms. It is not necessary to enquire whether there are not particular parts of this bill, especially as to some of the measures of relief, which are or are not demurrable. This is a demurrer to the whole bill. The Court is of opinion that the demurrer must be overruled, and it is so ordered and decreed. It is further ordered that the defendants file their answer within thirty days.

\*10

\*The defendants, Charles Gowing and Rodney Gowing, appealed; and now moved this Court to reverse the decree, on the grounds:

1. Because from the case made by the bill, the demurrer should have been sustained.
2. Because the demurrer was not decided in open Court, and the decree overruling the demurrer is a nullity.

Herndon, for appellants.  
Gadberry, contra.

The opinion of the Court was delivered by

DUNKIN, CH. This is what is technically termed a creditors' bill. The object is not only to enlarge the fund for the payment of Charles Gowing's creditors, but to exclude his son and co-defendant, Rodney Gowing, from the large share which, under various claims, he proposes to appropriate to himself. Other judgment creditors, besides Brandon and Nethers, are plaintiffs in these proceedings. But it is urged that, although the demurrer may have been properly overruled as to the other plaintiffs, yet, as Brandon and Nethers had selected their forum, they must be confined to the remedy which that proceeding affords. It is true that, in arresting Charles Gowing under a ca. sa., Brandon and Nethers lost the lien of their judgment; but, when their debtor became actor and proposed to assign his effects as a condition of his discharge, Brandon and Nethers were entitled to participate in the assigned fund. This precise point was considered and adjudged in *Mairs v. Smith*, 3 McC. 52. The assignment under the Insolvent Debtors' Act is for the benefit "of the suitor or suitors at whose instance the defendant stands charged," and of all others, &c. When the defendant takes the benefit of the Act, the plaintiff's lien is gone, but not his debt. In the language of Judge Nott, speaking for the Court, "the Act preserves the debt, but not the lien."

The original jurisdiction of this Court entitles the plaintiffs to a discovery both from

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Charles Gowing and from Rodney Gowing,

from which they are not precluded by the arrest of the former, and this proceeding might very properly be entertained as ancillary to the proceedings now pending at law. The demurrer admits the truth of facts constituting a gross fraud, which these defendants have combined to perpetrate upon the creditors of Charles Gowing, and it is the proper province of this tribunal to defeat such machinations by purging the conscience of those for whose benefit they are contrived.

It is ordered and decreed, that the judgment of the Circuit Court be affirmed, and that the appeal be dismissed.

JOHNSTON and WARDLAW, CC., concurring.

Appeal dismissed.

### 6 Rich. Eq. \*12

\*JANE MALLET v. J. BOLTON SMITH,  
Executor, and Others.

(Columbia. Nov. and Dec. Term, 1853.)

[Reported and annotated in 60 Am. Dec. 107.]

[Powers 30.]

Testator, by his will, made certain provisions for some of his slaves, which were void under the Act of 1841, (11 Stat. 154). He bequeathed to his sister J. M., \$2,000; made her one of his residuary legatees; and then provided as follows: "Should any of my legatees, under this my will, complain, or express any dissatisfaction with any disposition of my estate herein made, I hereby direct and empower my executors, in their discretion, to revoke any and all legacies such complaining legatee or legatees might have been entitled to, and to dispose of the same between my other legatees, as to my executors may seem just and proper." He appointed three executors, two of whom renounced, and one qualified. J. M. filed her bill, calling in question the validity of the provisions made for the slaves; and thereupon the acting executor, alone, executed a deed revoking the legacies to J. M., and assigning them, in certain proportions, to the other legatees: *Held*, that the power could not be exercised by the acting executor alone, the other two, who were still living, not joining with him.

[Ed. Note.—Cited in *De Saussure v. Lyons*, 9 S. C. 502.]

For other cases, see Powers, Cent. Dig. § 89; Dec. Dig. 30.]

[Wills 651.]

A condition that a legatee shall not dispute the will, when to be regarded as in *terrorem* merely, and when not, considered.

[Ed. Note.—Cited in *Rouse v. Branch*, 91 S. C. 113, 117, 74 S. E. 133, 39 L. R. A. (N. S.) 1160, Ann. Cas. 1913E, 1296.]

For other cases, see Wills, Cent. Dig. § 1542; Dec. Dig. 651.]

[Wills 651.]

Such a condition subsequent is void, whether there be a devise over or not, as trenching on the "liberty of the law," and violating public policy. Per Wardlaw, Ch., Johnson, Ch., concurring.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1542; Dec. Dig. 651.]

[Powers 30.]

At the common law, a joint power altogether independent of the office of executor, con-

ferred by the will upon several executors, must be executed by them all, even though some have renounced.

[Ed. Note.—Cited in *De Saussure v. Lyons*, 9 S. C. 497; *Smith v. Winn*, 27 S. C. 598, 4 S. E. 240; *Dick v. Harby*, 48 S. C. 530, 529, 26 S. E. 900.]

For other cases, see Powers, Cent. Dig. § 89; Dec. Dig. 30.]

[Wills 665.]

Where a legatee seeks to set aside a provision in the will for slaves, as void under the Act of 1841, he is not bound to elect, or make compensation to the disappointed legatees.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1561-1569; Dec. Dig. 665.]

[Wills 81.]

[Where a provision in a will in relation to certain slaves was void, the will will be left to stand according to its legal import; such provision being disregarded.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 202; Dec. Dig. 81.]

[This case is also cited in *Snider v. Robertson*, 9 S. C. 229, as to facts.]

Before Dunkin, Ch., at York, June, 1853.

A full statement of the facts of this case appears in the circuit decree, which is as follows:

Dunkin, Ch. William Hacket, late of Yorkville, departed this life in October, 1850, leaving a last will and testament, duly executed and bearing date, 16th October, 1847. Of this will, Robert G. McCaw, J. Bolton Smith and James R. Bratton, were appointed executors, but the defendant alone has qualified thereon. The testator had been engaged in merchandise, and died possessed of a very considerable estate, consisting of lands, slaves and other personalty. The fourth clause of his will is as follows: "I will, bequeath and devise unto my said brother, Hugh Hacket, if alive at my death, my negroes, Alsey, Mary, and her daughter Louisa,

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and Dick, in special charge \*and confidence, that as soon as may be practicable after my decease, he do erect a comfortable house for them to live in, upon the Chambers tract of land, devised in the second clause of this my will; and that the said Hugh Hacket permit Alsey, Mary, and her daughter and Dick, there to reside in the enjoyment of all the rents and profits of said last mentioned tract, without any person requiring or exacting any service or labor from either the said Alsey, Mary or Louisa, and that they be supported and maintained on the said tract of land during their several lives, out of the interest of the sum of one thousand dollars hereby set apart to the said Hugh Hacket for that purpose, and hire of boy Dick to be applied to their common support."

By the tenth clause of testator's will, he gives to the complainant by the description of "my sister Jenny Mallet," two thousand dollars—and by the fourteenth clause, he declares it to be his will, "if I am possessed of any thing not included in the above, and not hereinbefore disposed of, that my execu-



tors divide the same, together with any legacy that may fall back, equally between my brother Hugh Hacket and my sister Jane Mallet, share and share alike."

"Fifteenth. Should any of the legatees, under this my will, complain, or express any dissatisfaction with any disposition of my estate herein made, I hereby direct and empower my executors in their discretion to revoke any and all legacies such complaining legatee or legatees might have been entitled to, and to dispose of the same between my other legatees as to my executors may seem just and proper."

The next of kin of the testator are his brother Hugh Hacket and his sister Jane (the complainant.) He had devised the bulk of his real estate in trust for his brother, to whom he had also bequeathed some thirteen slaves specifically.

Of the slaves included in the fourth clause, Alsey, Mary and Louisa, constituted one family. Alsey is sixty-five or seventy years of age; her daughter Mary forty-five or fifty years, and Louisa, the child of Mary, and reputed child of testator, is a bright mulatto girl.

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\*On the part of the complainant, it is submitted that the provisions of the will are obnoxious to the Act of 1841, (11 Stat. 154,) and such is the judgment of this Court. This was faintly resisted on the part of the trustee, Hugh Hacket, who submitted, however, that if the Court should determine in conformity with the prayer of the plaintiff, that then he might be permitted to account to her for one moiety of the value of the slaves, Alsey, Mary and Louisa, without having them subjected to a sale; and as the Act declares that the trustee shall deliver up the slaves, or account for their value, this may be permitted, and provision therefor will be made in the decretal order. The legacy of Dick and of the thousand dollars is simply void, and passes under the residuary clause.

But it is insisted on the part of the defendant, that the complainant has forfeited her legacy of two thousand dollars, as well as her interest in the residue, by calling in question the validity of the provisions made in the fourth clause. The general proposition on this subject was established as early as *Powell v. Morgan*, 2 Vern. 91. That was a legacy upon condition that the legatee did not disturb or interrupt the will of the testatrix. The validity of the will was, however, unsuccessfully contested by the legatee. It was held that this was no forfeiture of the legacy, as there was *probabilis causa litigandi*, and such is now the well settled doctrine, to wit: that such condition is considered in *terrorem* merely, and does not operate a forfeiture of the legacy. But where there is not simply a declaration of forfeiture, but a valid bequest to a third person in case of breach of the condition, then if the legatee contro-

vert the will, his interest will cease and vest in the other legatee.

The exception is discussed by Sir William Grant in *Lloyd v. Branton*, 3 Mer. 117. He says that different reasons have been assigned by different Judges for the operation of a devise over; some holding that it was a clear manifestation of intention that the declaration of forfeiture was not merely in *terro-*

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\*rem; and others that it was the interest of the devisee over, which made the difference. But all agree that there must be a valid devise over in order to defeat the legacy. A devise to the executors is insufficient, or even a direction that the legacy shall fall into the residue. It is stated simply in *Cleaver v. Spurling*, 2 P. Wms. 528, "this is a good condition in our Law, and when the legacy is once vested in the devisee over, Equity cannot fetch it back again." The terms of the fourteenth clause of this will, are peculiar. "If any legatee shall complain or express dissatisfaction" with any disposition of the will, a discretionary power is given to the executors to revoke the legacy, and dispose of the same among the other legatees "as to his executors may seem just and proper."

This bill was filed 23d December, 1851. Answers were put in, and the cause was at issue in June, 1852. On 2d June, 1853, the defendant, J. Bolton Smith, who had alone qualified on the will, executed a deed by which he transferred and assigned the legacies of the complainant to the other legatees in the proportions specified in the deed.

It may first be remarked that by this fourteenth clause, nothing is given over to any devisee. In case of complaint or dissatisfaction, the executors are to have the authority, if they think proper to exercise it, to revoke the legacy of the non-content, and they are certainly at liberty not to revoke it. It is very questionable whether this amounts to any thing more than a mere declaration in *terrorem*. But it is quite clear that this power given to the executors has never been exerted or exercised, and probably never will be. It was a very high power; nothing less than that of revoking part of the testator's will and, to a certain extent, authorizing them to make a new will for him. The executors were Robert G. McCaw, J. Bolton Smith and James R. Bratton. The first named was evidently looked to by the testator, as he has appointed him especially the trustee of his real estate.

The power thus given to them by the will,

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was (in the language of Chancellor Kent) (a) a personal trust and confidence, to be exercised by them jointly, according to their best judgment, under the circumstances contemplated by the will. It is not an answer to say that the other executors have declined to qualify. Where power was given to the

(a) *Berger v. Duff*, 4 Johns, Ch. 368.

executors to sell, and one of them refused to qualify, it was clear that the others could not sell. Sug. on Pow. 162. And to remedy this inconvenience, an act of Parliament was necessary. In order to the successful exercise of the high power confided in them, the testator intended to have the benefit of the judgment and discretion of all those whom he had appointed to carry his will into effect.

It may not be without meaning, that in the very next clause of his will, he provides, (though unnecessarily,) that in reference to the sale of his lands, those of his executors who qualify before the Ordinary, should act. The other executors may have deemed it the best mode of exercising their discretion to abstain from qualifying on the will, and thereby leave the disposition of the property to the judgment of the tribunals of the country. They have refrained from exercising the power of revocation vested in them, and the Court will not compel them to act, "for, as is elsewhere said, that would be against the nature of a power which is left to the free will and election of the party to execute it or not; for which reasons, equity will not say he shall execute it, nor do that for him which he does not think fit to do himself." The legacies to the complainant remain, then, unrevoked.

It is declared that the fourth clause of the testator's will is null and void; and it is thereupon ordered and decreed, that a writ of partition issue to divide the negroes, Alsey, Mary and Louisa, between the complainant and the defendant, Hugh Hacket; that the commissioners value the said slaves, and that the same be vested in Hugh Hacket, upon his payment to the complainant of one moiety of the aforesaid value of the same.

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\*It is further ordered and decreed, that the defendant, J. Bolton Smith, account for Dick and his hire from the time of the filing of this bill, as part of the residuary estate of testator, and that he account generally for his transactions as executor; that reference be had before the commissioner for that purpose, and that he report thereon.

It is further ordered and decreed, that the defendant, J. Bolton Smith, executor as aforesaid, pay to the complainant the sum of two thousand dollars, as provided by the tenth clause of the will, with interest thereon from 30th October, 1851.

It is finally ordered and decreed, that the costs be paid out of the estate of the testator.

The defendants, Hugh Hacket, William K. Hacket and James Hacket, appealed, and now moved this Court to reverse the decree on the grounds—

1. Because it is respectfully submitted the provision in the testator, Wm. Hacket's will, that if any of his legatees should complain or express any dissatisfaction with any disposition of his estate as made

in his said will, his executors were directed, and should have power to revoke the legacies of such complaining legatee, and dispose of the same between the other legatees, was not in terrorem merely, but said condition was valid, and its violation worked a forfeiture of all benefit under said will, to the party complaining; and defendants insist that the complainant, by disputing the validity of the fourth clause of testator's will, is not entitled either to the legacy of two thousand dollars bequeathed to her in the tenth clause, or any part of the residue bequeathed in the fourteenth clause.

2. Because it is submitted that the testator, in his will, has empowered any one or more of his executors who might qualify, to revoke the legacies bequeathed to such of the legatees as might complain or become dissatisfied, and that the deed executed by J. B. Smith, the acting executor, is a valid and good execution of said power, and defeats all claim of the complainant to any benefit or interest under testator's will.

3. Because the power given in the will to

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revoke the said legacies, and to convey the same to other persons was executed, and is just as effectual to defeat the legacies as if the testator himself had given over the same to others.

4. Because as R. G. McCaw and J. R. Bratton, the two other executors named in the will, had not only refused to qualify, but renounced their right to do so, it is submitted that all the power bestowed by the testator on his executors, devolved on the one who alone qualified and acted.

The defendant, Hugh Hacket, appealed also on the further grounds—

5. Because it is submitted that the bequest of the boy Dick, to him, the said Hugh Hacket, is valid and good, and that the request of testator to him, to permit Dick to work for Alsey, Mary and Louisa, is not binding on the said Hugh Hacket, and worked no forfeiture of said bequest.

6. Because it is further submitted that if any part of the bequest in relation to Dick is not valid, it is only in relation to his services and hire during the lives of Alsey, Mary and Louisa.

Williams, Smith, for appellants.

Witherspoon and Wilson, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. This Court is content with the Chancellor's conclusion in this case and in general with his reasoning, although there is not entire concurrence of the members of the tribunal in the same views.

Mr. Williams says, (Wms. on Executors, 1094:) "a condition that a legatee shall not dispute the will is in general considered in terrorem merely, and will not operate a forfeiture by reason of the legatee's having disputed the legacy or effect of the will.



But where the legacy is given over to another person in case of a breach of such condition, then, if the legatee controvert the will, his interest will cease, and vest in the other legatee. If, indeed, the legacy, instead of being given to a stranger, is limited over to the executors in the event of

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such \*condition being broken, the condition is still regarded as in *terrorem*, and not obligatory. Yet, if the testator direct the legacy to fall into the residue upon a breach of the condition, and dispose of that fund, the residuary legatee will be a particular legatee of the individual legacy; and, as such, will be entitled to it, if the condition is broken."

Without intention or authority to commit the Court to this extent, I express my own opinion, in which Chancellor Johnston fully concurs, that a condition subsequent of this description is void, whether there be a devise over or not, as trenching on the "liberty of the law," *Shep. Touch.* 132, and violating public policy. In *Morris v. Burroughs*, 1 Atk. 404, Lord Hardwicke held such a condition to be clearly in *terrorem*, and that no forfeiture could be incurred by contesting any disputable matter in a Court of Justice. In *Powell v. Morgan*, 2 Vern. 91, cited in the circuit decree, it was adjudged that breach of such condition involves no forfeiture where there is *probabilis causa litigandi*. In one of the latest cases on this subject, *Cooke v. Turner*, 15 M. and Wels. 727, a condition was supported as valid, that if the devisee should dispute the sanity and competency of testator to make a will, (although testator had been found by inquest to be a lunatic,) or should refuse when required by the executors to confirm the will, the disposition in favor of such devisee should be revoked. In delivering the judgment of the Exchequer, Lord Cranmore, now Lord Chancellor, then Sir R. M. Rolfe, admits that the policy of the State prevents a testator from making the continuance of an estate depend on the legatee's committing a crime, or refraining to do that which it is or may be the interest of the State that he should do, such as that he should not marry, should not engage in commerce, should not plough his arable land, or should not do anything else, the performance of which partakes of the character of a duty of imperfect obligation; but he insists that there is no duty of perfect or imperfect obligation on an heir to contest his ancestor's sanity, and that it matters nothing to the

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State, whether the land be enjoyed by \*devisee or heir. It seems to me that this is a very narrow view of public policy. It is the interest of the State, that every legal owner should enjoy his estate, and that no citizen should be obstructed by the risk of forfeiture from ascertaining his rights by the law of the land. It may be politic to

encourage parties in the adjustment of doubtful rights by arbitration or by private settlement; but it is against the fundamental principles of justice and policy to inhibit a party from ascertaining his rights by appeal to the tribunals established by the State to settle and determine conflicting claims. If there be any such thing as public policy, it must embrace the right of a citizen to have his claims determined by law. The only authority quoted by the learned Judge, in support of his judgment, is the case of *Stapilton v. Stapilton*, 1 Atk. 2. There an arrangement between a father and two sons to cut off an entail, was nearly but not entirely consummated before the death of the eldest son; and to the bill of his infant heir for specific performance of the agreement, the younger son objected, in contravention of the previous settlement between the father and two sons, that the elder son was a bastard. His objection was properly overruled by Lord Hardwicke, who proceeded on the efficacy of family arrangements concerning doubtful rights. This case has no application to a condition in a will. Perhaps the condition in the present case is void even upon the motion of public policy declared by Baron Rolfe. The legatee here is subjected to forfeiture of her estate on condition she supports the policy of the State announced in the Act of 1841, 11 Stat. 154, inhibiting the practical emancipation of slaves, and gifts and trusts for their benefit. It must be against public policy to allow a testator to impose a condition intended to defeat such cardinal provisions, deliberately enacted by the legislature.

But the doctrine of the validity of such a condition, where there is a devise over, is too firmly established to be overruled, except upon grave consideration in some case where the point is necessarily involved in the decision; and that is not the fact here.

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\*Is there a devise over in the present case? The testator does not himself revoke the legacy on breach of the condition by a legatee, but gives to his executors a discretionary power, (which they may or may not exercise,) to revoke the legacy after his death on breach of the condition, and to distribute the legacy, as to them might seem proper, among other objects of his bounty. There is no devise over to any particular person. No interest was vested in any one by the law at the death of testator which could not be fetched back by equity; according to the prominent reason assigned for forfeiture where there is a devise over. Nor is there any distinct manifestation of testator's intent that the forfeiture is not declared merely in *terrorem*; according to another reason assigned for this doctrine. All is left to the discretion of the executors, and nothing is commanded peremptorily. The great distinction between a power and a trust, is that the former is peremptory in its character. My

brethren think it may be unsafe to place the decision on the ground that there is no devise over, inasmuch as a power, when executed, derives its efficacy from the will or other instrument of grant, and has retro-active relation, and is incorporated with the instrument of grant. I say for myself, that this can hardly be predicated of a power to be exercised on a contingency which may never happen, and if it happen, to be exercised only if the donees think the exercise judicious. A power coupled with a trust may be sometimes as peremptory as a mere power. But here the executors have a discretion to revoke, and a discretion as to the distribution of the legacy when revoked. So far from any command to them, there is a mere delegation of authority to make on a contingency a new will for testator if they so choose. No authoritative case requires us to consider the exercise of such power of appointment to executors as equivalent to a devise over by the testator himself; and I am unwilling to extend the efficacy of such a condition a line beyond the limit that authority compels me.

It remains to inquire whether the power, if lawfully committed to the executors, of

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revoking the legacy of a legatee \*controverting the will, has been exercised in relation to the plaintiff. The acting executor, without the concurrence of two other persons, who were appointed executors by the testator, and who are still living, although they have renounced the office of executor, has exercised, after the institution of the present suit, the power committed to the executors, of revoking the legacies to plaintiff, and of distributing her legacies among the other objects of testator's bounty. A naked power given jointly to several persons does not survive if one of the donees dies. A nice distinction is established as to the exercise by surviving executors of a power given to them jointly with others who may be dead, dependent on the fact whether they are designated by name in the donation of the power, or are mentioned only in their official character as executors. By the common law, a power of selling lands jointly conferred on executors by name, is defeated by the death of one of them; but if an administrative power, pertinent to their office, be conferred on executors without naming them, it may survive on the death of one to others who come within the description of the grant of power. Where a power to sell is given to three executors generally, (the doctrine is different if they be named in the donation,) two surviving executors may sell, because the plural number of executors remains to satisfy the terms. *Co. Litt.* 113, a.; *Vincent v. Lee*, 1 *Sug. Pow.* 143. Probably from the greater liberality of modern decisions, the power in such case would be adjudged to survive to a single executor. But the case of a surviving executor is not identical with the case of one acting executor, where other living persons have

been appointed executors, and have renounced the office. Formerly, where a power to sell was given to executors, and one of them refused the trust, the others could not sell. But by the statute of 21 Hen. VIII, c. 4, (2 Stat. 457) it is provided that where lands are willed to be sold by executors, and some of them refuse the office and administration of the will, sale by the executors who accept the administration, shall be as valid as if all the executors had joined. In *Drayton v.*

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*Glenn*, 2 Des. 250, \*in note, it was held, perhaps against the weight of English authorities, that this statute did not extend to the case where a testator directed a sale without expressly empowering his executors to make sale. This decision probably induced our Act of 1787, (5 Stat. 15,) empowering a majority of the acting executors to sell and convey, where a sale was directed by testator without appointing any one to make it; and empowering the administrator with the will annexed to sell, if the executors should die or renounce. It is obvious, that neither the English statute nor our own alters the common law as to joint powers given to executors, except in the special case of a power to sell lands. If, by any liberality of construction, we might be disposed to extend the statutory provisions concerning a joint power to sell to other powers given jointly to executors, pertinent to their office, and necessary to their administration of estates committed to them, we could not venture to include a power altogether independent of their office as executors. In such case a power jointly conferred on two or more would not survive on the death of one, much less on his renouncing probate. In *Townsend v. Wilson*, 1 Barn. and Ald. 608, where a power of sale was given to three trustees and one died, it was held that the survivors could not exercise the power. This judgment was denounced but followed by Lord Eldon in *Hall v. Dewes*, 1 Jac. 189 (4 E. C. R. 88,) and maintained in *Bradford v. Belfield*, 2 Sim. 264, (2 E. C. R. 407.) In *Peyton v. Bury*, 2 P. Wms. 626, a testator devised the residue of his personal estate to J. S., provided she marry with the consent of his two executors; held, that on the death of one of them, the condition became impossible, and that she might marry without consent of the survivor. In *Graydon v. Hicks*, 2 Atk. 16, a power to consent to the marriage of a legatee was given to several executors. One renounced the office and the administration. It was held that he was included within the description, and that the power was not annexed to the office of executor, and that it was independent of the

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rest of his duty as \*executor. Sir Edward Sugden, afterwards Lord St. Leonards and Lord Chancellor, in his treatise on powers, (1 *Sug. Pow.*, 138,) says, that where the power is given to executors, they may exercise it,



although they renounce probate of the will. He refers, for authority, to *Keates v. Burton*, 14 Ves. 434, and especially to a case in the reign of Henry VII, before the English statute above quoted. (2 Sug. Pow. 535). In this latter case, it is adjudged, that if a man makes his will, that his executors shall alien his land, without naming their proper names, if they refuse the administration and to be executors, yet they may alien the land: quod fuit concessum per Fineux et Tremaille for clear law: Rede non dedit. Renunciation of the office of executor implies no renunciation of a power not pertaining to the office of executor, not connected with the administrative functions of an executor. A power to revoke a legacy and make new distribution, is quite independent of the office of executor; it might well be conferred on persons named as executors who do not act in the general administration of the estate; and in effect, it delegates the office of testator, quite independent of the execution of an existing will. R. G. McCaw and J. R. Bratton still retain, notwithstanding their renunciation of executorship, the independent discretionary power of revocation and appointment; and this power has not been exercised by them. In *Cole v. Wade*, 16 Ves. 27, a testator gave the residue of his estate to his executors, in trust for such of his relations and kindred, and in such proportions, manner and form as his executors should think proper. Sir William Grant said: "I conceive that wherever a power is of a kind that indicates a personal confidence, it must prima facie be understood to be confined to the individuals to whom it is given, and will not, except by express words, pass to others by legal transmission, who may happen to sustain the same character." He quotes a case from *Moor*, 61, pl. 172, where all the judges concurred in holding that a power implying personal confidence, being joint, was determined by the death of

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one of the appointees. *Powell v. Morgan*, 2 Vern. 91; *Loyd v. Spillet*, 3 P. Wms. 344; S. C. 2, Atk. 148; *Popham v. Taylor*, 1 Br. C. R. 168; *Walter v. Maunde*, 19 Ves. 424; 1 Sug. Pow. 334, 336.

It is further argued that as the plaintiff cannot claim under and against the will, it is a case of election for her, whether she will give effect to the fourth clause of testator's will; or renounce all the legacies in her favor; at least that she is bound to make compensation from her legacies to the legatees whom she disappoints. But the Act of 1841 makes the legacy in the 4th clause void as against public policy, and the plaintiff does not claim against any valid portion of the will, and merely urges that the will shall be established according to its legal import and operation. In the proper construction of the will, we must consider the fourth clause as struck out, and forming no part of the testator's dispositions. Besides,

the legatees supposed to be disappointed here, are slaves, who have no civil rights or status in Courts, through which they might assert a claim for compensation.

Again it is argued, that nothing beyond the services or hire of Dick is given in trust for other slaves, and therefore void by the Act of 1841, and falling within the operation of the residuary clause. But either Dick is given absolutely in trust for slaves, or the remainder in him is not disposed of; and in either aspect, he passes by the residuary clause. The residuary legatees happen to be the next of kin of testator.

It is ordered and decreed, that the appeal be dismissed, and the Circuit decree be affirmed.

JOHNSTON, DUNKIN, and DARGAN, CC., concurred.

Appeal dismissed.

#### 6 Rich. Eq. \*26

\*WILLIAM EVANS and Others v. HUGH GODBOLD and Others.

(Columbia. Nov. and Dec. Term, 1853.)

[Wills  $\hookrightarrow$  524.]

Testator having a wife and six children, who all survived him and were his heirs at the time of his death, devised and bequeathed certain lands and chattels to his wife for life, and after her decease, "to be equally divided among my surviving heirs, share and share alike." One of the children died in the life time of the widow, tenant for life, without issue, and another died in her life time leaving issue, who, with the four children who survived her, were the heirs of the testator at the death of the tenant for life:—*Held*, that by the term surviving heirs the testator meant such persons as at the termination of the life estate should be his heirs; and, therefore, that the issue of the deceased child who survived the widow and the four children who also survived her were the persons entitled as remaindermen.

[Ed. Note.—Cited in *Evans v. Harlee*, 9 Rich. 511; *Presley v. Davis*, 7 Rich. Eq. 109, 62 Am. Dec. 396.

For other cases, see Wills, Cent. Dig. § 1122; Dec. Dig.  $\hookrightarrow$  524.]

[Wills  $\hookrightarrow$  524.]

Where there is a devise upon the contingency of survivorship, and a precedent life estate is interposed, upon the termination of which the survivors are to take, the period of survivorship is referred to the termination of the life estate, and not to the death of the testator.

[Ed. Note.—Cited in *Carson v. Kennerly*, 8 Rich. Eq. 269; *Blum v. Evans*, 10 S. C. 79, 80, 82; *Mangum v. Piester*, 16 S. C. 322; *Roundtree v. Roundtree*, 26 S. C. 464, 2 S. E. 474; *Durant v. Nash*, 30 S. C. 192, 9 S. E. 19; *Simpson v. Cherry*, 34 S. C. 74, 12 S. E. 886; *Selman v. Robertson*, 46 S. C. 272, 24 S. E. 187.

For other cases, see Wills, Cent. Dig. §§ 1116-1127; Dec. Dig.  $\hookrightarrow$  524.]

[Wills  $\hookrightarrow$  506.]

In this State, except as to estates not within the statutes of distribution, the term heirs means distributees, or hæres facti under those statutes.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1091; Dec. Dig.  $\hookrightarrow$  506.]

[Wills ⚡457.]

Where a testator uses a technical term he is presumed to use it in a technical sense, unless a special intent to the contrary is manifested by the context.

[Ed. Note.—Cited in *Fields v. Watson*, 23 S. C. 46.]

For other cases, see *Wills*, Cent. Dig. § 975; Dec. Dig. ⚡457.]

Before Dargan, Ch., at Marion, February, 1853.

This case will be fully understood from the circuit decree and the opinion delivered in the Court of Appeals. The circuit decree is as follows:

Dargan, Ch. The late General Thomas Godbold, of Marion district, by his last will and testament directed certain lands of which he was seized at the time of his death, to be sold by his executors. These lands are particularly described in the will, which is made an exhibit of the bill. The will makes no disposition of the proceeds of the sale, and though more than twenty-five years have elapsed since the decease of the testator, the executors have not exercised the power vested in them of selling the said lands. The omission, I imagine, has not been a culpable one. In fact, one of the executors, Charles F. Godbold, died soon after the decease of the testator. In the meantime the lands in question have descended to the heirs at law of the testator, including the widow, and the title remains vested in them. If a sale had

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been made in pursuance of the directions of the will, the proceeds would have been distributed among the heirs at law of the testator under the provisions of the statute of distributions. And as the lands have not been sold in the manner contemplated by the testator, his heirs at law are now entitled to a partition of said lands in the same proportions. The bill has been filed in part for this object. And all the parties in interest are properly before the Court. It is ordered and decreed that a partition be made of the intestate lands of the said Thomas Godbold, among his heirs at law, and the representatives of such of them as have subsequently died, according to their respective rights under the statute of distributions of this State. And it is further ordered and decreed that any of the parties in interest have leave to apply at the foot of this decree for a writ of partition to carry the same into effect.

The said Thomas Godbold, by his said will, devised and bequeathed, or as he expressed it, loaned to his wife, Sarah Godbold, for her life, certain real and personal estate. The land is particularly described in the will by metes and bounds. He gave her in this way the seventh part of his negroes, which were to be separated from his other negroes, and set apart for her in a manner specially directed. This was done in the manner prescribed, and the widow had possession of her share of the negro property, which she

enjoyed during her life. In like manner he gave her a horse, bridle and saddle, five cows and calves, fifty dollars worth of hogs, ten head of sheep, one yoke of oxen and a cart, one hand mill; also all his household and kitchen furniture, suitable plantation tools, a chair or gig to be purchased by his executors out of his estate for her, and provisions for one year.

In a subsequent part of the will he says: "It is my will and desire that all the property I have loaned my wife for her natural life, after her decease for it to be equally divided among my surviving heirs." There is no other part of the will that has reference to this portion of his estate.

In the early part of the current year the

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widow of Thomas \*Godbold, the said Sarah Godbold, departed this life, intestate, in possession of the lands and negroes given to her by her husband's will, and also of other negroes and other personal property, which she held in her own absolute right. As regards the latter there is no difficulty. Her own estate which she left is divisible among her heirs at law, according to their respective rights under the statute, at a proper time. It is ordered that the bill be retained for this purpose, and that after the expiration of a year from the decease of the said Sarah, any party in interest have leave to apply for a partition of said negroes. It is further ordered, that the accounts of the administrator be referred to the Commissioner, and that any balance of assets that may be found in his hands be distributed among the distributees of the said Sarah Godbold, according to their respective rights, after the expiration of a year from the death of the said intestate.

The only serious question in the case arises on the construction of that part of the will where the testator disposes of the remainder in the property given to his wife for life. This he directs, at her decease, to be equally divided among his surviving heirs. After the death of the testator to the time of the decease of his wife, no change occurred in his family, with two exceptions. He left the following children: Charles F. Godbold, who died soon after the testator's death, intestate, without issue, and unmarried; Hugh Godbold, John M. Godbold, Sarah Ann, who afterwards intermarried with the plaintiff, William Evans; Mary, the wife of the plaintiff, James Haselden; and Elizabeth, who first intermarried with John Haselden, and after his decease, with the defendant David Monroe. She predeceased her mother, Sarah Godbold, the tenant for life, leaving children as follows: Sarah Jane, who has intermarried with C. D. Evans; Hugh G. Haselden, Cyrus B. Haselden, James Monroe, and Franklin M. Monroe. The latter are defendants. And the question is, whether the children of the testator's deceased daughter are entitled to



share in the division of the property given by the testator to his wife for life.

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\*Whom does the testator mean to designate by the words, "his surviving heirs?" We will leave out of view for a moment the important qualifying participle, "surviving," and suppose that the testator had said, that the property after the death of his wife should be divided among "his heirs." By this term, he would mean his children; for no other persons could bring themselves within the description. He had no other heirs than his children, and therefore must have meant his children. The children of Mrs. Monroe can in no point of view be regarded as the heirs of Thomas Godbold, the testator. If the testator had given the property at the death of his wife to his heirs generally, a term which I have shewn to be in this instance equivalent to children, then Mrs. Monroe would have taken a vested remainder; and this on her death before the tenant for life, would have been her estate and gone to her heirs at law and distributees. Her children and husband would have succeeded to her share as her heirs, and not as the heirs or devisees of Thomas Godbold, the testator. If the testator had declared, that at the death of his wife this property should be equally divided among his surviving children, upon the present state of the authorities, I presume, there could scarcely be a question that none of the children could take but those who survived. And I think it demonstrable that the word "heirs," occurring as it does in this clause, can mean nothing but children.

But to what period does the event of survivorship relate? In my judgment it relates in this instance to the period of distribution, which was to take place on the death of the tenant for life.

The word "surviving" is one of strong import. It is regarded as technical in some of the cases. It cannot be considered as idly used by the testator. He must have attached to it some meaning. He obviously intended that such, and only such of his heirs (or children) should take as were living at some future period contemplated by him; otherwise, the word "surviving" has no meaning, and might as well be expunged from the will.

There are but two periods to which, by the

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terms of this will, \*the contingency of survivorship can possibly be referred. One of these is the death of the testator himself; the other is the death of his widow, the tenant for life. Her death is prescribed as the period of distribution.

When the period of distribution is left uncertain and indefinite by the will, and no time fixed to which it can be referred, as when the testator gives property generally to his surviving children, or to his children or the survivor of them, or to the survivors of any persons or class of persons named, it is

unquestionably a sound and rational construction to limit the event of survivorship, or the estate dependent on it, to the time of the testator's own death. For under these and similar words, all who were surviving at his death would be entitled to take. And it would be unreasonable, unless such intention clearly appeared, that the estates of those who should first afterwards die, though they might leave issue, should be divested. In such cases, not to limit the period of survivorship to the death of the testator, would be to divest the estate of the first decedent away from the devisees, at however remote a time, and to vest it in the survivors; and so on at the death of each, until the whole estate devolved upon the last survivor. To avoid this result, the survivors at the testator's death are held to take absolutely. The Court inclines to a construction which favors the early vesting of estates, and against a construction which divests an estate already vested.

The principal ground, however, upon which the Courts adopted a construction that referred the contingency of survivorship to the death of the testator, was, that the words directing a partition created a tenancy in common, and the right of survivorship was inconsistent with that estate. This reasoning has been condemned as illogical and inconclusive, for there is no reason why a testator may not, if he so wills and his meaning be clearly expressed, create first a tenancy in common, and on the death of one or more of the legatees, a right of survivorship among the others—not as in cases of joint

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tenancy, but \*by way of limitation, to take effect upon the event of survivorship within a given time.

Unsatisfactory and insufficient as this reasoning is, it has been resorted to in another class of cases to which it is still more inapplicable.

"Where, however," says Jarman, 2 vol. 633, "the gift was not immediate, (i. e. in possession) there being a prior life estate, or other particular interest carved out, so that there was another period to which the words in question could be referred, the point was one of greater difficulty. In these cases, as in those of the other class, the Courts for a long period uniformly applied the words of survivorship to the death of the testator, on the notion (as already observed) that there was no other mode of reconciling them with the words of severance creating a tenancy in common. The weight ascribed to this argument, however, was still more extraordinary in these than in the former cases; for even if indefinite survivorship were inconsistent with a tenancy in common, (but which clearly it is not) yet surely there could be no incongruity between such an interest, and a limitation to the survivors at a given period. Nevertheless, decision rapidly followed decision,

in which, on reasoning of this kind, survivorship was held, in cases of this sort, to refer to the period of the testator's decease."

The learned author then proceeds to cite and comment on a number of cases in which the survivorship was held to refer to the death of the testator, though a precedent life estate was interposed, at the termination of which distribution was to be made. He, in the next place, traces with his characteristic ability and research, the gradual progress of the revolution in the English Courts, as to the application of the doctrine in the class of cases last remarked upon. This was brought about in the way such changes are usually effected. The rule was sapped and undermined by expressions of dissatisfaction on the part of the Judges, as to the sufficiency of the reasoning by which it was supported, and by nice and finely drawn distinctions, taken with the view of avoiding the applica-

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tion of the rule in \*particular cases; until thus weakened and narrowed down, it was at length boldly discarded and completely overthrown in *Cripps v. Wolcott*, 4 Mad. 11, and the succeeding cases.

In *Cripps v. Wolcott*, the testatrix gave her real and personal estate to her husband for life, and directed, that after his death, the personal property should be equally divided between her two sons and her daughter, and the survivors or survivor of them, share and share alike. One of the sons died in the life time of the husband, and the daughter and the surviving son claimed the whole. Sir J. Leach said, "It would be difficult to reconcile every case upon this subject. I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, the survivorship is to be referred to the period of division. If there be no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. This was the case of *Stringer Phillips*, (1 Eq. Ca. Ab. 292.) But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole of the legacy. This is the principle of the cited cases of *Russell v. Long*, (4 Ves. 551, *Summer's* edition, note a) *Daniell v. Daniell*, (6 Ves. 297) and *Jenour v. Jenour*, (10 Ves. 561.) In *Bindon v. Lord Suffolk*, (1 P. W. 99) the House of Lords found a special intent in the will, that the period of division should be suspended until the debts were recovered from the crown, and they referred the survivorship to that period." "Here," concludes the learned Judge, "there being no special intent to be found in the will, the terms survivorship are to be referred to the death of the husband, who took a previous life estate."

This case was followed by that of *Gibbs v.*

*Tait*, 8 Sim. 32, and by that of *Blewitt v. Stauffers*, cited 2 Jarm. Wills, 650, when the principle of *Cripps v. Wolcott* was adopted.

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And \*again in *Pope v. Whitcombe*, 3 Rus. 124, (an earlier case than the last) where testatrix gave the residue of her estate to her brother during his life, and after his death in trust for four persons named, and the survivors or survivor of them share and share alike; of these two died during the life of the brother. And Lord Eldon held that they did not take vested interests in any part of the residue, but that the whole belonged to the two survivors.

The rule established by these latter decisions seems to be so reasonable, and so consistent with every principle of a sound interpretation, that I am indisposed to follow the earlier English cases, more especially, as the doctrine upon which they were decided, based as it is upon reasoning confessedly unsatisfactory, is now abandoned by the courts in which it originated.

The conclusion at which I have arrived in the construction of this part of *Thomas Godbold's* will, is, that the heirs of Mrs. Monroe are entitled to no share or part of the property given by the testator to his wife for life, and that only such of the children of the said testator surviving at the death of the tenant for life, are entitled to take said property, equally to be divided among them. And it is so ordered and decreed. It is further ordered and decreed that any party in interest may apply at the foot of this decree for a writ of partition to divide the said property in conformity with this decree.

I am not informed at what period of the year the tenant for life died. Any question that may arise as to the rents and profits of this property after the death of the tenant for life, is reserved.

The defendants, C. D. Evans and wife Sarah Jane, Hugh G. Haselden, Cyrus B. Haselden, James C. Monroe, and Franklin M. Monroe, appealed, and now moved this Court to modify the circuit decree, on the grounds:

1. Because his Honor erred in construing the words "surviving heirs," in *Thomas God-*

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*bold's* will, to mean surviving chil\*dren, and thereby excluded the defendants, as children of Mrs. Elizabeth Monroe, a daughter of the testator, who survived him but predeceased the tenant for life, Mrs. Sarah Godbold, from any interest in the negroes loaned to the said Sarah Godbold for life, and bequeathed after her death to the "surviving heirs" of testator.

2. Because his Honor's decree contravenes the special intent of the will, plainly inferable from the context, that the testator intended to designate by the words "my surviving heirs" any who may come under that description at a certain, but an undefined future period, viz: the death of the tenant for



life; and therefore whatever of technical import may be expressed in the words "surviving heirs" should be controlled by the intention of the testator.

Dudley, Thomas Evans, for appellants.  
Harlee and McDuffie, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. Thomas Godbold, by his will, gave to his wife certain lands and chattels and one-seventh of his slaves, and to his daughters certain pecuniary legacies, and to each of his six children one-sixth of the residue of his estate. As to the portion given to the wife for life, the will makes further provision in the following terms: "It is my will and desire, that all the property I have loaned to my wife for her natural life, after her decease for it to be equally divided among my surviving heirs, share and share alike; also all the property that I have loaned to my sons and daughters before mentioned, after he, she or they depart this life, the portion allotted to he, she or they shall go to the lawful issue of their bodies; and if either of my children shall depart this life, leaving no lawful issue of their bodies, then the whole of that part of my estate allotted to he, she or them should be equally divided among my surviving heirs." Elizabeth Monroe, daughter of the testator, survived him, but died in the lifetime of the widow, tenant

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for life, leaving five \*children yet living; and the controverted question in this case is, whether these grand-children are entitled to any share of the estate given to the widow for life.

It cannot be disputed that if Thomas Godbold had died intestate at the date of his wife's death, Mrs. Monroe's children would have been among his immediate heirs as representing their mother. The 2d clause of the 1st section of the Act of 1791 (5 Stat. 162) provides that "The lineal descendants of the intestate shall represent their respective parents, and be entitled to receive and divide equally among them the shares to which their parents would respectively have been entitled, had they survived the ancestor." By the common law of England, the term heirs means, (with exceptions as to cases of coparcenary and gavelkind, &c.) the persons who singly and successively inherit the real estate; but in South-Carolina it cannot mean, except as to estates without our statutes of distribution, anything more than distributees, or hæredes facti under these statutes. *Seabrook v. Seabrook*, McMul., Eq. 205; *Templeton v. Walker*, 3 Rich. Eq. 543 [55 Am. Dec. 646]. Even in England, when "heirs" is applied by a testament to personal property, it is understood to designate the next of kin, as they are the only persons entitled by the statute of distributions in that nation to succeed to that kind of estate. *Holloway v. Holloway*, 5 Ves. Jr. 399. *Vaux*

*v. Henderson*, 1 Jac. & Walk. 388, n. With us, the succession to personalty and the inheritance of realty, proceed to the same persons; and heirs universally means, as to estates to which decedents are beneficially entitled, the persons entitled to distribute among them the estate of an intestate. Testators may employ heirs as a word of purchase and not of limitation; and where they employ it as a word of purchase, they may add other ingredients or qualifications, and the devisees must answer the description in all particulars. Thus, although the established doctrine is, that whoever claims to inherit under a gift to heirs male, must convey his descent wholly through heirs male, it is otherwise where heirs male take by purchase. If lands be devised to A. for

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life, and after his decease to the \*heirs male of the body of B., and B. has a daughter who dies in the lifetime of her father and of the tenant for life, leaving a son who survives both A. and B., this grand-son shall take the estate, as he fulfils the description as to heirship and sex, of being the heir male of B. Co. Litt. 25; *Hobart*, 31; 2 Jarm. 9. So in the present case, persons claiming the estate of the testator given to the widow for life, must bring themselves within the description of heirs of testator surviving the widow. Unquestionably it is competent for a testator, if he thinks fit, to limit any interest to such persons as shall at a particular time sustain a particular character. Thus, in the present instance, the testator might have given his estate to such persons as would have been his heirs if he died intestate at the date of his wife's death; and the only debatable point is, whether he has expressed the intention so to give.

This Court is satisfied with the conclusion of the Chancellor, upon the argument and authorities contained in the circuit decree, that the persons intended to take, under the disposition in question, are such only as fulfil the description of objects at the termination of the precedent life estate. It remains for us to enquire, what objects at that epoch are designated by the testator under the terms "my surviving heirs."

When a testator uses a technical term, he is presumed to use it in its technical sense, unless a special intent to the contrary is manifested by the context. The testator here must be presumed to employ the term heirs to designate those persons who would have been entitled to his estate by succession and inheritance, under the statutes of distribution, upon the death of his wife, unless he has exhibited in other portions of his will his intention to use the term in the sense of children. It is not pretended that testator, in any part of his will, employed the term heirs in a popular and deflected sense, except that in directing division of the residue of his estate into six equal parts among his

six children, he says that the first allotment shall be "for the eldest heir, my son Hugh Godbold." The will is inartificially drawn, and the testator was probably inops consilii.

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It may be that he had some vague notion of the right of primogeniture, as still existing. However this may be, he corrects the ambiguity of the phrase "eldest heir," applied to the eldest son, by adding in immediate sequence "my son Hugh Godbold." This shows that he did not consider "eldest heir" as unequivocally describing his eldest son; and the phrase taken altogether does not justify the inference that testator confounded heirs with children. In all the other portions of his will, the testator describes his children by the terms sons and daughters, and nowhere manifests his ignorance of the technical import of heirs. Take, for example, the whole of the clause connected with the present contest, which clause is cited near the beginning of this opinion. In this clause, the testator carefully distinguishes heirs from sons and daughters and children, and manifests his purpose of bounty to the issue of his children. In *Packham v. Gregory*, 30 Eng. C. R. 396, 4 Hare, 396, Sir James Wigram says: "I will not without reason adopt a construction which would or might be attended with the consequence, if one legatee should die during the tenancy for life leaving issue, of excluding that branch of the objects of testator's bounty. The consequence of disinheriting issue is one ground on which the Court seeks, if it can, to avoid a construction attended with it."

It is properly suggested in the circuit decree, that the term "surviving" in application to heirs of testator, would be unmeaning if referred to heirs at testator's death. In that case, heirs standing by itself would have precisely the same meaning as surviving heirs. But it is not true that "surviving heirs" is a mere pleonasm when referred to survivorship at the death of the tenant for life. Without the use of it, the heirs of testator at his death would have taken a vested interest, transmissible to their representatives, and widowers and widows of the children, not heirs of the testator, would have taken shares. *Leeming v. Sherratt*, 24 Eng. C. R. 14; *Bankhead v. Carlisle*, 1 Hill, Eq. 358. Heirs of the same person may be very different individuals at different epochs. In *Buist*

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*v. Dawes*, 4 Strob. \*Eq. 38; 4 Rich. Eq. 415, in note, where, after precedent particular estates, the estate, real and personal, was given contingently to J. S. in fee, who died during the subsistence of the particular estates, it was held that those persons who were the heirs and distributees of J. S. at the time of his death, and not different individuals who were his heirs at the falling in of the estate for enjoyment, were entitled to his estate by descent and succession.

*Hicks v. Pegues*, 4 Rich. Eq. 413. The converse is a corollary from this doctrine; and if his heirs at the termination of the particular estate, be designated by a testator as purchasers of the remainder, they take in exclusion of heirs at his death. The grand-children in the present case claim as heirs of the testator, and not of their mother—in substitution of the parent, and not through her. If the devise had been to children of the testator who might survive his widow, it may be granted that the devise would have been contingent upon their survivorship of the widow, and that children dying in her life time were not devisees of any transmissible interest, and that it could not be ascertained until her death who were the devisees. But the actual devise is to surviving heirs and not to children, and grand-children are heirs of the testator. Still under the description of heirs they take by purchase, and not by descent.

It is argued, that testator means children by the term heirs, because when his will was written children were his heirs apparent, and at his death children were his only heirs. This is not strictly true in point of fact, for his widow was one of his heirs. Passing this by, why should testator be supposed to speak exclusively of the state of things existing at his death? He certainly directs division of this portion of his estate to be made at a future, fixed yet indefinite, time, and among objects who should then fulfil the description; and it seems illogical to argue that he did not contemplate any change in the heirship by future contingencies. He could hardly have reasoned that because children were his heirs at his death, children must be his only surviving heirs at the death of his widow. Whenever one disposes of his estate by gift in futuro,

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the terms of donation naturally receive construction and application according to the state of things when the disposition takes effect.

A very perplexing question might have been involved in this case as to the extent of the shares of the grand-children, when allowed to come in under the description of heirs. The Court of Errors, in *Templeton v. Walker*, 3 Rich. Eq. 543 [55 Am. Dec. 646], established the doctrine, that wherever resort must be had to the statutes of distribution to ascertain the objects of gift, the statutes must also determine the shares of the donees, unless the instrument of gift indicates that a different distribution shall be made. The statute of 1791 provides that grand-children shall take among them the share to which their parent, if surviving, would have been entitled; but here the testator provides that his surviving heirs shall take equally, and share and share alike.

It is unnecessary to determine in this case, whether the grand-children come within the



general rule or within the exception, inasmuch as by their pleadings and through their counsel here, they claim among them no more than the share to which their mother would have been entitled if she had survived the life tenant. No fair argument, however, as to the meaning of testator in this donation can be founded on the assumption of a conclusion doubtful in itself, that upon our construction the grand-children must take per capita with the children of testator. If this result follow, it is only because we interpret the testator as expressing his intention to this effect, whether ignorantly or wilfully. It would afford, at most another of many instances in which the conjectured intention of testators is defeated by adherence to settled rules of construction, framed to define the general intention of testators, and prevent the necessity of bringing the construction of every will into litigation. It is for the good of the State that such general rules should prevail, and that every case should not depend on its circumstances and the flexible discretion of the tribunal.

It is adjudged and decreed, that the children of Mrs. Monroe are entitled to take among them the share in the estate devised

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\*to Sarah Godbold for life, which their mother would have taken if she had survived said tenant for life.

It is further ordered that the circuit decree be modified in this particular, and in all other respects be affirmed.

JOHNSTON and DUNKIN, CC., concurred.

DARGAN, Ch., dissenting. I wish briefly to state, that I have seen no reason to change the opinion which I have expressed in the circuit decree.

The testator directed that after the death of his wife, the property given to her for life should be "divided among his surviving heirs, share and share alike." This language must be considered as having been spoken at the time of the testator's death. And thus spoken, without further explanation, or qualification, it could only embrace the persons who were his heirs at that time.

If the testator had declared, that after the death of his wife, the property should be divided among the persons who might be his heirs at that time, or had used any words of similar import, then the construction given by this Court would be correct. But the will may be scrutinized in vain for any manifestation of such intent.

It is perfectly obvious, that the construction which the Court has given to this part of the will, attaches no meaning to the word "surviving." This construction makes the meaning the same as if the testator had directed the property to be divided among his heirs generally, and the word "surviving" had been omitted. Yet it must be clear, that

the testator did mean something by employing that expressive word.

The construction given in the circuit decree makes the words "surviving heirs", spoken by the testator at his death, mean his surviving children. The context of the will affords some indication of the meaning which the testator attached to the word "heir." In directing the manner in which the property given directly to his six children should be divided, namely, that it should be divided into six equal parts, and drawn

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by lot, he \*directs that the first drawn lot shall be assigned to his "eldest heir," Hugh Godbold, &c. He thus indicated the meaning which he attached to the word heir, using it as a synonym with child. It is more than probable that when he used the word again in the clause under construction, he attached to it the same meaning. It is reasonable to suppose that a word occurring several times in the same instrument, written by the same person, has been used each time in the same sense.

Whatever the testator may have meant by the words his surviving heirs, I feel very confident that the construction adopted by the Court is not the true one. The results of that construction are perfectly startling, and plainly shew that such could not have been the intention of the testator.

When the Court decided that the issue of the deceased child should be let in, a per capita distribution among them and the surviving children became inevitable. The words share and share alike make it a tenancy in common.

It was thought a hardship, (such was the argument of counsel,) that the issue of the deceased child should be excluded; and it was contended, that inasmuch as the testator had given the mother an equal share in the first distribution after his death, it follows, that he intended that her issue, however numerous they might be, should come in for a per capita division of the estate in remainder, and each one of them take an equal share with his own surviving children. The testator, in my opinion, has not said so, either expressly or by implication.

It is admissible, (and is so allowed to be,) to test the correctness of a construction by its results, actual, probable, or even possible. Let us first test this construction by its actual results. The surviving children of the testator are four: the children of his deceased daughter, Mrs. Monroe, are five. The construction given by this Court assigns to the children of Mrs. Monroe, the testator's grand-children, five-ninths of the estate, and assigns to the four surviving children of the testator among them only four-ninths. Such an intention, I am sure, was very foreign from the testator's mind. It does not alter

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the case, as to the ques\*tion of construction,



because the Court, on the statement of counsel that the Monroes claim no more, (though some of them are infants,) give them only the share to which their mother, if living, would have been entitled.

But let us test this construction yet further by results not improbable. Suppose the testator's family to have been very prolific. Suppose that five out of the six children had died before the tenant for life, leaving a numerous offspring, in the aggregate 20, 30 or 50 in number. Suppose the surviving child of the testator also to have had a numerous family. Then upon this construction each one of those numerous descendants of the testator would come in for an equal share, restricting the surviving child, with his numerous family, (all descendants of the testator,) to a 20th, 30th or 50th part, as the case might be. Such could never have been the intention of the testator. This construction makes the testator give the preference to his remoter descendants over his own children, and this is not in accordance with nature. It is more natural to suppose that he had excluded the remoter issue, and given the whole to his own surviving children. This, I think, he has done, or intended to do.

Decree modified.

#### 6 Rich. Eq. \*43

#### \*A. J. NIX and Others v. ROBERT BRADLEY.

(Columbia. Nov. and Dec. Term, 1853.)

[Wills  $\hookrightarrow$  682.]

Testator devised property to a trustee for the use of his five daughters "in equal proportions, share and share alike, and not subject to the debts, contracts, or sale of their present or future husbands." *Held*, that each daughter took a separate estate in her share.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1610; Dec. Dig.  $\hookrightarrow$  682.]

[Husband and Wife  $\hookrightarrow$  8.]

One of the daughters being unmarried, and sui juris received from the trustee a negro as part of her share, sold him, and invested the proceeds in other negroes, taking a bill of sale in her own name. She afterwards married, and her husband received a sum of money as further part of her share under the will: *Held*, that the marital rights of the husband attached upon the negroes purchased by the wife before the marriage, but not upon the money received by the husband.

[Ed. Note.—Cited in Staggers v. Matthews, 13 Rich. Eq. 154.

For other cases, see Husband and Wife, Cent. Dig. § 26; Dec. Dig.  $\hookrightarrow$  8.]

[Husband and Wife  $\hookrightarrow$  134.]

Where a single woman has an absolute interest in property for her sole and separate use, the marital rights of no husband whom she afterwards takes, will attach upon it; but she may before marriage, and while sui juris, sell it, and dispose of it as she pleases, and hold the proceeds discharged of all trust or restraint.

[Ed. Note.—Cited in Aaron v. Beck, 9 Rich. Eq. 415; Witsell v. Charleston, 7 S. C. 104, 105.

For other cases, see Husband and Wife, Cent. Dig. §§ 393, 495, 496; Dec. Dig.  $\hookrightarrow$  134.]

[Equity  $\hookrightarrow$  34.]

The maxim de minimis non curat lex does not apply to money demands.

[Ed. Note.—Cited in Kennedy v. Gramling, 33 S. C. 386, 11 S. E. 1081, 26 Am. St. Rep. 676; B. & M. White Laundry Co. v. Charleston & W. C. Ry. Co., 83 S. C. 212, 65 S. E. 239.

For other cases, see Equity, Cent. Dig. § 98; Dec. Dig.  $\hookrightarrow$  34.]

[This case is also cited in B. & M. White Laundry Co. v. Charleston & W. C. R. Co., 83 S. C. 209, 65 S. E. 239, and distinguished therefrom, and in Markley v. Singletary, 11 Rich. Eq. 399; Bouknight v. Epting, 11 S. C. 77, as to the three modes of creating separate estates.]

Before Wardlaw, Ch., at Barnwell, February, 1853.

The facts of this case fully appear in the Circuit decree, which is as follows:

Wardlaw, Ch. The plaintiffs are the administrator and next of kin of Martha Bradley, deceased, and they claim from the defendant, who is her widower, account and partition of the estate she derived under the will of her father, David Cave.

David Cave died in October, 1834, leaving of force a will dated May 22, 1834, by which he directed that his estate should be divided, by sale or partition, into six equal parts, by three competent persons, selected by his executors, (although the will names no executor,) and disposed of said parts as follows: "One sixth part whereof, I give and bequeath to my son, Matthiew Cave, absolutely and forever; the other five remaining parts of my property, real and personal, I give and bequeath to my son, Matthiew Cave, in trust, nevertheless, for the use, benefit, and interest of my daughters, Dorcas Kirkland, Elizabeth Nix, Martha Cave, Nancy Cave, and Mary Cave, in equal proportions, share and share alike, and not subject to the debts, con-

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\*tracts, or sale of their present or future husbands." The estate of the testator consisted of seven hundred and seventy-eight acres of pine land, nine slaves, some furniture, hogs, cattle, &c. This will was admitted to probate, and Matthiew Cave took administration of the estate, with the will annexed, December 19, 1834.

In January, 1835, the estate of the testator was divided by sale of the land and some chattels, and by specific partition of some of the chattels, and on February 11, 1836, Martha Cave gave to Matthiew Cave a receipt for \$768 69, in full of her share, with a schedule prefixed, showing that she received a slave named Peter, at \$550, cash \$50, and other articles, mostly consumable in use. In April, 1835, Martha Cave sold Peter to Jesse Rice for \$600; and on April 28, 1835, purchased from A. J. Nix, for \$650, two slaves, Chloe and her child Richard, and took a bill of sale for them in her own name. Chloe has since had four other children, Cuffee, Bob, Adam and Nancy.

On December 6, 1838, defendant took Mar-

tha Cave to wife, she being then about thirty-two years of age. At the time of the marriage, according to the responsive statement of the answer, she was possessed of the two slaves Chloe and Richard, a horse, about eight head of hogs, seven cattle, one or two beds and furniture, and nothing more; and all these chattels, except the two slaves, have "been long ago" dead or consumed in use. The defendant admits that after the marriage, he received certain small sums of money, appearing by proof to be about \$300, represented to be on account of his wife's share of her father's estate; but alleges that the whole was expended during the coverture. It further appears that the defendant received from Matthew Cave, chattels valued at \$32 50, and money to the sum of \$175, as his share of the estate of Nancy Cave, one of the daughters of the testator, who died without issue; also, the sum of \$34 40 in full of the share of his wife and himself in the estate of John Cave, deceased, who is stated, but not proved, to have been a debtor of testator.

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\*Martha Bradley died without issue, June 29, 1851; A. J. Nix administered upon her estate in January, 1852; and on May 11, 1852, this bill was filed.

The defendant pleads purchase for valuable consideration without notice. This plea constitutes no defence against a legal title according to the settled doctrine of this State; and the title of the plaintiffs, if valid, is a legal title. Moreover, I consider the probate and registration of the will, which is the instrument of plaintiffs' claim, as furnishing constructive notice to all persons. Defendant also relies upon the analogous defence of fraud upon his marital rights by the secret conveyance of the wife's estate; but this defence is applicable only to conveyances of her estate made directly or indirectly by the wife in contemplation of marriage, and here the wife had no estate independent of that acquired by the alleged secret conveyance of her father. Again, the defendant urges, that the bequest, in trust, for the separate use of Martha Cave, vested the absolute title of the personality in her, as she was unmarried and without contemplation of marriage at the death of the testator, and that her title upon the marriage passed to her husband by possession. "So far as able argument and high authority may amount to a final adjudication, it is now settled that a gift to the sole and separate use of a woman, married or unmarried, is good against an after-taken husband." *Wilson and Bailer*, 3 *Strob. Eq.* 262 [51 *Am. Dec.* 678], and the cases there cited. This remark of the Court of Errors is a sufficient reply to this defence in its broad extent, but it is applicable only to so much of the property as remained in possession of the wife at the time of the marriage. A gift to the separate use of a woman, excludes the marital rights of a present or future husband, but it does not serve

to enlarge and extend the husband's responsibility for her acts. Nor does a mere gift to the separate use of a woman, without gift over, or other restriction of her power of alienation—and such is the present instance—in any respect limit her power of alienation while discoverd. The separate use can exist only in the married state. It operates

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as a restriction of the rights of a \*husband, but not as a restriction of the property in the woman while sole. *Tullett v. Armstrong*, 1 *Beav.* 1; *S. C.* 4 *Myl. & C.* 377; 1 *White & T.* 340; *McQ., H. & W.* 300. A husband is liable for the debts of his wife before marriage, including the consequences of a breach of trust committed by her, (*Palmer v. Wakefield*, 3 *Beav.* 327,) but as his liability originates in the marriage, it ceases with it, and if not enforced during the coverture, it cannot be enforced against a surviving husband in law or equity, however large the fortune he received with his wife. *McQ., H. & W.* 39.

If we consider the bequest to Martha Cave as a mere gift to her separate use, not affected by trust, it seems plain that she had the right, while sole, to alien Peter, and that, having exercised the right, her surviving husband is not responsible for her act. Her sale was treated in the argument as a breach of trust, giving the beneficiary the option of following the trust funds in the other slaves purchased by her; but although I conclude from the evidence that she did invest the proceeds of Peter in the purchase of Chloe and Richard, it seems to me an abuse of language to speak of her sale of Peter as a breach of trust. She was not trustee, but sole beneficiary, with none other having any right to complain of her conduct.

It does not appear that Matthew Cave or any other person ever accepted the trusts created by this will. On the contrary, the estate of the testator was divided, and the portions of the daughters delivered to them in possession as absolute property. No duty was imposed by the will upon the trustee to obstruct the legal title's following the possession, except for the prevention of marital rights, and this was inapplicable to Martha Cave at the time of her alienation of the property. I am of opinion that Martha Cave had the legal right, while sole, to sell the estate given to her by this will, and that at most, her husband is not liable beyond the property, settled to her separate use, received by him upon the marriage.

A gift to the separate use of an unmarried woman, although not restraining her aliena-

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tion while sole, may be well deemed \*to prevent the marital rights from attaching, upon her subsequent marriage without alienation. 1 *Sug. Pow.* 288. And by the settled course of decision in this State, the woman, after marriage, has not power of alienation beyond that conferred upon her by the instru-



ment creating the separate estate. But in the present case, there is no proof that any of the separate property of the wife remained at her death. The portion existing at the marriage was of inconsiderable value, and, according to the answer, perished, or was consumed in the use during the marriage. Equity will protect the separate property of the wife from the husband and his creditors, but will throw no unnecessary hindrance upon her enjoyment of that which is her own. It is not the wife who is here complaining, and there is no evidence that the husband has in any particular employed the property contrary to her wishes or interests. Even if the property were wasted, it is the plaintiff Matthew Cave, and not the husband, who is liable as trustee for the breach of trust. It seems to me that it would be straining very much to hold the husband liable in such case as trustee to volunteers under the wife, for money which she may have expended, and perishable articles which she may have consumed. It may be further remarked, that no separate estate in the wife existed, as to the chattels and moneys received from the estates of Nancy Cave and John Cave; that it is probable only, and not certain, that the horse, hogs, cattle, and beds in possession of the wife at the marriage were of her separate estate; and that no account is given of the expenditure or investment of the moneys received on account of Martha Bradley's interest in her father's land.

It is ordered and decreed that the bill be dismissed.

The complainants appealed, and now moved this Court to reverse the decree on the grounds:

1. Because the Chancellor erred in deciding that the deceased wife of the defendant, Robert Bradley, could rightfully dispose of the property bequeathed to her by the will of her father.

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\*2. Because the Chancellor erred in deciding that the marital rights of the defendant, Robert Bradley, attached to the property of which partition was sought.

3. Because the Chancellor erred in deciding that the marital rights of the defendant, Robert Bradley, attached to the amount of money derived from the estate of John Cave, deceased—which amount of money also was bequeathed under the will first above mentioned.

4. Because under the facts and documents presented in the cause, the property of which partition was sought constituted a sole and separate estate of the deceased wife of the defendant, Robert Bradley, and upon the death of the said wife, the said property was distributable between her surviving husband and her next of kin, as prayed for in the bill.

Bellinger and Hutson, for appellants.  
A. P. and J. T. Aldrich, contra.

The opinion of the Court was delivered by

DARGAN, Ch. There are three modes of disposition, by which a separate estate may be created in favor of a married woman. First; where technical words are employed; as in instances where the estate is given for "the sole and separate use of the wife." Second; where the estate is not given after this form, but the marital rights are excluded by express words. For example, where an estate is given to the wife, but not to be subject to the power, control or liabilities of the husband; or, where the marital rights are restricted by words of a similar import. Third; where the marital rights are excluded by implication; as in instances, where, by the instrument creating the estate, the wife has the power to do acts, to exercise a control, and to make dispositions of the property, which are inconsistent with the marital rights. It is thought, that the most, if not all the cases of this description, may be brought within one or the other of these classifications.

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\*The testator, David Cave, by his will, directed all his estate, real and personal, to be sold by his executors. One-sixth part thereof, he gave to his son Matthew Cave, absolutely, and for ever. He then proceeds to declare as follows: "The other remaining five parts of my property real and personal, I give and bequeath to my son, Matthew Cave, in trust nevertheless, for the use, benefit and interest of my daughters, Dorcas Kirkland, Elizabeth Nix, Martha Cave, Nancy Cave and Mary Cave, in equal proportions, share and share alike, and not subject to the debts, contracts, or sale of their present, or future husbands." This constituted a separate estate in the testator's daughters under the second classification of such cases above enumerated.

In January, 1835, the testator's land, and some of the personal estate was sold for the purpose of partition. And a division was made among the parties entitled, of the remaining chattels, including the negroes.

The presiding Chancellor in his report of the case states, that "on the 11th February, 1836, Martha Cave, (then sui juris,) gave Matthew Cave a receipt for \$768 69, in full of her share; with a schedule prefixed, showing that she received a slave named Peter, at \$550, cash \$50, and other articles mostly consumable in the use. In April, 1835, Martha Cave sold Peter to Jesse Nix for \$600; and in April, 1835, purchased from A. J. Nix for \$650, two slaves, Chloe and her child Richard; and took a bill of sale in her own name. Chloe has since had four other children, Cuffee, Bob, Adam and Nancy. On the 6th December, 1838, the defendant Robert Bradley intermarried with Martha Cave, she being

then about thirty-two years of age. At the time of the marriage, according to the responsive statements of the answer, (and there was no opposing evidence,) she was possessed of the two slaves, Chloe and Richard, a horse, about eight head of hogs, seven cattle, and two beds and furniture, and nothing more. And all of these chattels, except the two slaves, have long ago been dead, or consumed in the use. The defendant admits,

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that, after the marriage, he received certain small sums of money, appearing by proof, to be about \$300: represented to be on account of his wife's share of her father's estate; but alleges, that the whole was expended during the coverture. It further appears, that the defendant received from Matthew Cave, chattels valued at \$32, and money to the sum of \$175, as his wife's share of the estate of Nancy Cave, one of the testator's daughters who died without issue; also the sum of \$34 40, in full of the share of himself and wife in the estate of John Cave, deceased, who is stated, but not proved, to have been a debtor of the testator."

Martha Bradley died 29th June, 1851, and the plaintiff, A. J. Nix, administered on her estate in January, 1852. This bill was filed on the 11th May, 1852.

The plaintiffs claim from the defendant an account of the estate which his deceased wife, Martha Bradley, derived under her father's will, on the ground, that it was her separate estate, upon which the marital rights did not attach; and that Martha Bradley dying intestate, said estate was distributable among her next of kin under the statute of distributions.

I have already shewn, that the estate which Martha Bradley derived under her father's will, was, in its inception, her separate estate. But there may be a fee in an equity, as well as in a legal estate; and Martha Bradley took an absolute interest in the equity. There was no limitation or remainder. The plaintiffs had no estate in the property, and they can only claim in the way of succession by or through her.

The question then occurs, can a feme sole, who is sui juris, alienate her separate estate? Can she encumber it? Can she subject it to the payment of debts; devise or bequeath it? Can she make any disposition of it, which a man, under similar circumstances would be authorized to make? There cannot be a doubt, that on both principle and authority, all these questions must be answered in the affirmative.

One of the most valuable incidents, in the institution of property, is the right of alienation; and no citizen of the country, male or female, who is under no disability, can be re-

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strained in the exercise of the right, without a violent assault upon the very nature of the institution. There is no form of conveyance

which ingenuity can devise, by which a man, who is under no disability, can have property without the power to convey and assign his right, whatever that may be. The same principle applies in its full force, and all the reasoning on which it is founded, to a feme sole under the like circumstances.<sup>(a)</sup> The married woman is secure in the enjoyment of her separate estate, without the power of alienation, and of subjecting it to payment of her debts, on the ground, that she is under the disability of coverture, and can make no contracts, or assignments that are binding upon her estate, further than is authorized by the instrument creating it.

If these views be not correct, a feme sole with a separate estate, though it be in fee, would be denied the enjoyment of her property, with the incidents belonging to it, and which make it valuable. She would not be able to devise, bequeath, sell or give it, though she lived in single blessedness to the end of her life. There is no reason in such a restraint upon the rights of property.

The authorities which I will now cite, abundantly shew, that I have not stated the principle too strongly. "It is, at length, clearly established," says Mr. Lewin, "that a feme sole may dispose absolutely of a gift to her separate use; and the principle is briefly this, that whenever a person possessing an interest however remote is sui juris, that person can not be restrained by any intention of the donor, from exercising the ordinary rights of proprietorship." *Lew. on Trusts*, 151.

Sir Edward Sugden, in treating of a woman's power over her separate estate, prior to marriage, says, "her power of alienation, while discover, is denied by none." 1 *Sugden on Powers*, 202.

Mr. Bell says, "if property be given to the

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separate use of a woman who is not married at the date of the gift, with a clause in restraint directed against any future marriage, she will have all the rights of a feme sole, and an absolute ownership while she continues sole. And upon her application, the property will be transferred to her absolute use." *Bell on the property of Husband and Wife*, 508.

Mr. McQueen says, "as the separate use cannot exist but in the married state, so neither can the restraint upon anticipation. There is no form of limitation whereby a single woman can be prevented from squandering her income, or dissipating her money. If, then, property become vested in her while discover, although the instrument may express that the gift is to be to her separate use, and subject to restraint upon alienation, she may nevertheless dispose of it absolutely;

(a) *Woodmeston v. Walker*, 2 Russ. and M. 197; *Brown v. Pocock*, 2 Russ. and M. 210; *S. C.* 5 Sim. 663; *Jones v. Salter*, 2 Russ. and M. 208; *Barton v. Briscoe*, Jac. 603.



because property cannot be given to a feme sole, any more than to a man, without being subject to the incidents which property implies; and one of these is the unlimited power of disposal." 1 McQueen on Husband and Wife, 313.

In *Tullett v. Armstrong*, 1 Beav. 1; S. C. 4 My. & Cr. 390, Lord Langdale held, that the alienation of her separate estate by a feme sole was valid. "The restraint," he says, "is annexed to the separate estate only during coverture. Whilst the woman is discovert, the separate estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage." This decision was on appeal affirmed by Lord Cottenham, 4 My. & Cr. 405.

Sir John Leach twice held, that a woman, while sole, could not assign her separate estate; and in both cases, his decisions were reversed by Lord Brougham, who held that the assignments were valid. 1 Sug. Pow. 202.(b)

It is clear, therefore, that all the dispositions which Martha Bradley made of her separate estate before her intermarriage with the defendant are valid, and did not consti-

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tute any separate estate in her at the time she entered into the coverture. And this includes Chloe and Richard, and the other issue of Chloe. She sold Peter, as she had a right to do. With the purchase money of Peter, the Chancellor says, (he is satisfied from the evidence,) she bought Chloe and Richard. But she took the title in her own name, discharged of all trust, or restriction, thus renouncing the separate estate. These negroes were never a part of the separate estate, and the marital rights attached upon them.

But the Chancellor says, "the defendant admits, that after the marriage, he received several small sums of money, appearing by proof to be about \$300, represented to be on account of his wife's share of her father's estate; but alleges that the whole was expended during the coverture."

Upon this state of facts, the question is raised, whether the separate use does not continue as to that portion of the estate which was not disposed of by the wife, while sole, and which was received by the husband after the marriage? And if so, is the husband who has received the same, liable to account?

It is asked with much plausibility and force, if the woman, while sole, can sell or even give away her separate estate, why may not the husband take it as a purchaser for valuable consideration? "Has the Court any authority to alter the nature of that property on her subsequent marriage, and limit the gift so as to exclude the rights of the

husband?" Coleridge Sol. in *Tullett v. Armstrong*, 1 Bev. 11.

The principle asserted in the foregoing proposition is not without the support of authority. *Massey v. Parker*, 2 My. & K. 174; *Newton v. Reid*, 4 Sim. 141. It seems at no late day to have been a disputed question in the English Court of Chancery.(c) It would be proper here to remark that between the law of England and that of South Carolina, there is an important distinction as to the

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power of a married woman over her separate estate. Whilst in the former country, the wife has all the rights incident to property with the absolute power of disposal, even in favor of her own husband, except so far as she is restricted by the instrument which creates the estate; in this State, the wife having a separate estate, has, during coverture, no power of alienation over the property further than she is authorised by the instrument under which she derives it. Without bearing in mind this distinction, the English cases upon this interesting subject, will not be so well understood. Thus they hold, there, that a married woman having a separate estate without any restraint upon the power of disposal, may do with it as she pleases; may exercise all the rights of ownership. It is otherwise where there is a restraint upon alienation. In such instances, the wife, in her use of the estate, must conform to the conditions which the restraint imposes upon her. It is the latter class of cases that will apply in questions arising in our Courts, where the restraint exists in all cases of separate estate where power is not given to the wife; and such restraint is implied from the nature of the estate.

In *Squire v. Dean*, 4 Bro. C. C. 326, it was held, that if the husband is permitted by the wife to receive her separate estate, and it is applied to the maintenance of the family, she will be presumed to have assented to such application of it. And in *Beresford v. the Archbishop of Armagh*, 13 Sim. 643, it was held, that if the husband receives the wife's separate estate, and the fact be known to the wife without the assertion of any claim or objection on her part, a gift to the husband will be presumed.

The defendant, Robert Bradley, says, by way of defence, that the portion of the separate estate of his wife received by him was expended during the coverture. It does not appear, that it was expended in support of the family; nor by the express or implied assent of the wife. And even by the English cases, the husband under such circumstances would be held to account on the death of the wife.

But conceding, that it was satisfactorily

(c) 1 Mad. Ch. 473; *Pawlet v. Delaval*, 2 Ves. Sen. 679; *Clinton v. Hooper*, 5 Bro. C. R. 201; *Lynn v. Ashton*, 1 Russ. & M. 188.

(b) *Woodmeston v. Walker*, 2 Russ. & M. 197; *Brown v. Pocock*, 2 Russ. & M. 210.

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proved, that the pro\*perty was expended for the support of the wife, or was actually given by her to the husband, or to a stranger, the principle of the class of cases last referred to will not apply in this State. Those are cases in which the wife's power over her separate estate was not restricted. They are not in point here, where the wife can in no case sell, or give, her separate estate, unless it be coupled with a power of disposal, or appointment to uses.

When a feme sole has a separate estate, with restraint upon alienation in England, or without it in this State, (where the restraint is always implied,) though the restriction be suspended, and the power of alienation exists unfettered, while she is discover, as soon as she marries, the restraint is called into activity, and operates to the exclusion of the marital rights. This doctrine was fully recognized in *Tullett v. Armstrong*, 1 Beav. 1. And on appeal, it was affirmed by Lord Cottenham. S. C. 4 My. & Cr. 377, 392. It would seem, however, that "the moment she becomes again single, the separate use, and the restraint in anticipation, will both cease, though still capable of revival, and subject to extinction, upon subsequent marriages, and subsequent discoveries, toties quoties."(d)

In *Clark v. Jacques*, 1 Beav. 36, an annuity was given by will to Sarah Grace Hitchcock who was a feme sole at the death of the testator, to her separate use, and with a restraint upon alienation. After the death of the testator, Sarah Grace Hitchcock intermarried with Thomas Jacques, who died leaving Sarah Grace surviving him. She afterwards intermarried with Richard Hitchcock. The said Richard Hitchcock and Sarah Grace Hitchcock having sold the annuity to one Ireneus Mahew, united in a petition to the Court for a confirmation of the sale. No disposition of the annuity was made while she was discover. Lord Langdale, master of the Rolls, refused the petition, holding that the separate use with restraint against alienation attached upon the estate during the second coverture. See *Scarborough v. Borman*, 1 Beav. 34; *Dixon v. Dixon*, 1 Beav. 40.

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\*The reason why a feme sole having a separate estate, even with a restraint upon alienation, may sell, or give it to a stranger, and yet the husband may not take it as a purchaser upon the valuable consideration of marriage, has been placed upon various grounds. The distinction is anomalous. By some it has been attempted to be based upon the assent tacitly given by the husband when he marries a woman with a separate estate: Lord Cottenham in *Tullett v. Armstrong*, 4 My. & Cr. 404. But, as reasoned by his Lordship, resting the claim of the wife upon such

assent of the husband, it is assumed, that without such assent, it would not exist. Neither could the assent of the husband be implied without notice of the settlement, and thus would be raised an issue of fact as to the notice in almost every case. Based upon such grounds, the protection which this Court could give to the separate estates of married women would be very inadequate and uncertain.

Others have supposed the title of the husband as a purchaser to be defective, because the title is not consummated until the solemnization of the marriage; after which, the wife is incompetent to contract, or to confer title, by reason of the coverture. This reason is also illogical and inconsistent: for by the same process of reasoning, it could be shewn, that the wife would be incompetent by her marriage to confer title upon her husband of her chattels in possession.

The doctrine must be allowed to be an anomaly—an exception to the usual incidents of property—a creature of the Court of Equity, adopted for the preservation of the separate estates of married women, without which, they would, in many instances, be endangered and destroyed by the marital power and influence. It is surely within the competency of a Court, where the idea of separate estates originated, and where rights under them are enforced, contrary to the rights of the husband as recognized in Courts of law, to modify the rules regulating such estates, and to amplify their defences, so that they may be effectually preserved for the purposes for which they were created. Besides this, the aim of the donor in creating

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a separate \*estate is always directed against the marital rights. Without marriage, no such estate would be created; neither could it be. It can only exist in the marriage state; for, otherwise, it has no meaning. The Court, therefore, simply carries out the intentions of the donor, and the purpose of this institution, when it considers a feme sole competent to dispose of her separate estate while she is sole; and if not so alienated, in disallowing the marital rights of the husband after the marriage.

The sum for which the defendant will be responsible, under the foregoing principles, will be small; not exceeding \$300, if so much. The Solicitor for the defendant, in this branch of the case, has quoted the law maxim, "de minimis non curat lex." The maxim has never applied to money demands. Nor do I know that the sum in controversy would be regarded by the parties claiming it, as insignificant. Be this as it may, we are not at liberty to withhold a remedy for the enforcement of any claim, however small, which is presented in proper form, and to which the party claiming is entitled by the law of the land.

It is ordered, and decreed, that the circuit decree be modified.

(d) McQ., II. & W. 314; *Jones v. Salter*, 2 Russ. & M. 208; *Barton v. Briscoe*, Jac. 603.



It is further ordered, that the defendant is liable to account to the administrator of his deceased wife, Sarah Bradley, for all sums of money and choses in action; also, for all other property of the testator, other than that which was consumed in the use; and which have come into the hands of the said defendant during his coverture with the said Sarah Bradley; together with interest upon the value of the same from her death.

It is further ordered, and decreed, that the Commissioner take an account of the same, and report to the Circuit Court.

In all other respects, it is ordered and decreed, that the circuit decree be affirmed, and the appeal be dismissed.

DUNKIN and WARDLAW, CC., concurred.

JOHNSTON, Ch., absent at the hearing.  
Decree modified.

### 6 Rich. Eq. \*58

\*NELSON CARLTON & CO. and Others v.  
PAUL S. FELDER and Others.

(Columbia. Nov. and Dec. Term, 1853.)

[*Judgment* ¶876.]

Upon a judgment obtained in Alabama, on which execution was issued within a year and a day, no presumption of satisfaction arises under the statute of that State, although the execution was not renewed within the ten years allowed by the statute for such renewal.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1648; Dec. Dig. ¶876.]

[*Courts* ¶95.]

The interpretation of a statute of Alabama by her own Courts, the Courts of this State are bound in comity to adopt.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 322, 323; Dec. Dig. ¶95; *Statutes*, Cent. Dig. § 256.]

[*Creditors' Suit* ¶4.]

F. and B., co-partners, both of whom resided out of the State, and were insolvent, were indebted to the plaintiffs. F. became entitled in this state to a distributive share of personalty and choses in action in the hands of the administrator, and also to a distributive share of the lands of the intestate. Pending a bill by some of the distributees against the administrator and other distributees for partition and account, the plaintiffs filed a creditor's bill against F., the other distributees, and the administrator, to subject the interests of F. in the real and personal estate and choses in action to the claims of his creditors.—*Held*,

That the Court had jurisdiction in the matter, the plaintiffs not having plain and adequate remedy at law;

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. §§ 5, 8; Dec. Dig. ¶4.]

[*Creditors' Suit*, ¶4.]

That the bill was properly filed as a creditor's bill, and creditors not named in it and whose demands were not set out, might come in under the notice calling in creditors;

[Ed. Note.—Cited in *Brenan v. Burke*, 6 Rich. Eq. 206; *S. S. Farrar & Bros. v. Haselden*, 9 Rich. Eq. 337.

For other cases, see *Creditors' Suit*, Cent. Dig. § 5; Dec. Dig. ¶4.]

[*Creditors' Suit* ¶27.]

That the co-distributees of F. were properly made parties to the bill;

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. § 112; Dec. Dig. ¶27.]

[*Creditors' Suit* ¶18.]

That it was no defence to the bill that another suit was pending against the administrator, as the proceedings in the two suits could be so managed that no inconvenience could arise.

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. § 94; Dec. Dig. ¶18.]

[*Costs* ¶105.]

F. had appeared and pleaded to the bill and plaintiffs had been required to give security for costs.—*Held*, that plaintiffs could not be required to give a bond of indemnity similar to an attachment bond.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 408; Dec. Dig. ¶105.]

[*Replevin* ¶5.]

*Held*, that F. was not entitled to replevy his share of the estate by giving bond and security for its forthcoming, &c.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 27-37; Dec. Dig. ¶5.]

[*Equity* ¶52.]

It is not enough to bar proceedings in Equity that the plaintiff may, by great circuity and at great inconvenience, at last come at a remedy at law. His remedy must be plain and adequate.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 172; Dec. Dig. ¶52.]

Before Wardlaw, Ch., at Orangeburg, February, 1853.

A sufficient statement of this case is contained in the decree of the Circuit Court which is as follows:

Wardlaw, Ch. In this suit, the plaintiffs, in behalf of themselves and such other creditors of Edmund J. Felder as may come in and contribute to the expense of the suit, seek to make liable to the payment of his debts, the undivided interest of said Edmund J. Felder in the estate of his late half brother, John M. Felder, who died intestate, on the

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1st of September, \*1851, leaving a large estate, consisting of lands, chattels, and credits, to be distributed among brothers and sisters of the half blood, and nephews and nieces of the whole blood. The plaintiffs, at April term, 1839, of the circuit Court of Autauga county, in the State of Alabama, recovered judgments for large sums of money against Edmund J. Felder and James Bradford, partners, trading under the style of Felder and Bradford, and within a year and a day lodged executions, *fi. fa.*; and these executions being returned *nulla bona*, the plaintiffs seem not to have taken any further steps towards the enforcement of their claims, until this bill was filed, July 7, 1852. The administrators and distributees of John M. Felder, deceased, are the defendants. The bill alleges that shortly after the rendition of the judgments against him in Alabama, the said Edmund J. Felder left that State, and has not since had any fixed residence, but has abided temporarily in Mis-



Mississippi, Texas and California; that said James Bradford is utterly insolvent, and that said Edmund J. Felder is utterly insolvent, and without property, beyond his interest as a distributee of John M. Felder; and the bill prays that all the interests of said Edmund J. Felder in said estate may be ascertained, and subjected to the payment of his debts, and that to this end the administrators may account for their transactions in the estate of their intestate, including their receipts of the rents and profits of his real estates. The administrators have filed an answer, in which they consent to an accounting, if required by the Court, except for some sum which they claim to have paid over to E. J. Felder, without notice of his debts. Edmund J. Felder, by demurrer and plea, resists the bill on various grounds; and it is as to the validity of the demurrer and plea that my judgment is sought. The questions raised by these pleadings will be considered, without minute exposition of the pleadings themselves.

This defendant insists that the plaintiffs are not entitled to the jurisdiction of this Court, inasmuch as they have a plain and adequate remedy at law, and they have not exhausted their legal remedies. As the de-

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fendant resides beyond the limits of the State, no process for the collection of the debt due by him could be issued by the Court of Law, except attachment; and that could be levied at most upon the defendant's distributive share in the land of the intestate. In *Young v. Young*, 2 Hill, 425, it was held that the distributive share of an absent debtor in personal estate in the hands of an executor or administrator, and the proceeds of the real estate sold by order of the Court of Equity and in the hands of the commissioner, were not subjects of attachment; and it is further said, that it may be well questioned whether the interest of a distributee in real estate before partition, be subject to attachment. In deciding the point that attachment will not lie against an absent executor or administrator, the Court in *Weyman v. Murdock*, Harp. 127, justly argue that "it would derange the whole course of administration and marshalling of assets, if an attachment were permitted to bind or take away the property of a deceased person out of the hands of an executor or administrator, and prevent him from paying the debts of the testator or intestate, according to law." The right of a distributee in the lands of an intestate under the Act of 1791, until distribution is made, is treated in *Rabb v. Aiken*, 2 Mc. Eq. 125, as a chose in action, an inchoate and contingent right, subject not only to the claim of creditors of the intestate, but also to the right of co-distributees to have the whole land sold, or assigned to one or more upon payment of the assessed value, if such course, in the opinion of the

commissioners to make partition, would be advantageous to the parties in interest; and that case seems to conclude that the undivided interest of a distributee could not be sold under an execution against him. This course of reasoning was not necessary to the determination of *Rabb v. Aiken*, for there actual partition had been made, and the land vested in two of the distributees by judgment of the Court of Law, before levy and sale were made to pay the debt of another distributee; and the lien of the judgment creditor was divested by the judgment in partition. Title to lands cannot be in abeyance; upon the death of an intestate the ti-

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tle to lands whereof he died seized must vest in his distributees, for his administrator cannot convey them, and there is no other person in whom the title can be supposed to vest. The estate of a tenant in common, is no more deficient in quantity than the estate of a sole tenant; and is equally liable to seizure and sale under execution or attachment. This train of remarks is substantially adopted from a Ms. circuit decree of Chancellor Harper, in *Anderson v. Campbell*. The same Judges who decided *Rabb v. Aiken*, speaking by the same organ, afterwards, in *Black v. Steel*, 1 Bail. 307, held that the interest of one among several heirs or distributees of land is liable to levy and sale under execution against him; and that the decision in *Rabb v. Aiken* settles merely the right of co-distributees to have the land sold or assigned for partition, as paramount to that of a judgment creditor of the distributee, and consequently, that a sale for partition destroys the lien of the judgment. The vendee of a distributive share, of course, has no superior right to the distributee, and purchases subordinately to the rights of creditors of the intestate and co-distributees; but these rights may be asserted, so far as I can perceive, as satisfactorily against the vendee as against the distributee. A sale of the interest of the distributee does not divest the liability of the lands for the debts of the intestate, nor limit the rights of co-distributees. There can be no eioigning nor absolute destruction of the subject by the tenant, as in the case of personal property; and for waste, and other incidents of possession, the vendee is liable to the same remedies as the distributee. Admitting the general right of creditors of an absent debtor to proceed at law by attachment upon his distributive share in lands, I think the plaintiffs could not so proceed against their debtor in this case. Before the institution of the present suit, namely, June 1, 1852, the said Edmund J. Felder and others filed their bill in this Court, against the administrators and other distributees of the intestate John M. Felder, for partition and account. This Court took cognizance of the subject matter before any proceeding was instituted in a court of

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concurrent jurisdiction as to the same \*subject. Creditors of a distributee can claim only through the distributee, and are privies to a suit instituted by him, and are bound by his selection of a forum. As is said in *Rabb v. Aiken*, "this is a case in which the maxim that *lis pendens* is notice to all the world, applies with all its force. The land now in question was the subject matter of the suit for partition, and those proceedings must be conclusive upon all who were either parties or privies to it." As this Court, when it assumes cognizance of a cause, must proceed to judgment according to the state of affairs existing at the filing of the bill, subject to the differences produced by death, marriage, bankruptcy, assignment or other exceptional particulars, there is little variation of consequences between the institution and the judgment in a cause. After the institution of the case in this Court to ascertain their debtor's share, the plaintiffs might have been liable for contempt if they had proceeded elsewhere; at least they were not bound to proceed in another court of concurrent jurisdiction. Granting, then, the truth of the proposition, that a creditor is bound to show that he has pursued his remedies at law to every available extent against his debtor, before coming into equity for the satisfaction of his debt from equitable assets, (although I suppose proof of the insolvency of the debtor, which is the end of the exhaustion of legal remedies, may be made by other equivalent evidence,) yet in the present case I am of opinion that the plaintiffs had no legal remedy to exhaust, and that they are entitled to the remedies of this Court. *Bowden v. Schatzell*, *Bail. Eq.* 360 [23 *Am. Dec.* 170]; *Napier v. Gidiere*, *Sp. Eq.* 215 [40 *Am. Dec.* 613]. The fault in the structure of the present bill is, in not making it directly subsidiary and incidental to the previous bill; but this is not made a ground of objection, and it may be regarded as cured by the pleadings of the defendants; and any improper consequences to the defendants may be prevented by the orders of the Court in this case.

I am of opinion, however, that the remedy of the plaintiffs in this Court is restricted to E. J. Felder's distributive portion of the lands and chattels, or the proceeds of the

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sale of them; and \*that the plaintiffs have no right to call upon the administrators of the intestate for a general account of their transactions. This call for an account is equivalent, in substance and effect, to a creditor's pursuing the debtor of his debtor for satisfaction—a circuitry which might lead to interminable litigation among parties without privity. It is true that, in this case, the administrators do not object to the accounting, but the distributee objects, and, I think, he may avail himself of a defence which his trus-

tees negligently or collusively fail to make. *Massey v. Massey*, 2 *Hill Eq.* 496; *Peyton v. Peyton*, *Id.*

This defendant also insists by plea that, by operation of the Act of Alabama, of 1835, *Alkin's Dig.* 621, the judgments of the plaintiffs must be presumed to be satisfied, as the executions upon them have not been renewed for ten years and more. If the effect of the Act be to fix ten years instead of the term of twenty years by common law, as the lapse of time which will raise the presumption of payment of judgments, the Act would affect the obligation of contracts, and operate wherever the contracts were sought to be enforced, and would be altogether unlike statutes of limitations upon particular actions, which belong to the law of the forum. The third section of this Act provides, in substance, that when an execution shall have been issued on any judgment within a year and a day after the rendition of such judgment, which shall not have been returned satisfied, it shall be lawful, at any time thereafter, to issue execution on such judgment without suing out *scire facias*, or other process to revive the same. And, in such case, the judgment shall not afterwards be presumed to be paid or satisfied, without actual payment or satisfaction entered, "unless no execution shall be issued on any such judgment or decree for the space of ten years." The fourth section of the Act declares the right to sue out a *scif.* on such judgment, without limitation of time, where no execution whatever has been issued thereupon. In the interpretation of foreign statutes, we are bound to follow the construction given by the tribunals of the State which enacts them. This Act has come

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under the review of the Supreme \*Court of Alabama, in the case of *Van Cleave v. Haworth*, 5 *Ala. R. (N. S.)* 188; and the judicial interpretation there given is not only conclusive as authority, but just and sound. The Court says: "The only new rule, then, intended by this statute seems to be that when a period of ten years elapses, from the suing out of the execution, without any continuation of the process, the same presumption of satisfaction shall arise as does the omission to sue out execution within a year and a day. It would be very absurd to suppose that no absolute presumption could arise of payment, when there was an entire omission to sue out execution for any period short of twenty years, and yet to hold that the omission to continue one within ten years should be a complete bar. We consider, then, the presumption of payment spoken of in the last clause of the third section, as only arising to such an extent that no execution can be sued out after a lapse of ten years, in continuing the process, without reviving the judgment by *scire facias*." The plea is overruled. The judgments in Alabama, although conclusive evidence of indebtedness here, create no lien in South-



Carolina, and have no superior rank in the order of payment over simple contracts of the debtor. Equality is equity.

It is ordered and decreed, that the Commissioner of this Court call in, by advertisement in some newspaper for three months, the creditors of Edmund J. Felder, to present and prove their demands, on or before any day thereafter, to be peremptorily fixed by said Commissioner; and that he report upon said debts to this Court, at its next regular sitting.

It is further ordered, that the plaintiffs on the record give security for the costs of this suit, on or before the first of November next, or that the bill be dismissed.

The defendant, E. J. Felder, appealed, on the grounds:

1. Because the bill ought to have been dismissed as to Gabriel Felder, Jos. Pou, and Eliza M. Pou, his wife, against whom no case was made.

2. Because the matters and things set forth

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by way of demurrer and plea, to wit: The plain and adequate remedy at law; the pendency of another suit; the want of jurisdiction, and the presumption of payment under the Alabama statute, constituted a valid sufficient defence for Edmund J. Felder, and the bill ought to have been dismissed as to him.

3. Because on the case as made by the pleadings the bill ought to have been dismissed.

4. Because leave to answer should have been granted to Edmund J. Felder, he being entitled so to do according to the rules and practice of the Court, even if his demurrer and pleas had been correctly overruled.

5. Because even if the bill be sustainable, the relief granted ought to have been confined to the creditors expressly named in the bill.

6. Because even if the bill be sustained, the amount of property impounded by the decree ought to have been limited to the demands expressly sued on, or at most to the demands which shall be rendered in by a certain day.

7. Because the creditors ought to have been required (as in cases of attachment at law,) to give bonds of indemnity in double the amount of their demands, to save harmless the said Edmund J. Felder.

8. Because the said Edmund J. Felder ought to have been allowed to replevy his share of the estate by giving bond and security for the forthcoming of the property impounded, or so much thereof as may be sufficient to pay the demands sued on or, at most, the demands to be rendered in by a certain day.

9. Because the said decree is in other respects contrary to Law and Equity.

Bellinger, Memminger, for appellant.  
W. M. Huston, contra.

The opinion of the Court was delivered by

Johnston, Ch. The preliminary enquiry, in this case, is, whether the judgments obtain-

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ed in Alabama against Felder \*and Bradford, and set out in the bill, are extinguished by the statute of that State relied on in one of the pleas. If they are, the case is at an end; and we are saved the consideration of every other question argued before us. But, in my opinion, the observations of the Chancellor on this point, are clearly correct. If the statute were open to us for construction, it scarcely admits of a doubt. By the common law, where a year and day are allowed to elapse, the presumption of satisfaction is so far raised, that a second execution cannot be issued, as of course; and the party is left to revive his right to execution by scire facias; or to sue upon his judgment, in debt. By our own statute of 1827, the period within which a judgment creditor may issue a second execution is extended to seven years. If he allows that time to elapse, he is driven to his sci. fa., or his action on the judgment. The Alabama law differs in no respect from ours, except that the time for renewing executions fixed by the latter is seven years; whereas it is extended to ten by the former.

But the interpretation of the statute of Alabama, by her own Courts, is conclusive, and we are bound, in comity, to adopt it. This is familiar and well settled law. The case of Van Clave v. Haworth, referred to in the decree, is decisive.

We are, therefore, to look into the remaining questions in this case: and I shall dispose of them by considering whether the plaintiffs are entitled to remedy in this Court, and entitled to it in the way pointed in the decree.

The plaintiffs present themselves in South Carolina with several judgments obtained by them in a sister State. These judgments are subsisting to that extent, that if they could bring in the defendants by the service of legal process, they could make them answer in law Courts, in an action of debt. But neither of the defendants is in the State. So the bill avers: and such appears to have been the fact at the institution of the present suit. What are the plaintiffs to do? It is insisted by the defendant Edmund J. Felder, that they have ample remedy at law; and, therefore cannot come into equity.

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\*It is undoubtedly true that if a party have legal remedy, plain and adequate, it is good bar to his proceeding in this Court. But let us consider whether these plaintiffs had, at their command, a legal remedy of that character.

It is not enough that a party may, by great



circuity, and at great inconvenience, at last come at a remedy at law. His remedy must be plain and adequate.

Both the judgment debtors being absent from the State, how were the plaintiffs to recover against them at law, so as to subject their property lying here? There was no possibility of bringing them into Court by personal service of process; and they had no place of residence here where process could be left. And if one of them had been found here, or had had a place of residence here, rendering it possible to implead him; it must be remembered that, the cause of action being against partners, it was necessary to bring in the other partner—or proceed under the special statute; under which the liability of the absentee party must be foregone. Is that a plain and adequate remedy which demands a virtual and, it may be, a perpetual release of one of the debtors?

But the case made, is that both the debtors were out of the State, though one of them has since appeared to the present suit. Only one of them (Felder) had property in the State. It is said that the plaintiffs might have proceeded in an action of debt by way of foreign attachment. There are several reasons why this would not have afforded a remedy.

The ultimate liability of Bradford must be waived in such action, unless he could be made a party. Granting that the attachment might have been levied on a portion of Edmund J. Felder's interests in the estate of his deceased brother; that would have sufficed only to affect him, so as to induce him to become a party. The proceeding by foreign attachment originating in the custom of London, is intended to operate in rem, by drawing the party interested in the property attached to attend to his interests, and appear and defend the suit. If he fails, the judgment when obtained is to operate on that property.

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\*But though the several property of partners be liable to partnership debts, the attachment of the property of one partner is not a sufficient means to bring both the partners into Court, without which the action must result in a judgment against one of them and the virtual discharge of the other.

If Felder had dissolved the attachment, and appeared to the action, and pleaded in abatement the non-service of Bradford; what would have saved an abatement of the case, but the statute of Judge Prioleau, relating to partnership cases? which would have compelled the creditors to leave Bradford out of their judgment.

Would such a remedy have been plain and adequate?

Again. We are not to know the value of the different species of property to which Edmund J. Felder may be entitled in his brother's estate, any more than the amount of his debts. It is admitted that his inter-

ests in the real estate are subject to the process of attachment. His interests in the tangible personal property in the hands of the administrators, are not liable; nor is his interest in the choses in the same hands. These are equitable interests.(a) They cannot be taken out of the hands of the administrator, without deranging his administration. Nor, as has been decided, can he be made garnishee, in respect to them.(b) Now suppose the interests of this distributee in the real estate, (of whose value we are to know nothing,) should prove insufficient to pay the judgment of the attaching creditor when obtained; it has been adjudged that the residue of that judgment is ineffectual as a further demand against the debtor.(c) Would a remedy be at all adequate, which might be attended with such consequences?

Suppose the tangible personal property divested out of the administrators by an assignment, in gross, to the distributees: still, though thus changed from an equitable to a legal interest in them, the undivided share

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of Edmund J. would not be liable \*to the levy of an attachment. The interest of a party in real estate, held jointly with third persons, is subject to levy and sale, because it passes by deed and assignment. But such an interest in personalty is not so subject, because it passes only by delivery; and it can neither be taken possession of under the levy, nor delivered to a purchaser without committing a trespass on the other joint owners.

If all these difficulties, both with regard to the real estate and the tangible personal estate, were gotten over; still, as I have repeatedly remarked, we cannot legally know their value; and, of course, cannot know whether they would afford a full remedy, without resorting to the accountability of the administrators.

With respect to choses for which the administrators are accountable, though it was, perhaps, once doubted whether the creditor of a distributee was entitled to maintain a bill here; the case of *Kinloch v. Meyer* (Speers, Eq. 427) has settled his right to do so. The appeal by the defendant (E. J. Felder) opens this part of the decree; and we avail ourselves of the opportunity to modify it in this respect. The objection that equity does not entertain a bill against the debtor of a debtor cannot avail when the absence of the debtor of the suing party prevents his remedy by compelling an assignment, and when he is obliged to adopt a proceeding in this Court analogous to an attachment at law. In attachments, a very frequent, and sometimes the only, remedy consists in proceeding

(a) *Bush v. Bush*, 1 Strob. Eq. 379.

(b) *Sp. Eq. 430*; *Young v. Young*, 2 Hill, 425.

(c) *White v. Floyd*, *Sp. Eq. 353-4*, and authorities there cited.

against debtors of the absent debtor as garnishees.

It is objected that no creditors are entitled to relief here but the specific creditors named in the bill. The objection is not to the frame of the bill, as a creditors' bill; but that whatever the frame of it, no creditor not named in it, and whose demands are not set out as causes of suit, should be helped by this Court. It is sufficient to say that this very point was considered and decided in *Heath v. Bishop*, 4 Rich. Eq. 46 [55 Am. Dec. 654], so far as remedy is sought out of equitable assets. It may be necessary, for aught

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we can know—as I have repeatedly intimated—to resort to the assets in the hands of the administrators in this case for a full satisfaction of the demands of even the creditors named in the bill: in which case all creditors are entitled to come in and claim. Of course, we must leave it to a future occasion, when the debts shall be stated, and the different sources for their payment set out, to decide as to the ratio in which the creditors shall be allowed payment out of the different funds.

Again; it is objected that the co-distributees of the debtor, E. J. Felder, have been improperly made defendants in this case. The objection comes from him, and not from them. But allowing it the force of their authority, it is clearly not tenable in this case. In *Kinloch v. Meyer*, before referred to, it was said that the necessity of making the co-distributees of the debtor parties, was not perceived. But that was a case in which the only subject pointed out for paying his debts was the accountability of the executor. Here we have (if we proceed to a full remedy, as we should) not only that accountability, but personal property to be cleared from the intestate's debts, and subjected to partition, and real estate to be divided, in order to create distinct subjects to be subjected to the demands against E. J. Felder. To this partition, all the distributees are necessary parties.

Another objection made in this case, arises out of the suit instituted against the administrators one month before the filing of this bill. The administrators do not object to accounting here though that suit is pending. It is E. J. Felder, who joined in bringing that suit, that raises the objection. Giving the utmost authority to his plea: we are of opinion that the proceedings in the two suits can be so managed, in the practice of this Court, that no inconvenience shall arise.

The last point raised, is that this proceeding being in analogy to attachment at law, the plaintiffs should be required to give a bond similar to an attachment bond; and that E. J. Felder should be allowed to replevy.

To require a bond after appearing and

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pleading, as this defendant has done, would not be allowed at law. Besides, the bond, if given, would, as I apprehend, only subject the obligor to liability for the costs occasioned by his proceeding. The Chancellor has substantially provided for that, by requiring security to be given for the costs. As to the replevy, the matter is entirely misconceived. There has been nothing levied on; nothing has been taken possession of; there is nothing to be re-delivered or replevied. The land is where it was before. The assets are in the hands of the administrators. Surely it is not intended that, under the name of a replevy, we are to take the assets out of their hands, and deliver them to E. J. Felder. If, after partition of the personalty, this defendant desires possession of the part assigned to him, pending the litigation with his creditors, perhaps upon application to the Circuit Court, he may obtain it, by giving proper security.

It is ordered that, except as modified by this opinion, the decree be affirmed, and the appeal dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

#### 6 Rich. Eq. \*72

\*MILLY SECREST v. WILLIAM McKENNA.

(Columbia. Nov. and Dec. Term, 1853.)

[*Dower* ⇐14.]

Where one enters under a written contract to receive titles on payment of the purchase money, and, after payment, under a bill for specific performance, to which his creditors are parties, the premises are sold as his property for payment of his debts, his widow, after his death, will not be entitled to dower therein, he never having had a legal seizin.

[Ed. Note.—Cited in *Morgan v. Smith*, 25 S. C. 340; *Boykin v. Springs*, 66 S. C. 370, 371, 44 S. E. 934.

For other cases, see *Dower*, Cent. Dig. § 54; Dec. Dig. ⇐14.]

[*Adverse Possession* ⇐63.]

The possession of one who enters under a contract to receive titles on payment of a note for the purchase money, is not adverse until he makes the payment.

[Ed. Note.—Cited in *Blackwell v. Ryan*, 21 S. C. 123; *Watts v. Witt*, 39 S. C. 369, 17 S. E. 822; *Poston v. Ingraham*, 76 S. C. 170, 56 S. E. 780.

For other cases, see *Adverse Possession*, Cent. Dig. § 344; Dec. Dig. ⇐63.]

Before Dunkin, Ch., at Lancaster, June, 1852.

The decree of his Honor, the Circuit Chancellor, which states the facts of the case, is as follows:

Dunkin, Ch. Dower is a legal right, and can attach only on a legal seizin of the husband during the coverture. The Court assumes that in July, 1833, Leroy Secrest, the



late husband of the demandant, entered on the premises under a written contract to receive titles for the same, on payment of a note given for the purchase money, to wit: three thousand nine hundred and thirty dollars. While in possession, Secrest put valuable improvements on the premises, to the extent perhaps of \$2000. The note was not paid at maturity, being payable in three equal annual instalments; but in Nov., 1833, Secrest had confessed judgment thereon, and execution was lodged in the Sheriff's Office on 21st Nov., 1833; on the day of the confession the defendant executed to Secrest a bond to make titles on payment of the note; on 7th November, 1842, other party of Secrest was sold by the Sheriff, and \$5,512 56 of the proceeds were applied to the satisfaction of this execution, being the amount then due thereon.

On 26th April, 1843, Secrest filed his bill in this Court against the defendant, to compel him to comply with his contract, by executing titles; other creditors of Secrest were parties to the proceedings, as Secrest had, in the meantime, become embarrassed. The defendant resisted the prayer of the bill, on the ground that he was one of the sureties of

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Secrest on his official \*bond as Sheriff—that he had been compelled, or would be compelled to pay money on that account, and insisted on his right to tack. Pending the litigation, to wit: in December, 1844, the premises were ordered to be sold, by the Commissioner, and the proceeds to be paid into Court. They were accordingly sold and purchased by the defendant for about the sum of one thousand and fifty dollars, who complied with his bid. The defendant's right to tack was sustained, and by an order of 26th June, 1846, (subsequently affirmed,) the proceeds of the sale were ordered to be paid to the defendant. Secrest died insolvent in 1847, or 1848—evidence was offered that the defendant, as surety of Secrest, had paid some \$2400 over and above the sales of the premises received from the Commissioner.

The Court is not called upon, nor is it at liberty to institute an inquiry whether the defendant has not been greatly benefited by his transactions with the plaintiff's husband. Whether he has not only been fully paid for the property, which he received back in its improved state, but more than indemnified for any liabilities he may have incurred for the deceased.

The solution of that inquiry would not determine the only issue presented for the Court. If Leroy Secrest had, at any time, during the coverture, a legal seizin, the plaintiff is entitled to a decree; if not, the defendant must be dismissed. In the argument the seizin of Secrest was inferred from his possession for ten years subsequent to July, 1833. But it is very clear that until the note was payable, and even until the note was paid, in Nov., 1842, the possession was

subordinate to the legal title of McKenna, and therefore not adverse. The bill of Secrest, in April, 1843, is a substantial acknowledgment that until payment, his possession was fiduciary. If in November, 1833, the defendant had executed a conveyance, and Secrest had reconveyed by way of mortgage, it has been ruled that until payment the possession of the mortgagor was fiduciary, and not adverse. *Thayer v. Cramer*, 1 McC. Eq. 395.

It is ordered and decreed that the bill be dismissed, but without costs.

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\*The plaintiff appealed and now moved this Court to reverse the decree on the grounds:

1. Because the husband of the demandant had a legal seizin during the coverture in the House and lots from ten years' peaceable and adverse possession subsequent to July, 1833, during which time he exercised repeated acts of ownership, such as renting the house and lots, and putting up various improvements and additions thereto, without any objection or hindrance on the part of the defendant, and the demandant is therefore entitled to her dower therein.

2. Because the husband of the demandant was beneficially seized of the house and lots and after payment of the note given for the purchase money, had a right in Equity, to a conveyance of the fee simple: his wife is therefore entitled to her dower therein, though the husband's right be derived under an executory contract, to make titles upon payment of the purchase money.

3. Because the defendant in his answer to the bill of Secrest, filed in April, 1843, having consented to the sale of the house and lots, as Secrest's property, and his purchase of the same, at the Commissioner's sale as Secrest's property, is a substantial acknowledgment that the possession of Secrest was title—paramount—to the legal paper title of himself, and therefore adverse, and having acquired his right to and possession of the house and lots by his purchase of the same, as Secrest's property, he is estopped from, and cannot deny the seizin of Secrest; and his Honor erred in overruling the objection urged by plaintiff's counsel, against the introduction of the record of the case of *Secrest v. McKenna*, on the ground that McKenna is estopped from denying Secrest's title, as he purchased the property at the Commissioner's sale as Secrest's, and the demandant is entitled to her dower therein.

Williams, Cooke, for appellant.

Clinton, contra.

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\*PER CURIAM. This Court approves and affirms the decree of the Chancellor; and it is ordered that the appeal be dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.



## 6 Rich. Eq. 75

JOHN ADAMS v. JOHN J. MACKEY and Others.

(Columbia. Nov. and Dec. Term, 1853.)

[*Husband and Wife* ⇐150.]

Property was held in trust for the support and maintenance of a married woman and her children, not to be subject to the debts, contracts, or control of her husband, and on her death to pass to her children. For repairs on a carriage, and for services rendered, the husband and wife gave their sealed notes. The wife died: *Held*, that the creditor was not entitled to payment out of the trust estate.

[Ed. Note.—Cited in *Mayer v. Galluchat*, 6 Rich. Eq. 3.

For other cases, see *Husband and Wife*, Cent. Dig. § 578; Dec. Dig. ⇐150.]

Before Dunkin, Ch., at Lancaster, June, 1853.

A statement of this case is contained in the Circuit decree, which is as follows:

Dunkin, Ch. The will of Thomas Mackey bears date in February, 1841, and the testator died shortly thereafter. His daughter, Agnes, was then the wife of John J. Sims. By several clauses of his will he devises and bequeaths to his son (the defendant) John T. Mackey, certain real and personal estate, in trust for the support and maintenance of testator's daughter Agnes, and her children by her present husband, John J. Sims. In each clause it is expressly provided that the property so given shall not be subject, in any manner, to the debts, contracts or control of her husband; and further, that, on the death of testator's daughter Agnes, the property shall pass "to her children by her present marriage." Part of the property be-

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queathed \*consisted of the sum of seventeen hundred dollars, which was afterwards invested in negroes, to be held subject to the same trust. The testator authorized the trustee to expend the interest of the seventeen hundred dollars, and, if that was insufficient, so much of the principal as he thought expedient for the purposes aforesaid.

It was stated at the hearing, that Agnes Sims is dead. This petition was filed (as the Court supposes) since the death of Agnes Sims. The copy petition furnished to the Court, contains no evidence of the time of filing; no copy of the causes of action; no statement as to the time when they arose. No evidence was offered at the hearing.

It is stated in the petition, however, that at some time, one Mayer made repairs on a carriage belonging to the trust estate to the value of eighteen dollars, for which John J. Sims and his wife gave their sealed note, and that one M. B. Arant rendered other services stated, for which John J. Sims and his wife gave their sealed note for twenty dollars, and that both these notes were delivered to the petitioner for valuable consideration.

"If any thing can be considered as set-

tled," says Chancellor Harper, in *Reid v. Lamar*, 1 Strob. Eq. 37, "it is the settled law of this State, that where property is given or settled to the separate use of a married woman, she has no power to charge, incur, or dispose of it, unless in so far as power to do so has been conferred upon her by the instrument creating her estate." By the express inhibition of Mackey's will, the property is placed beyond the control of John J. Sims, and the signature of his wife is a mere nullity.

It is suggested that Sims and his wife were the agents of the trustee. This is denied by the answer and no proof was offered. But if the allegation be susceptible of proof then the petitioner has a plain and adequate remedy at law against the trustee. The only equity to which a creditor in such case can be entitled is to be subrogated to the rights of the cestui que trust. If the cestui que trust has not received the income of the trust estate to which he, or she, was entitled, and

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credit has been \*given to effect the objects of the trust, the creditor, in the event, for instance of the insolvency of the trustee or the like, may claim any arrears of income to which the cestui que trust might be entitled. But this is a rare exception. In general a person must look to the party with whom he contracts: if the contract is with the trustee, he must look to him and not to the trust estate. The remedy of the trustee is out of the trust funds properly applicable. See *Morton v. Adams*, 1 Strob. Eq. 72. So, if the creditor contracts with the cestui que trust he must look to him for payment. He can reach the trust estate only through the cestui que trust, and upon a special statement shewing the right of the cestui que trust and the equity of the creditor to subrogation. But even then, as remarked by the Court in *Magwood v. Johnston*, 1 Hill, Eq. 228, "Every estate must bear its own burden, or instead of effecting the objects of the trust they will be defeated."

The trustee states that the entire income was received by the cestui que trust during the coverture, and, he denies that the demands for which payment is sought were for the benefit of the trust estate. The prayer of the petition is that so much of the corpus of the trust estate as may be necessary, shall be subjected to the satisfaction of the petitioner's claims.

In the judgment of the Court, he has presented no cash which would entitle him to aid, and the petition is accordingly dismissed.

The petitioner appealed on the grounds:

1. As the answer of the defendants admit that the carriage was a part of the trust estate, and the consideration of the note to Mayer for \$18, was for repairs upon the carriage, the Court, it is submitted, should have

decreed the same out of the rents and profits, or the corpus.

2. As the answer admits that the note to Arant for \$20 was for horse power to work the trust lands, the same should have been decreed against the rents and profits, or some other part of the trust estate.

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\*Clinton, for the appellant.  
Williams, contra.

PER CURIAM. This Court concurs in the decree. It is, therefore, affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN, and  
WARDLAW, CC., concurring.  
Appeal dismissed.

### 6 Rich. Eq. 78

L. A. BECKHAM v. H. J. PRIDE and Others.  
(Columbia. Nov. and Dec. Term, 1853.)

[*Executors and Administrators* ⚡531.]

D. and P. were sureties on the administration bond of J. S., on whose administration accounts a large sum was ascertained to be due. For that sum J. S. gave his bond, which was taken as payment, to the guardian of the distributees, with D. as surety, payable at a future day, with interest payable annually. To this arrangement P. was no party, and gave no consent. J. S. in his next annual return to the ordinary, claimed and received credit for the amount of the bond. A further sum was afterwards ascertained to be due by J. S.—half of which D. and P. each assumed to pay:—*Held*, that as to the amount of the bond of J. S. and D., P. was discharged as surety on the administration bond, and could not afterwards be made liable to D. for contribution.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2424; Dec. Dig. ⚡531.]

Before Dunkin, Ch., at Chester, July, 1853.

This case came before the Court on exceptions to the report of the Commissioner, which is as follows:

"In relation to the third point, as to the respective liabilities of F. W. Davie and Pride, for Sitgreaves, the facts are these: F. W. Davie and F. L. J. Pride were sureties on the administration bond of J. S. Sitgreaves, as administrator of Walter Izard, deceased. On the 13th day of March, 1840, John S. Sitgreaves executed his bond with F.

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W. Davie, as surety to N. \*R. Middleton, guardian of Izard's children, conditioned for the payment of \$12,444 90, with annual interest from date, by way of payment or credit upon Sitgreaves' administration accounts, and Sitgreaves took credit to himself for that amount, in his returns to the Ordinary. It was afterwards ascertained that the further liabilities of Sitgreaves, as administrator, amounted to over \$10,000, which were equally divided between the sureties. Davie's estate

has been compelled to pay the above named bond of \$12,444 90, in addition to his half of the \$10,000 deficiency. Davie gave his own note on the 19th March, 1845, for the above named bond, and also on the 24th June, 1845, executed his note for one-half of the other sum stated. The executor of Davie insists that Pride must pay one-half of the said sum of \$12,444 90, it being part of the defalcations of Sitgreaves. This claim is denied on the part of the representatives of Pride.

"The question as to the respective liabilities of F. W. Davie and Pride, for the defalcations of Sitgreaves, on his administration bond for the estate of Izard, is of considerable importance to the parties, and is not free from difficulty. The facts connected with this transaction have been already detailed. The point referred to the Commissioner is to ascertain and report "what were the several liabilities of the said H. A. Davie, F. W. Davie, and F. L. J. Pride, as endorsers and sureties of said John S. Sitgreaves, at the time of the said assignment," of his choses in action, &c., to H. A. Davie. This assignment was made on the 28th of February, 1845. Was Pride at all liable for Sitgreaves at that date to any one for the amount of \$12,444 90, for which he, (Sitgreaves) had given his bond, with Col. Davie as surety to the guardian of Izard's children? Middleton, the guardian, had taken the bond of Sitgreaves and Davie for that much of the indebtedness of the former on his administration bond. It is proved by Mr. G. W. Williams that Sitgreaves had credit on his returns to the Ordinary for that amount paid to Middleton. Middleton having received the new bond of Sitgreaves and Davie, as payment pro tanto—was not Pride wholly discharged by him as to that sum? It may be

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\*remarked here, that this new bond, although of no higher grade than the administration bond of Sitgreaves, was, in some respects, more advantageous than the other. It reduced that to certainty, which was before uncertain; it accumulated and made principal of the interest to that date, and made it payable with annual interest for the future. If Middleton accepted the bond of Sitgreaves and Davie, as payment, his remedy against Pride was gone, and Davie's liability for Sitgreaves was changed in its character. In my view, Pride ceased to be liable, both to Middleton and Davie, for any portion of Sitgreaves' liabilities liquidated by his new bond. It may be urged that the conduct and acknowledgments of the parties proved that Pride considered himself still responsible. That may be so, but it cannot change the legal indebtedness of the sureties. On the other hand, there are some circumstances leading to a different conclusion. After Sitgreaves' failure, Col. Davie gave his own note in place of the Middleton bond, and



afterwards confessed judgment on that sum and the additional liability afterwards ascertained. Pride also gave his note, with Col. Davie as surety for his half of their additional liability, upon which he afterwards confessed judgment. No effort seems to have been made then, nor at any time afterwards, by Col. Davie, to hold Pride responsible for half of the large note, a neglect which seems hard to explain, if he thought Pride at all liable. My conclusion, after much hesitation, is that Pride's estate is not liable for any part of the \$12,444 90, for which Sitgreaves executed his bond to N. R. Middleton, with F. W. Davie as his surety."

To this report the executor of F. W. Davie, who was a party defendant to the bill, made the following exceptions:

1. Because the Commissioner has charged the estate of F. W. Davie with the exclusive liability for the debt of \$12,444 90 to the guardian of Walter Izard's children; whereas the estate of F. L. J. Pride was liable for one-half thereof.

2. Because the report proceeds upon the er-

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roneous assumption that F. L. J. Pride ceased to be liable, both to Middleton, the guardian, and F. W. Davie, for any portion of Sitgreaves' liabilities, liquidated by the new bond of Sitgreaves and F. W. Davie, for \$12,444 90, after that bond was given.

Dunkin, Ch. The facts may be thus stated: On 13th March 1840, J. S. Sitgreaves, as administrator of Walter Izard, deceased, was indebted to Russell Middleton, guardian of W. Izard's children, in the sum of \$12,444, for which F. W. Davie and F. L. J. Pride were sureties. On that day Middleton took in payment (as the Commissioner reports) a bond of Sitgreaves and Davie, payable at a future day, with the interest payable annually. In the next annual return to the Ordinary, Sitgreaves claimed and received credit as so much paid on his administration accounts. Several views may be taken of this subject, all leading to the same conclusion. The creditor has the right to receive what he pleases as payment. Middleton (very judiciously as it proved) took the bond in payment, and as administrator, Sitgreaves and his sureties were discharged. See *Peters v. Barnhill*, 1 Hill, 236, note.

But again: The debt due by Sitgreaves, on his administration account, was payable presently, and might have been enforced. By the arrangement of 13th March, 1840, Middleton gave time to the principal debtor, and thereby discharged the sureties, unless they were parties to the new arrangement, and consented thereto. F. L. J. Pride was no party, gave no consent, and was therefore exonerated from liability. F. W. Davie became surety on the new bond. But if Sitgreaves had given the bond, secured by a third person, and that had been taken with an extension of the

credit, with the consent of F. W. Davie, such consent may have prevented Davie's discharge, but could have no effect on the liability of Pride, who gave no consent, and was asked for none. *Hampton v. Levy*, 1 McC. Eq. 112. The Court might enlarge further upon the subject, but the facts are very clearly stated in the report of the Commissioner, and it is not deemed necessary to add

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to the reasons \*therein given for his judgment, in which the Court concurs. These exceptions are overruled.

The executor of F. W. Davie appealed, and now move this court to reverse so much of the decree as overruled his first and second exceptions, upon the ground that the debt of \$12,444 90 having been paid by F. W. Davie, or his estate, the appellant has a right to claim contribution from the estate of F. L. J. Pride, who was the co-surety of F. W. Davie, and equally bound for the payment of the said debt.

DeSaussure, for appellant.  
Williams, contra.

PER CURIAM. We concur in the decree; and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

#### 6 Rich. Eq. \*83

\*MARY P. SCHOPPERT, by Next Friend, v. JAMES GILLAM and Others.

(Columbia. Nov. and Dec. Term, 1853.)

[Wills  $\hookrightarrow$  524.]

Testator having a wife, E., two sons, and a daughter, S., who had been the wife of P. B. deceased, by whom she had three children, made his will by which he gave to his wife for life, certain negroes, and directed them at her death to be sold 'with their increase (if any) and equally divided between his two sons or their heirs, and the surviving children of P. B., deceased.' The three children of P. B. by S. were all that he ever had—they survived him and the testator also, but two of them died in the life time of E., the tenant for life, one or both leaving issue: *Held*,

That by the words 'surviving children of P. B.' the testator meant such as survived E.; and, therefore, that the one who survived her was alone entitled to the share given to the children of P. B., in exclusion of the two who died in her life time.

[Ed. Note.—Cited in *Presley v. Davis*, 7 Rich. Eq. 107, 62 Am. Dec. 396; *Blum v. Evans*, 10 S. C. 80; *Mangum v. Piester*, 16 S. C. 322; *Roundtree v. Roundtree*, 26 S. C. 464, 465, 2 S. E. 474; *Durant v. Nash*, 30 S. C. 192, 9 S. E. 19; *Simpson v. Cherry*, 34 S. C. 74, 12 S. E. 886.

For other cases, see Wills, Cent. Dig. § 1123; Dec. Dig.  $\hookrightarrow$  524.]

[Wills  $\hookrightarrow$  487.]

The circumstances by which a testator is surrounded when he attests his will, will always be allowed an influence in the interpretation of



dubious words or phrases in it; though they cannot be resorted to to prove his intention apart from his language.

[Ed. Note.—Cited in *Addison v. Addison*, 9 Rich. Eq. 66.

For other cases, see *Wills*, Cent. Dig. § 1026; Dec. Dig. ¶487.]

[*Wills* ¶524.]

As a general rule, words of survivorship are to be referred to the period of division and enjoyment.

[Ed. Note.—Cited in *Selman v. Robertson*, 46 S. C. 272, 24 S. E. 187.

For other cases, see *Wills*, Cent. Dig. §§ 1116-1127; Dec. Dig. ¶524.]

Before Johnston, Ch., at Newberry, July, 1853.

This case will be fully understood from the opinion delivered in the Court of appeals.

Sullivan, for appellants.

Jones, Garlington, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. Robert Gillam died in 1814, leaving his wife, Elizabeth, and three children, to wit: William, James and Sarah. Sarah had been married to Philemon Berry Waters; who died in 1807, and by whom she had three children, Robert, Philemon and Mary B. After the death of her husband, Philemon Berry Waters, Sarah had become the wife of William Sheppard.

In the will of Robert Gillam, executed the 27th of October 1813, the following dispositions occur, among others not necessary to notice:

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"I also give unto my said beloved wife," (Elizabeth,) "a negro fellow, named Tom, and a wench, named Linn, and her child," &c., "during her natural life: and at her death, to be sold, together with their increase, (if any,) and equally divided between my two sons, William and James, or their heirs, and the surviving children of Philemon Berry Waters, deceased.

"I also give to my daughter, Sarah Sheppard, in addition to what I have already given her, twenty dollars."

This trifling sum is all that is given to Sarah Sheppard in any part of the will: so that the gifts of the testator to her, to which he alludes, must have been made anterior to the will.

Elizabeth, the widow of the testator, died in 1851, at a very advanced age, about ninety years: and the executor, in pursuance of the directions of the will, took possession of the slaves, with their increase, and sold them, and now holds the proceeds.

It is stated in the pleadings, and agreed on, that Philemon Berry Waters never had any other children than the three above named: all of whom were alive at his death, and at the death of the testator, Robert Gillam.

But between the death of the testator and the falling in of the life estate, the two sons,

Robert and Philemon Waters had died, leaving (either one or both) issue. The daughter, Mary B. (now the wife of Phillip Schoppert,) alone survived.

Her bill is brought to adjust her interests in the proceeds of the slaves sold by the executor; and to have a settlement made on her. And for these purposes her husband is made a defendant, together with the executor and the heirs of her deceased brothers, &c. All parties in interest are before the Court.

By the decree of the Circuit Court, it was adjudged that she, as sole surviving child of Philemon Berry Waters, was entitled, in exclusion of the children of her brothers Robert and Philemon; and that the fund should be divided equally between herself, William Gillam and James Gillam, each taking one-third; and that her third should be settled as prayed.

This is an appeal by the children of the plaintiff's two brothers; in which they contend that in the construction of the testa-

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tor's will, the three children of Philemon Berry Waters, who were all living at his (testator's) death, should have been held to have taken a vested remainder in the slaves, limited upon the death of Elizabeth Gillam; and that the share of each of those who had died during her life, should have been distributed to his children.

On examination of the words of the will, it is the unanimous opinion of this Court, that the construction put upon them by the Chancellor, on circuit, was correct.

What might have been the effect of the will as to the survivorship among the children of Philemon Berry Waters if it had been stated and shewn that he had had other children in his lifetime, and that the three named in the pleadings were the only ones who survived him, it is not necessary to consider. My opinion is, rather, that on proof of such a state of the family, the testator would have been held to have referred to it, and that the three children surviving him (Waters) would have been adjudged to have taken vested interests, as ascertained persons, under the will. If so, their interests would have been transmissible, and the children of Robert and Philemon would have taken their parent's share.

Parol proof may always be received of the circumstances by which a testator is surrounded at the time he attests his will; and those circumstances will always be allowed an influence in the interpretation of dubious words or phrases in it; though they cannot be resorted to to prove the testator's intention, apart for his language.(a)

It is a pretty obvious inference from this this doctrine, that, as surrounding circumstances may be resorted to for the construc-

(a) *Rosborough v. Hemphill*, 5 Rich. Eq. 95.

tion of a testamentary paper, the same words or phrases, occurring in different wills, will receive different interpretations, according to the diversity of circumstances under which the several testators composed their testaments.

It is probable, therefore, that if Philemon

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Berry Waters had \*been shewn to have had a larger number of children than the three whom he left behind him, the testator would have been held to have spoken of these three as his surviving children, meaning thereby to speak not of a survivorship among these children, but of their being survivors of their father.

But it was admitted and agreed on at the hearing, and has been again admitted and insisted on here on the argument of this appeal, that Robert, Philemon and Mary were the only children the father ever had; and, therefore, there is no room left for the interpretation to which I have referred.

There are but two other modes suggested, of construing the words surviving children of Philemon Berry Waters: to construe them as meaning such of the children as survived the testator; or as meaning such of them as survived the life tenant, and were in esse to take at the period of distribution.

The case of *Cripps v. Woolcott*, 4 Madd. 11 (b), would seem to decide this point, generally. It is held in that case that words of survivorship are to be referred to the period of division and enjoyment, unless the contrary intent be especially shewn.

There is nothing in the will in this case to shew an intention at variance with the rule that the survivorship relates to the period of distribution. On the contrary, there is much on the face of the will to help the rule.

It seems plain from the testator's language that he looked to changes to take place, during the life estate, both as to the property and as to the persons to whom it was to go in remainder. As to the former, it may be observed that the increase of the property is taken into consideration by the testator. This may be admitted to be but a very slight circumstance. But the expressions in relation to a change in the persons to take in remainder are far from being slight or unimportant. The testator directs the division to be made equally between his two sons, William and James, or their heirs, and the surviving children of Philemon Berry Waters, deceased. Here it seems plain that he contemplated the possibility of the death of his

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two \*sons; and that he intended to provide for it by declaring that their interests should be transmitted to their heirs. Is it not fair to presume that the testator had in view the possible death of Waters' children, and em-

ployed the term surviving in reference to that event? If he intended that their shares should be transmissible, like those of his sons, why did he not direct, as in the case of his sons, that their heirs should take in their place? Taking the whole clause together, it seems pretty clear, that on the death of the sons during the life-estate their interests should be transmitted to their heirs, and, on the death of any of the children of Waters, his or her interests should be transmitted not to his or her heirs, but to such of the other children as should survive the life-tenant.

There are other reasons for this construction to be gathered from the will. The mother of these children had married a second husband. It appears by the will that the testator gave her but twenty dollars. Whether he conceived that he had already fully provided for her, or was displeased with her second marriage, or whatever may have been his motive, it seems not unreasonable to conclude that he intended the provision made by him for the children of her first marriage to enure exclusively to their advantage, and not to her or her second family.

The children of Waters were of very tender age, and he may have supposed it improbable that his widow (on whose life he suspended their interests,) already an old woman, should live to the advanced period to which her life was protracted: or that the infant children of Waters would, during her life, have families or children of their own, to take in case of their death. His probable conclusion was that the best means of saving any portion of their interests from going over to the Shepards was to limit it to the survivors among themselves, at the death of his widow.

It is ordered that the decree be affirmed and the appeal dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

#### 6 Rich. Eq. \*88

\*ALFRED M. REEDER and Wife and Others  
v. JAMES S. SPEARMAN and Others.

(Columbia. Nov. and Dec. Term, 1853.)

[Wills  $\hookrightarrow$  614.]

Testator devised and bequeathed land and negroes to his son W. C., and to his children after his death, and in the event of his dying without issue, then and in that case to revert to my estate and be divided among my surviving children or their issue: *Held*, that W. C. took an estate for life, with remainder to his children as purchasers.

[Ed. Note. Cited in *Addison v. Addison*, 9 Rich. Eq. 67; *Williams v. Kibler*, 10 S. C. 425; *Clark v. Clark*, 19 S. C. 352; *Smith v. Smith*, 24 S. C. 315; *Wallace v. Craig*, 27 S. C. 524, 4 S. E. 74; *Folk v. Hughes*, 100 S. C. 225, 84 S. E. 714.

For other cases, see *Wills*, Cent. Dig. § 1402; Dec. Dig.  $\hookrightarrow$  614.]

(b) And see *Deveaux v. Deveaux*, 1 Strob. Eq. 287-8.



The resolutions in Wield's case (6 Co. 17) approved, and the decision in Johnson v. Johnson (McM. Eq. 345) held not to conflict with them.

[Ed. Note.—Cited in Chavis v. Chavis, 57 S. C. 175, 35 S. E. 507.]

Before Wardlaw, Ch., at Newberry, July, 1852.

The facts in relation to the only point decided in this case by the Court of Appeals, are fully stated in the opinion delivered in that Court.

Petigru, Carroll, for appellants.  
Fair, Bauskett, contra.

The opinion of the Court was delivered by

DARGAN, Ch. Jacob Crosswhite, by his last will and testament, bearing date the 11th July, 1825, gave to his "son, William Crosswhite, and to his children after his death," certain slaves who were referred to by name, and a tract of land which was specifically described. He had in preceding clauses given to his daughter Sarah Davidson, negroes and a tract of land, and to his daughter Betsey Roebuck, negroes, in the same form of expression: that is to say, the gift was to them, "and to their children after their death." By the fifth clause, he proceeds to say, "it is my intention, and I do hereby make it the express condition of the previous devises and bequests, that in the event of either of my children, the aforesaid devisees and legatees, dying without issue, then and in that case, that the property herein before devised and bequeathed to the aforesaid child, or children, who may die without issue, shall revert to my estate, and be divided among my surviving children or their issue."

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\*The property given by the testator to his children, went into their possession respectively, and was enjoyed by them after his death.

Some time in the early part of the year 1833, Wm. Crosswhite, having duly executed his will, died, leaving surviving him, his wife Lucy, who afterwards intermarried with James S. Spearman, and an only child, John Bobo Crosswhite, then an infant of about the age of three years.

By his will Wm. Crosswhite gave to Lucy a tract of land called the Toland tract and five negroes, with some other chattels, all of which were described, one-third of his live stock, and provisions for one year. In his will he says, "I give, devise and bequeath to my son, John Bobo Crosswhite, upon his attaining the age of 21 years, absolutely and forever, the whole rest and residue of my real and personal estate, with its future increase, and annual profits. Should he die before he comes to the age of 21 years, having lawful issue, then I give the same absolutely to such issue. But in the event of his dying before he attains the age of 21 years, without lawful issue living at his

death, then I give and devise absolutely and forever, the one half of the property contained in this clause, to my wife Lucy Crosswhite, one-fourth in the same absolutely to the children of my sister Sarah Davidson, and one-fourth in like manner, to the children of my sister Elizabeth" (Roebuck.)

On the 4th June succeeding the death of Wm. Crosswhite, Samuel Davidson, the surviving executor of Jacob Crosswhite, filed a bill in this Court against John Bozeman, the executor of Wm. Crosswhite, Lucy Crosswhite, and John Bobo Crosswhite, charging that Wm. Crosswhite had derived the greater portion of the property of which he died possessed, both real and personal, under the 4th clause of the will of his father, the said Jacob; and that the said William only took a life estate therein, &c. He prayed, among other things, that it might "be ordered and decreed, that all the property in the possession of William Crosswhite, at his death, and which formerly belonged to Jacob Crosswhite, passed under the will of Jacob Cross-

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white, on the \*death of William Crosswhite, to his son John Bobo Crosswhite," or to himself as executor, &c.

On the 16th July, after the filing of the bill, John Bozeman, the executor of Wm. Crosswhite, put in his answer; wherein he insisted that his testator took the property given to him by his father's will in his own absolute right; and that the plaintiff had no right or claim to the same; but if otherwise, he insisted that the said property belonged to John Bobo Crosswhite as remainderman, and submitted to the Court, whether John Bobo Crosswhite could take both under and against his father's will. An order pro confesso was taken against Lucy Crosswhite; and the case came on for trial at July Term, 1833, on the bill, the answer of Bozeman, and that of John Bobo, who answering by guardian ad litem submitted his rights to the protection of the Court.

The Chancellor who heard the cause, decreed, that William Crosswhite took a life estate in the property given to him by the 4th clause of his father's will, with a remainder in fee to his son John Bobo Crosswhite. He further decreed that John Bobo could not take under and against his father's will, but that it was a case of election. But that as he was an infant, and could not elect for himself, the Court would elect for him; and in order that the Court might elect understandingly, it was referred to the Commissioner to inquire and report upon the value of the benefits which the infant might derive under the will of his father, and that of his grand-father.

No election was made; nor was the report ever submitted; for in the same year John Bobo Crosswhite died, being an infant of tender years; and the case abated. At the en-



suing term of the Court, it was struck from the docket.

Thus the proceeding rested until the 25th May, 1852, when the present plaintiffs filed their bill. They are the children of Sarah Davidson, and Elizabeth Roebuck. They claim under that clause of the will of William Crosswhite, in which he gives, in the event of his son John Bobo dying under the age of 21 years, and without issue living at

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his death, one-fourth of the \*property which he had previously given to John Bobo, to the children of Sarah Davidson, and one-fourth thereof to the children of Elizabeth Roebuck. They further claim that William Crosswhite took an absolute estate in the property given to him by his father's will, and not a life estate as the Court had decreed. The bill is brought against the executor of Bozeman, and the representatives of Lucy Crosswhite, afterwards Lucy Spearman, who on the decease of her son, John Bobo Crosswhite, obtained possession of the property. They pray for a revival of the bill of 1833, which had abated on the death of John Bobo, for recovery of their share of the property, an account for rents, and profits, &c.

It can hardly be questioned, that the limitations in favor of the plaintiffs, in the will of William Crosswhite, are valid. And if the estate of which they seek a partition and account, was the absolute property of William Crosswhite, and if there were no other impediments, the plaintiffs would be entitled to a decree.

The defendants have raised an objection in limine. They deny that the plaintiffs have a right, under the circumstances, to revive the abated bill. They further contend, that the present plaintiffs, claiming under the will of William Crosswhite, were represented by the executor thereof in the former suit, and are concluded by the decree rendered in that cause. And finally they say, that if these impediments to the recovery of the plaintiffs did not exist, upon the construction of Jacob Crosswhite's will William Crosswhite took only a life estate, and his son John Bobo took as remainderman. If the last proposition be true, it will be unnecessary to discuss and decide the preceding questions that have been raised; for in that view of the case, the plaintiffs can have no interest in the subject matter.

In the argument of this appeal, each party has appealed to, and relied upon Wild's case, 6 Co. 17. They therefore cannot dispute its authority. Indeed, its authority will not admit of question from any quarter. For as it is said by the learned and pre-eminent jurist who reports it, "the case for difficulty was argued before all the Judges of England."

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The principles re\*olved in that case have been received for law from that day to this in England, and are confessedly the law of South Carolina. It is pleasant and profitable

in our judicial researches to ascend to the pure fountains of the common law, and to deduce from thence just and true expositions of the principles of that system. It would be better if this were oftener done. The wisdom of the sages of the law who lived in those early times, we are too prone to take at second hand.

Wild's case, by the special verdict of the jury, was to this effect: "Land was devised to A. for life; remainder to B., and the heirs of his body; remainder to Rowland Wild and his wife, and after their decease to their children—Rowland and his wife then having a son and daughter. Afterwards the devisor died; and after his decease A. died. B. died without issue. Rowland and his wife also died, and the son had issue, a daughter and died. If this daughter should have the land or not, was the question: and it consisted only upon the consideration what estate Rowland Wild and his wife had, viz: if they had an estate tail, or an estate for life with remainder to their children for life."

In Wild's case there were three propositions "resolved as good law." First, "If A. devises his lands to B. and to his children, or issues, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the devisor is manifest and certain, that his children or issues should take; and as immediate devisees they cannot take, because they are not in *rerum natura*; and by way of remainder they cannot take, for that was not his intent, for the gift is immediate; therefore such words shall be taken as words of limitation." Second, "If a man devises lands to A. and to his children, or issue, and he then has children or issue of his body, then his express intent may take effect according to the rule of the common law, and no certain and manifest intent appears in the will to the contrary. Therefore, in such case, they shall have but a joint estate for life." Third, "But it was resolved, that if a man, as in the case at bar, devises

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land to husband and wife, and after \*their decease, to their children, or the remainder to their children; in this case, although they have not any child at the time, yet every child they shall have after, may take by way of remainder, according to the rule of the common law; for the intent appears that their children shall take immediately,—but after the decease of Rowland and wife." The cases cited in Thomas' edition of the Reports most amply sustain the principles adjudged in this case. More particular reference to them here will be unnecessary.

The plaintiffs' counsel, in their argument, attempted to bring the case at bar, under the first proposition in Wild's case. The first proposition is good law, beyond all question. Undoubtedly, if a man devises property to A. and his children or issue, A. having no children at the time of the devise, it would create a fee tail in England, and

a fee conditional in South-Carolina. There is a manifest intent of an immediate gift to the children.<sup>(a)</sup> But they not being in existence, cannot take; for they must take at once, or not at all. There is no indication of an intention that they are to take in succession to A. and after the termination of a previous estate in him. Therefore, if they take any interest at all, it must be by descent per formam doni; as in an estate tail or fee conditional.

The case now under judgment does not come within this class. Here, (in the will of Jacob Crosswhite,) there is a manifest intention, not only that the children of William shall take, but that they shall take in succession to him, after his decease, and the termination of a life estate in him. It obviously falls within the third proposition, which was considered to have embraced the issue in Wild's case. There is the most perfect analogy. In the one case, the devise was to Rowland Wild and his wife, and after their decease to their children. In the other, the devise is to William Crosswhite, and to his children after his death. Death and de-

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cease are synonymous words. The only other difference is the transposition of words, without the slightest alteration of the sense. The most subtle sophistry cannot detect a seemingly material difference. If Wild's case be authority, (and who would have the temerity to insinuate a doubt of it,) then under the 4th clause of Jacob Crosswhite's will, his son William took only a life estate, with a remainder to his children; that is, as it has resulted, to his son John Bobo Crosswhite.

The only case which presents an apparent contradiction to this conclusion, is that of Johnson v. Johnson, McM. Eq. 345. But when viewed in the proper light, it recognizes and supports, instead of raising a question as to the authority of Wild's case; for the latter was invoked as affording an authoritative rule by which Johnson v. Johnson was to be decided.

In Johnson v. Johnson, the testator (James Stuart) gave to his "daughter Maria Johnson, and to her children after her", a tract of land, a negro, and sundry other chattels. It was held, that the children could not take, either as immediate devisees, or as remaindermen. That case might have been decided the other way: in fact it was one of those ambiguous cases, which might have been decided either way, without doing much violence to established rules. The only difference between that and the present case is the omission of the word "death", following the words "after her". The omitted word might have been supplied by implication, to

carry into effect the intention of the testator, that the children should take after the death of the first taker. That construction would have brought the case on a parallel with Wild's case, and the case in hand. It is clear however that the Court thought the words "to Maria Johnson and to her children after her", equivalent to the words, to Maria Johnson and her issue after her, and that it was intended by the testator, that the children or issue of Maria should take after her in indefinite succession; thus constituting a fee conditional as to the land, and an absolute estate in Maria, as to the chattels, under the first and not the third resolution, in Wild's case. That the Court con-

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\*strued the gift to Maria Johnson, and her children after her, as a gift to her, and to her children or issue to take in indefinite succession, is made more manifest by the subsequent language of the Chancellor, who delivered the opinion of the Court. "It would be different", says he, "if there was a limitation over in the event of Mrs. Johnson's leaving no issue living at her death. That would show an intention of giving in remainder to the children living at her death, and would restrict the mother to a life estate". The very cases cited, show that such was the view of the Court, for they are pertinent only to that construction. And assuming that such was the intent of the testator, the decision in Johnson v. Johnson does not admit of dispute or cavil.

In Shearman v. Angel, Bail. Eq., 351 [23 Am. Dec. 166] the words of the devise of a tract of land were "to my mother for life, and at her decease to her children forever." A bequest of slaves to the testator's mother was couched in the same language. The circuit decree, both as to the land and the slaves, gave the mother a life estate, with remainder to the children. From this part of the circuit decree no appeal was taken. A bequest of \$1000 and some other chattels to the testator's mother and to her children forever, was held to constitute an absolute estate in the mother; and this construction was affirmed on appeal. I cite this case as affording some analogies, though not strictly in point.

Upon a construction of the will of Jacob Crosswhite, founded upon the most unquestionable principles and upon the highest authority, this Court has come to the conclusion, that William Crosswhite took a life estate both as to the realty and the personalty, with a remainder to John Bobo Crosswhite. It follows that the present plaintiffs have no interest in the subject matter.

It is therefore ordered and decreed that the bill be dismissed.

DUNKIN and WARDLAW, CC., concurred.

JOHNSTON, Ch., gave no opinion.  
Bill dismissed.

(a) The same words would give an absolute estate in personal property. It is familiar doctrine, that words creating a fee tail or fee conditional, will give an absolute estate in chattels.



## 6 Rich. Eq. \*96

\*HIRAM SHANNON and Others v. ELIZABETH W. WHITE and Others.

(Columbia. Nov. and Dec. Term, 1853.)

[*Limitation of Actions* ⇨195.]

Where a bill impeaching a transaction on the ground of fraud, alleges, in order to avoid the bar of the statute of limitations, that the fraud was discovered within four years, the onus of showing want of notice is not on the plaintiff. The defendant, in order to avail himself of the statute, must show that the plaintiff had notice more than four years before the filing of the bill.

[Ed. Note.—Cited in *Myers v. O'Hanlon*, 12 Rich. Eq. 209; *Mans v. Feaster*, 4 S. C. 257; *Richardson v. Mounce*, 19 S. C. 482; *Bank of Charleston v. Dowling*, 52 S. C. 367, 29 S. E. 788.

For other cases, see *Limitation of Actions*, Cent. Dig. § 715; Dec. Dig. ⇨195.]

[*Limitation of Actions* ⇨197.]

In such a case it is not sufficient to prove that the plaintiff had a suspicion of the fraud. It must be shown that he had knowledge of the facts constituting the fraud, or possession of a clue by which with proper diligence he might have come to a knowledge of those facts.

[Ed. Note.—Cited in *Beattie v. Pool*, 13 S. C. 384; *Harrell v. Kea*, 37 S. C. 374, 375, 16 S. E. 42; *Smith v. Linder*, 77 S. C. 541, 58 S. E. 610.

For other cases, see *Limitation of Actions*, Cent. Dig. §§ 722-726; Dec. Dig. ⇨197; *Cancellation of Instruments*, Cent. Dig. § 53.]

Before Dunkin, Ch., at Chester, July, 1853.

The question of law decided in this case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Dawkins, Thomson, for appellants.

Herndon, McAliley, contra.

The opinion of the Court was delivered by

DARGAN, Ch. Elizabeth Wherry White is the widow and sole administratrix of Francis White, and she and the defendant Jane White, the only child of the said Francis White, are his heirs at law and distributees.

The plaintiffs are the creditors of Carter Lee, and seek by these proceedings to vacate certain conveyances of property, both real and personal, by Lee to White the intestate, which they allege to have been in fraud of Lee's creditors.

It would be unprofitable for me to encumber this opinion with a statement in detail of all the pleadings and proceedings which have taken place in the progress of this earnestly contested cause, or of the voluminous evidence which has been adduced by the different parties. It will be sufficient for me to notice such of the pleadings, and such of the facts as will render intelligible what I now have to say.

The bill in substance charges, that all the estate, real and personal, of Dr. Carter Lee,

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and all his choses in action had \*been conveyed by the said Lee, or by the sheriff, with

his consent, and by his contrivance, to Francis White, in the years 1840 and 1841, to secure and indemnify him for various sums of money advanced for the payment of Lee's debts; and upon the trust and confidence, that after these advances of money had been repaid to White, by cash, the hire of the negroes, and the transfer of choses in action, the negroes, and the other property thus obtained by White should be restored to Lee, or be held in trust for his benefit. The plaintiffs further charge, that bills of sale were made by Lee to White at different dates in the year 1840, for five slaves, namely: Dave, Alick, Anonymous, Jeff and Caty; and that on sale day in July, 1841, White purchased, with the consent, and by contract with Lee, and on the same conditions and trusts, all the remaining negroes of Lee, namely: Emily, Mary, Savilla, and her two children, Green and Violet, at the price of \$3,305. It is further charged that Lee paid for the house and lot where he resides, purchased by him from John Kennedy, but that the title was made to White; that he assigned to White certain notes, tools for working in tin, blacksmith's tools, &c., his interest in his father's estate, and paid considerable sums in cash for the purpose of reimbursing White for the moneys which he had advanced the said Lee, and that these assignments were upon the same trusts. These are substantially the allegations of the bill; which was filed on the 22d of May, 1849.

The answer of Elizabeth W. White, the administratrix of Francis White, denies all the material allegations of the bill; denies positively the fraud and the trust; alleges, that all the transfers of property by Lee to White were made to him absolutely, and without condition, or trust, and that the choses in action were paid for in cash. She also sets up the statute of limitations as a plea in bar to the plaintiff's claim.

Chancellor Wardlaw, by an order filed 30th October, 1851, directed issues to be made up and submitted to a jury in the Court of Law. The order is as follows: "It is ordered and decreed, that issues be made up

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in the Court of Common Pleas for Ches\*ter district, in which the plaintiffs in the present bill shall be the actors, and Elizabeth White and Jane White shall be the defendants, to try whether the conveyances and transfers of the real and personal estate of Dr. Carter Lee to Francis White in his life time, or any of them, whether made directly by said Lee, or through the sheriff, or the mother or legatees or distributees of the father of the said Lee, were made with the design to defeat, delay or hinder the creditors of said Lee, or with any other fraudulent purpose; or whether the same were made upon any secret trust for the benefit of said Lee; and wheth-



er the purchase money, or other advances of money made by said White to Lee, have been reimbursed by said Lee to White in the whole, or to any, or what extent. And that on the trial of said issues, the answer of Elizabeth White, so far as it is responsive to the allegations of the bill, and the testimony in this cause as reduced to writing by the Chancellor, or the Commissioner in Equity, may be used as evidence by either party."

At Spring Term 1852, the issues as directed by the foregoing order, having been made up, were submitted to a jury and tried. The presiding Judge has reported the verdict together with the evidence. The following is the verdict of the jury:

"We find that the deed of conveyance by Joel Patterson and others for the nine acres of land, and the deed by Lucy and Carter Lee for the interest of Carter Lee in the estate of Elliot Lee his father, and the several bills of sale and assignment of the negroes named in the bill, were made to Francis White to secure advances of money made by him to Carter Lee; and upon the trust, that the property should be re-vested in Carter Lee, when these advances were paid. We further find, that the alleged advances by White to Lee, and payments by Lee to White, cannot be properly ascertained by us, but should be accounted for."

The case came on for trial at July Term, 1852: the Chancellor who presided, confirmed the verdict. He also decided, that the transfers of property by Lee to White, were mala fide and fraudulent. He gave leave to the

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plaintiffs to amend their \*bill, so as to charge, that they had only discovered the fraud within four years previous to filing their bill. He also ordered, that the Commissioner take and report a statement in detail of the plaintiffs' claims; also an account of the sums paid and advanced by White, (the plaintiffs in their bill admitting that these should first be paid;) and also an account of the reimbursements made by Lee, with interest on both sides, and what balance remains due in favor of White on said account. Also that he include on the side of reimbursement the hire of the slaves as prayed, and all proper reimbursements, and that he state any special matter.

The plaintiffs filed an amended bill, in pursuance of the order of the Court giving them leave to do so; and to this amended bill the defendants filed a demurrer.

The case came on again for trial at July Term, 1853. The Commissioner then submitted his report upon the accounts taken in pursuance of the directions of the decree of July Term, 1852. The case was heard upon the demurrer of the defendants, and upon the report and exceptions thereto. The demurrer was overruled, and the report was confirmed. And this is an appeal from the decree overruling the demurrer and the ex-

ceptions to the report, and from the previous decisions made in the case.

As to the demurrer, it will be as well here to say, that this Court concurs with the Chancellor who overruled the said demurrer, and for the reasons stated by him. And so much of the appeal as relates thereto is hereby dismissed.(a)

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\*Preliminary to the issues as to the fraud, is the question which arises under the statute of limitations. For if the plaintiffs are barred by the statute, it will be unnecessary to look farther into the case. And anterior to this, is another question, the decision of which may greatly aid us in coming to a satisfactory conclusion. The latter question may be stated thus: When the plaintiff, with the view of evading the bar of the statute of limitations, alleges that the fraud was discovered within four years, (or within a period in which the statute will be no bar,) upon which party does the onus probandi lie, of shewing the want of notice? Does it lie with the plaintiff who alleges the want of notice, or with the defendant who interposes the bar of the statute? Whether the onus lies with the plaintiff, or the defendant, will in the most of cases seriously affect the result of the issue as to the applicability of the statute.

The English cases on this subject are confused and contradictory, and the point has never been adjudged in our Courts.

In the prosecution of this enquiry, and in the solution of the question, it will not be improper to resort to the philosophy of evidence. From the nature of man, and from

(a) So much of the Circuit decree as relates to the demurrer is as follows:

DUNKIN, Ch. It may be proper to premise that by the decree of Chancellor Johnston leave was granted to the plaintiffs to amend their bill by stating that the fraud was not discovered until within four years of instituting these proceedings. The amendment was accordingly made, to which the defendants filed a special demurrer. The principal ground seems to be, that the amendment was not verified by the oath of the plaintiffs. It may be remarked that the original bill was not filed on oath, nor does it seem to have been necessary. The amendment relies on a fact to take the case out of the Statute; and, as the decree declares that this averment casts the onus on the defendants, it may be that it should have been supported by the oath of some of the plaintiffs. If the defendants had objected to the filing on this ground, or had moved to take it off the file, it would

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have \*given the plaintiffs an opportunity to remove an objection which is of doubtful validity. But the defendants thought proper to file a special demurrer, and mingled this with other grounds clearly untenable, and then objected to any proceeding by the Commissioner, under the reference ordered, until the judgment of the Court was had on this special demurrer. The Commissioner overruled the objections, and heard the testimony, which established that the important facts could not have been well known to the plaintiffs, until after the death of defendants' intestate in 1848. The Court overruled the demurrer at the hearing.

the circumstances by which he is surrounded, it is rarely possible to establish the negative of any proposition involving an issue of fact in the common transactions of life. Whether the plaintiff has had a knowledge of the fraud for more than four years before the filing of his bill, though he asserts it, is a negative proposition. And while man has the power of veiling his thoughts, it would be difficult in many, and impossible in most cases, to prove it by evidence. For though it might be shewn that he did not have the information from this source or from that—

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from one or from \*many individuals, non constat that he did not have it from other sources or from other persons. It is a rule in pleading of almost universal application, that the onus is with the party who is interested in establishing the affirmative. And until the affirmative is proved, or *prima facie* proved, it is not necessary for the adverse party to offer any evidence.

The ground upon which the Court of Equity applies the statute of limitations is the laches of the plaintiff. He is required to prosecute his claim with a reasonable diligence. But how can laches be imputed to him who is ignorant of the fraud? When the defendant pleads the statute of limitations, the plaintiff in an artistic system of pleading might reply, that the statute does not apply, because he had notice only within the statutory period. But as we have no replications in this Court, the plaintiff may allege the want of notice in his bill, in anticipation of the plea. This must arrest the operation of the statute until the defendant, who is in the affirmative of the question, by proof brings his case within its provisions.

I will conclude what I have to say upon this branch of the subject, by referring to the separate opinion of Chancellor Johnston in *Thrower v. Cureton*, 4 Strob. Eq. 155 [53 Am. Dec. 660], where the authorities are collated.

On the trial then of this question of notice, it was incumbent upon the defendants to prove that the plaintiffs had notice of the fraud more than four years prior to the filing of the bill. And here it is to be remarked, that it would not be sufficient to prove that the plaintiff had a suspicion of the fraud. But it is necessary to bring home to the defendant a knowledge of the facts constituting the fraud. Suppose some one were to tell him that a fraud had been committed, it would not be sufficient, unless he were informed of the facts constituting the fraud, or put in the possession of a clew, by which, with a proper diligence he might come to a knowledge of the facts. He would not be required to enter into a costly contest, which would end in disappointment and defeat, or to encounter a shadowy and intangible phantom, which was sure to elude his attack.

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\*But when a knowledge of the facts constituting the fraud are brought home, or the means by which a knowledge of those facts might by proper diligence have been obtained,—then the statute begins to run, and not before.

Having thus defined the principles which must govern us in the decision of this question of notice, I proceed to apply them to the case under judgment. That the plaintiffs or some of them had a strong suspicion of the fraud at the very period of its perpetration, is abundantly clear from the evidence. But we are not satisfied from the evidence, that the plaintiffs had such a knowledge of the facts, constituting the fraud, as would have authorized them to proceed with any reasonable prospect of success. Indeed, we think that the negative of the proposition comes nearer to being established than the affirmative. It was only after the fraudulent and corrupt pact between Lee and White had been broken by the representatives of the latter, and Lee, under the influence of resentment and malice, had betrayed his confederate and exposed his own infamy, that the plaintiffs were put in possession of the clew to this labyrinth of fraud. The chancellor who tried the cause, decided, that the proof did not authorize the belief that the plaintiffs did have notice of the fraud more than four years before the institution of their suit. And upon a careful examination of the evidence, we concur in that opinion. The plea of the statute of limitations was therefore properly overruled.

This brings me to the consideration of the issue as to the fraud. To prove the fraud, Lee himself was examined as a witness, the defendants insisting upon his incompetency. The ground of this objection was, that his testimony tended to create a fund to satisfy the claims of his creditors. On the other side it was contended, that his interest was in a state of equipoise. In the opinion of this Court, it will not be necessary to decide the question of Lee's competency. It appears, that neither the Commissioner nor the Chancellor laid much stress upon his evidence. And this Court is of the opinion, that throwing Lee's testimony aside, there still remains evidence amply sufficient to

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\*establish the fraud. It would be unprofitable, as I have said, for me to enter into a detailed statement of the facts that were proved. It will suffice to say, that setting aside the evidence of Lee as incompetent, this Court is convinced that the alleged fraud has been satisfactorily proved.

It is ordered and decreed, that the Circuit decree be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, and WARDLAW, CC., concurred.

Appeal dismissed.



## 6 Rich. Eq. 103

MARY CANADY and Others v. JASPER GEORGE and Others.

(Columbia. Nov. and Dec. Term, 1853.)

[*Marriage* ⇨11.]

J. C. residing in this State had a wife living in Georgia, and known to be alive as late as the Fall of 1812. He married again in 1818, and died in 1851. Before his second marriage he said that his wife was dead, and received a letter and read it to by-standers stating her death:—*Held*, after the death of J. C., that his second marriage was valid—the presumption of the death of the first wife before the second marriage, arising from her absence unheard of for forty years, being strengthened by the presumption that the husband was innocent of crime in contracting the second marriage, and by the information of her previous death.

[Ed. Note.—Cited in *Corley v. Holloway*, 22 S. C. 386.

For other cases, see *Marriage*, Cent. Dig. § 30; Dec. Dig. ⇨11.]

[*Bastards* ⇨98.]

Deeds from a putative father to his bastard children, purporting to be for valuable consideration, *held*, upon the evidence to be voluntary.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 249; Dec. Dig. ⇨98.]

Before Wardlaw, Ch., at Barnwell, February, 1853.

The decree of his Honor, the Circuit Chancellor, is as follows:

Wardlaw, Ch. John Canady died intestate, April 9, 1851, and William Cook became the administrator of his estate, November 25, 1851. The plaintiff Mary claims to be the widow, and the plaintiff Vashti to be the sole legitimate child of the said John Canady; and the defendants are five illegitimate children of the said intestate, begotten on

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the body of Rachael \*George, with the husbands of two of them who are daughters. On April 5, 1851, John Canady, by four deeds, conveyed in fee to each of said illegitimate children, one-fifth of the plantation whereon he resided, worth about \$3,000, and apparently the whole of his estate, reciting as a consideration in the deed to the two daughters, "services rendered" by them to him, and in the three deeds to the three sons, "one hundred dollars," paid by each to him.

The bill filed January 2, 1852, seeks to set aside the said deeds, in whole or in part, first on grounds which may at once be put aside as unsupported by proof, that the grantor was of unsound mind, and that the grantees procured the deeds by the exercise of undue influence over him; and secondly, that said deeds are void under the provisions of our Act of 1795, (5 Stat. 270,) so far as the estate conveyed to the bastard children exceeds one-fourth of the clear value of the donor's estate after payment of debts.

The defendants endeavor, in the first place, to sustain the deeds, on the ground of bona fide sale for valuable consideration. It is in evidence, that the donor, at the date of these

deeds, was about seventy years old; that for some ten years previous he was too infirm for active labor; that his natural children lived with him, and worked industriously on his plantation; that nothing had been expended on their education; and that he frequently spoke of indebtedness to them. But on the other side, it is proved that the donor, a week or two before the execution of the deeds, had made a will containing like provisions for these children as the deeds—that the deeds were prepared by his friend and adviser, Dr. J. J. Harley, upon some notion of the draftsman, that they were more operative than a will, without instruction from the grantor, and without any bargaining between grantor and grantees as to the value of services and land; and that these were executed in the absence of the grantees, without adjustment of accounts or payment of money—and that the nominal consideration was very inadequate. It may be conceded that a pu-

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tative father may legally \*sell for sufficient consideration to his natural children as to other strangers, and that their services may constitute a valuable consideration for such sale. *King v. Johnson*, 2 Hill, Eq. 624. But the evidence of sale in such case should be unambiguous. We must not lightly presume a sale, nor violate the policy established by the Legislature upon appearances merely specious. I regard the notion of sale by these deeds as a mere pretext.

The defendants next insist, that the marriage of the plaintiff Mary and John Canady was invalid, because he then had a wife living. It is clearly proved by witnesses, who were present on the occasion, that in October, 1818, the ceremony of marriage was formally pronounced by a minister named Prescott Bush, between John Canady and the plaintiff, Mary, then Mary Johnson. It is also proved, that after living together a few months they separated, and that in due time after the separation, the plaintiff, Vashti, appeared as fruit of their connection. After this separation she returned to her father's house, and he for a time lived in concubinage with women named Ferely and Stringfellow. The plaintiffs argue that the rights and duties resulting prima facie from this ceremonious union between Canady and Mary, can be destroyed only by evidence equally full and precise of pre-contract by one of the parties. But as the law of this State prescribes no special form for the contract of marriage, nor special rules of evidence on the subject, marriage, as other facts concerning which there is no statutory regulation, may be established by circumstantial evidence, except in indictments for bigamy or actions for crim. con.

The testimony of persons who witnessed a marriage is not of higher degree, nor always more satisfactory than the testimony of wit-



nesses, who prove the cohabitation of a man and woman with the reputation of their intermarriage. In the present case, the evidence establishes that John Canady, in 1804, returned from Georgia to his ancestral home in Barnwell district, bringing with him as a wife a woman named Agnes Saunders, and that he and she lived together for nearly two years with the reputation of being man

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and wife, and that this reputation was sustained by declarations of themselves and other members of the family, of actual marriage between the couple. The force of the presumption arising from their cohabitation merely, is much impaired by testimony that she had previously produced a bastard in North-Carolina, and that he was a lewd fellow; but their cohabitation and the uniform reputation of their being man and wife, satisfy me of the fact of marriage between them.

It is further argued for plaintiffs, that the law of Georgia, which must control the construction and obligation of the contract wherever it may come into question, requires that bans and license should precede, and registry follow the contract of marriage there; and that evidence from cohabitation of parties and reputation of their marriage is insufficient unless additional proof of these requisites be given. But the law of Georgia does not make bans, license and registry essential pre-requisites to the validity of a marriage, and merely imposes penalties for their non-observance. Prince's Digest, 231, 237.

We have in South-Carolina, unrepealed statutes requiring registry of marriage, and inhibiting any lay magistrate from joining persons in marriage under penalty. 2 Stat. 243, 289. But it was never supposed that unregistered marriages by lay magistrates were void; and the Court in *Watson v. Blaylock*, 2 Mill, 351, declared the Act imposing penalties on lay magistrates for solemnizing marriages, obsolete and invalid—the only instance in our judicial history, in which Courts have ventured to declare an Act of the Legislature inoperative from mere non-user.

Agnes Saunders went to Georgia in 1805, leaving an infant about three weeks old. After the lapse of some months she made another visit of a few days to this State, and in 1806 returned with the infant to Georgia. No claim in behalf of herself or child has at any time since been made upon Canady or his estate; nor has any witness seen either of them since. William Buckhalter, who married a sister of John Canady, testifies that he received a letter from said Agnes

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in the fall of 1812. \*Since the commencement of this suit, this witness went to Georgia in behalf of the defendants, to make inquiries concerning this woman, but he re-

ports no information obtained. There is no evidence that she or her child have ever been heard from since 1812; beyond some loose declarations of John Canady, made long after his separation from the plaintiff Mary, and the beginning of his illicit intercourse with Rachael George; and I cannot rely upon these declarations, inasmuch as they probably sprang from the motive of subserving the interests of his unlawful family, and as they are contradicted by other of his declarations. A sister of the plaintiff Mary testifies, that Canady stated to the father of herself and the plaintiff, three or four weeks before the intermarriage of John and Mary Canady, that his former wife Agnes had been killed by a fall from a horse, and that her father required some evidence on the point. And Thomas Turner testifies that at some church meeting held in the neighborhood, before plaintiff Mary's marriage, Canady received a letter by the hands of Jack Rogers, from some relative of his former wife, stating her death, and read this letter to the by-standers. It is manifest from this summary, that there is no explicit proof of the death of Agnes Sanders before Canady's taking to wife Mary Johnson; and if her absence and lack of information of her existence for seven years be necessary to raise the presumption of her death before the event of the second marriage, the full term had not then expired. The life of a human being will be usually presumed to continue for seven years from the date of the last information of his existence, and there must be some circumstance in aid of a shorter term than seven years without knowledge of his life, to raise the presumption of his death before any intervening event. The lapse of seven years, however, raises merely the presumption of death without absolutely fixing the date of it, at one rather than another day of the seven years, and leaves the date to be inferred from all the circumstances of each particular case. It is an important element in determining the question whether one died before any particular event

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within the seven years, \*that the lack of information of his existence continued for a long time after the seven years. Where the presumption in such case is complete by a long blank in the history of the individual, (in the present case for forty years) it is more natural and reasonable to fix his death near the beginning of his unexplained absence and of uncertainty as to his continuing life; especially where this conclusion is needed as a shield from crime, or a protection of accrued rights.

In *Webster v. Birchmore*, 13 Ves. 363, the rights of the parties depended upon the question whether I. had died before S. I. had not been heard of for 23 years, but of this term not more than five or six preceded the death of S. Lord Eldon determined that I. died

before S.; laying stress on the circumstances that I., at his departure, expected to return in six months, and that he was not then in health.

In *Naisor v. Brockaway*, M. S., Charleston, May, 1830, Rich Eq. Cas. 449, the question was whether B. died before attaining the age of 21 years, as to some purposes, and before 18 years as to others; he left Charleston in 1814, being then of the age of 14 years, and resided in New-York six months, and was not afterwards heard of. Chancellor Harper held in a circuit decree not appealed from, that B. died before 18; and asserted as a general proposition, that the ignorance of his existence during the whole term was the consequence of his death, which should be referred to the time when his existence became uncertain, admitting, however, that circumstances might modify this general rule. I am not prepared to admit as a general rule, that when death is established by presumption from lack of information of life for a great lapse of time, the date of death must be referred in the absence of other circumstances to the beginning of the term of uncertainty or negativeness as to continued life; for this is contrary to the presumption that human life will continue for seven years, and as it seems to me to common sense and experience. In my opinion the time of death is to be determined by the circumstances of each particular case.

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\*It is true, however, that our Law Court has determined, that when a grant is presumed from twenty years possession, the grant bears date at the inception of the possession. *Sims v. Meacham*, 2 Bail. 101. And Judge Evans delivering the opinion of the Court in *Chapman v. Cooper*, 5 Rich. 459, upon the presumption of the date of death, says, he "can see no reason why, when the presumption depends upon the common law acquiescence of twenty years and upwards, we should be restrained in giving the presumption the same effect as to time which we give to other presumptions." It is unnecessary to pursue this discussion for the purpose of the present case. Here the presumption of Agnes Saunders' death before the second marriage of her husband is strengthened, not only by the presumption that he was innocent of crime in contracting the second marriage, but also by accredited information of her previous death. A chancellor determining upon facts like a jury in the other Court, should deduce the conclusion of a fact from presumption, whenever a Judge of the Law Court might properly direct a jury to presume the same fact. In *Chapman v. Cooper*, before cited, the Court of Law presumed the lawfulness of the marriage of a woman to her second husband, entitling her to dower in his estate, although the second marriage was within five or six years of her marriage

to a former husband, and at a time when the former husband was uncertainly and contrarily reported to be alive and dead, relying for the presumption of the death of the former husband before the second marriage, principally upon the fact that he had not been heard from for twenty years and more after the second marriage.

That case concludes the present, and I am of opinion that Mary Canady is the lawful wife and Vashti Cook the lawful child of John Canady.

It is declared and adjudged that the conveyances by John Canady to his natural children by the deeds of April 5, 1851, are void, for the excess of the estate conveyed above one-fourth of the clear value of his estate at the time, after the payment of his debts; and that the plaintiffs are entitled to distribute

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this \*excess among them according to our statute of distributions; and it is ordered and decreed that the Commissioner of this Court inquire and report as to the extent of such excess.

The defendants appealed, and now moved this Court to reverse the decree, on the grounds:

1. Because it was abundantly proved, that John Canady had a wife living in the Fall of 1812. And the legal presumption that she was alive for seven years from that time, is not rebutted sufficiently by the circumstances proved—on the contrary, it is submitted that the proof rather fortifies the legal presumption.

2. Because, in the absence of the proof to invalidate John Canady's marriage with the complainant Mary, it is submitted that there is proof sufficient of a valuable consideration to sustain the deeds.

Owens, for appellants.

Bellinger and Hutson, contra.

PER CURIAM. This Court concur in the decree of the Circuit Chancellor, and the appeal is dismissed.

DUNKIN, DARGAN, and WARDLAW, CC., concurring.

JOHNSTON, Ch., absent at the hearing.

Appeal dismissed.

6 Rich. Eq. \*111

\*ALLEN LANCASTER and Others v. WILLIAM SEAY and Others.

(Columbia. Nov. and Dec. Term, 1853.)

[Parties  $\S$ 95.]

Bill for partition. At the hearing it appeared that the suit was defective—all parties not being before the Court. The Circuit Chancellor refused to give plaintiff leave to amend, and dismissed the bill without prejudice:—On appeal, his decision was sustained.

[Ed. Note.—For other cases, see Parties, Cent. Dig.  $\S$  160-166; Dec. Dig.  $\S$  95.]



[App. and Error ⇐949.]

When at the hearing it appears that the suit is defective from the default of the plaintiff, it is a matter of discretion whether leave shall be given him to supply the defect.

[Ed. Note.—Cited in Attorney General ex rel. Independent or Congregational Church of Wappetaw v. Society for Relief of Elderly and Disabled Ministers, 8 Rich. Eq. 240; Chichester & Co. v. Hastie, 9 S. C. 335; Strickland v. Bridges, 21 S. C. 27; Baker v. Hornick & Co., 51 S. C. 316, 28 S. E. 941.]

For other cases, see Appeal and Error, Cent. Dig. § 3835; Dec. Dig. ⇐949.]

Before Dunkin, Ch. at Spartanburg, June, 1853.

This case will be sufficiently understood from the Circuit decree, which is as follows:

Dunkin, Ch. Jorial Barnett died intestate about forty years ago, leaving, as the plaintiffs allege, a handsome estate, real and personal, and leaving also a widow and eleven children. The bill was filed on the 24th February, '53, by two of the children of the intestate, against two other of his children and their husbands, who are in possession of a tract of land containing two hundred and ten acres. It is alleged that of this tract no partition was made, and that all the other children reside beyond the limits of the State. Partition of this tract is sought. Defendants allege that at the death of their father they were minors, about thirteen or fourteen years of age; that he left other real estate; that their mother, the widow of the intestate was for the last forty years in undisturbed possession of this tract, claiming it as her own; and when she died, about a year since, it passed under her last will and testament to her daughters, these defendants. The defendants insist, however, that the distributees of Jorial Barnett are not as stated in the bill, that he left no son named Jorial, and that he did leave a son named Joseph, who died long since, leaving a large family, who are not parties, and that two of the alleged daughters against whom judgment pro confesso has been taken, have been long since dead, leaving families, who are not parties.

Defendants allege that the tract is of little

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value, and that the proceeding is vexatious. They pray that they may have the advantage of the want of proper parties, and that the bill may be dismissed.

Whatever rights the plaintiffs now have, it is perfectly clear from the pleadings, that they possessed the same rights about forty years ago. During all that time the premises were in possession of the party under whom the defendants claim. In Riddlehoover v. Kinard, 1 Hill, Eq. 378, it was held that half that lapse of time was sufficient to raise the presumption of a grant from the State, or "of almost anything else that is necessary to quiet the title of property." In that case an administration was presumed, and that the defendant had acquired a title from the

administrator. So in Hutchison v. Noland, 1 Hill, 222, the Court say we will presume whatever is necessary to give efficacy to long possession. Among these may very well be included the partition of an estate, or ouster by a tenant in common, or the like. The intestate, Jorial Barnett, left other real estate besides a handsome personal estate, according to the bill, and it is not suggested that partition remains to be made of anything but this tract. The widow was entitled by law to one-third of the estate. None of the other heirs have interposed any claim except the complainants, who can be entitled in any view only to two-elevenths of two-thirds of the premises. But it is not proposed definitely to adjudicate the rights of the parties. The plaintiffs admit the infirmity in the pleadings and that they are unable to proceed without making new parties. In Biederman v. Seymour, 17 Eng. C. R. 594, 1 Beav. 594, it is well remarked by Lord Langdale, that "it is the duty of a plaintiff to come fully prepared to ask the Court for a decree; and if he is not so prepared, and it appears that the suit is defective from his default, it is an indulgence to give the plaintiff leave to supply that defect afterwards, and it becomes the duty of the Court to consider whether for promoting the ends of justice leave should be given or not."

Under all the circumstances of this case,

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the only proper alternative presented is to protract the litigation by giving leave to the plaintiffs to make other parties upon payment of all the costs up to this time, including the costs also of the amendment, as in Jennings v. Springs, Bail. Eq. 181, or by dismissing the bill without prejudice, so that the plaintiffs, if so advised, may bring a new suit so as to make all proper persons parties thereto; and their right to do so will not be affected by this decree. See Miller v. McLase, 7 Paige, 452.

It is ordered and decreed that the bill be dismissed with costs, but without prejudice.

The complainants appealed, and now moved this Court to reverse the circuit decree, on the grounds:

1. Because the only acknowledged error in the bill is a mistake in the christian name of one of the parties, which may have been amended without dismissing the bill.

2. Because the complainants had a right to partition, whether the lands belonged to the estate of Agnes Barnett or her husband.

3. Because the Chancellor should have given the complainants leave to amend, at most by paying the costs of the term, and to decree otherwise was contrary to Equity and the ordinary practice of the Court.

Bobo, for appellants.

Dean, contra.

PER CURIAM. The second ground of appeal insists that the plaintiff was entitled to



a division of the property, whether considered as the estate of his father or as that of his mother. This is very extraordinary. The bill does not even mention the mother, or suggest that she survived the father, or if she did, that she is dead, or left any estate. It simply states the death of the father, describing the estate he left, and enumerates his children, saying that they are his heirs.

The other grounds of appeal relate to matters purely of discretion; and not seeing

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that the Chancellor erred in the exercise of that discretion, it is ordered that the decree be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and  
WARDLAW, CC., concurring.

Appeal dismissed.

#### 6 Rich. Eq. 114

WILLIAM HURT v. JAMES H. HURT and  
Others.

(Columbia. Nov. and Dec. Term, 1853.)

[*Executors and Administrators* 315.]

A distributee absent from this State, but within the United States, who has been properly made a party, by publication, to a bill for distribution of the estate of the intestate, is concluded by the decree for distribution, unless he appear and petition for re-hearing within two years—the time allowed by the Act of 1784, (7 Stat. 210.)—although the decree excludes him altogether from the share of the estate to which he was entitled; and it makes no difference whether he had actual notice of the suit or not.

[Ed. Note.—Cited in *Howard v. Cannon*, 11 Rich. Eq. 25, 75 Am. Dec. 736; *Verdier v. Verdier*, 12 Rich. Eq. 143; *Roye v. Charleston Savings Institution*, 14 Rich. Eq. 67.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1309; Dec. Dig. 315.]

Before Dunkin, Ch., at Spartanburg, June, 1853.

The facts of this case are stated in the circuit decree, which is as follows:

Dunkin, Ch. In the latter part of the year, 1846, one Joel Hurt, of Spartanburg district, died intestate, leaving a considerable estate. Administration on his estate was granted to James Silman and Isham Hurt. On the 18th February, 1848, a bill was filed in this Court by the administrators, alleging that the real estate had been sold under the order of the Court; that the personalty had been reduced to money, the debts paid, and that distribution was ready to be made among the parties entitled as heirs or distributees of the intestate. The intestate left no widow or lineal descendant. He had had brothers and sisters, both of the whole and half blood—all of those of the whole blood were supposed to have pre-deceased the intestate, unless

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\*it were a brother, William Hurt: of him the bill alleges that he is "supposed to be

living, and residing in the State of Kentucky; that he had been heard from about five years previously, but the complainants alleged that they were ignorant whether he was or was not living, or if dead, whether he had left any representatives." The existence of the children of a deceased brother of the whole blood, as well as of the existence of some brothers and sisters of the half blood, is set forth, and the aid of the Court is prayed in ascertaining and determining the rights of the parties, the complainants submitting that this would depend upon the existence or non-existence of the brother or sister of the whole blood at the death of the intestate.

On 5th March, 1848, an order for publication was made against the several defendants alleged to be absent from the state, among whom was William Hurt. The rule to plead having expired on the 6th June, 1848, an order pro confesso was taken against the absent defendants. At June sittings 1848, an order was entered at the instance of the solicitors of the administrators, by Chancellor Johnston, that all persons claiming to be next of kin to the said Joel Hurt (the intestate) do establish before the commissioner of this Court the degree of consanguinity in which they stood to the intestate, before the 1st June next, (1849). This notice was under the order published for three months in Spartanburg, in a New-Orleans paper, and one at Nashville, Tennessee. At June sittings, 1849, this notice was extended for a year longer in the same papers. At June sittings, 1850, a final decree was pronounced, directing a distribution of the funds among the five children of a deceased brother of the whole blood, and a brother of the half blood, share and share alike. In July, 1850, the decree was carried into execution, by payment to the several parties entitled to receive the same. All these parties reside beyond the limits of this State, except the defendant, James H. Hurt, who is one of the five children of a deceased brother.

On 1st March, 1853, the plaintiff, William Hurt, filed this bill, alleging that he was not aware of the proceedings until within

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\*a year past, that the funds had been distributed under the decree among parties, all of whom were now beyond the limits of the State, except the defendant, James H. Hurt, and praying "that the said James H. Hurt and all other parties who drew the funds as aforesaid, account for so much of the same as rightfully belonged to the plaintiff, with interest thereon." All the proceedings against the absent defendants, seem to be null and void for any effective purpose. As they are beyond the limits of the State and have no property within the State, it is not perceived on what principle they can be rendered amenable to the jurisdiction of the Court. Prior to the partition of the estate they were properly parties in relation to their

interest therein. But after the decree had been pronounced, the estate settled in conformity thereto, and the several parties had received their respective shares, there was an end of the litigation.

But the defendant, James H. Hurt, relies on the former decree and proceedings, in bar of the plaintiff's action. The absent defendant in that suit, Wm. Hurt, was made a party in the mode prescribed by law. In order to protect, as far as possible, the rights of absent defendants, it is provided by the 24th section of the A. A., 1784, (1 Brev. Dig. 203; P. L. 337; 7 Stat. 210,) that if any person against whom a decree shall be made, or his or her legal representative, shall, within four years after passing said decree, if without the limits of the United States, and within two years if absent from this and within the United States, appear in Court and petition to be heard with respect to the matter of such decree, &c., the person so petitioning shall be admitted, &c., and such proceedings shall be had, &c., as if no former decree had been made in the said cause. But if neither the persons against whom such decree shall be made, nor his legal representative shall appear and petition for a re-hearing within the time above mentioned, such decree shall stand absolutely confirmed against the person against whom it was made, his legal representatives, and all claiming under him. The decree of June, 1850,

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stood then absolutely confirmed in July, 1852. It may be that errors existed either of fact or of law in that decree.

If the half blood were entitled at all, the absent brother of the half blood would seem to have had scanty justice rendered to him, as he was awarded but a sixth when the canons of distribution gave him a moiety. Yet after the expiration of two years, it would be incompetent for him to open the decree. Perhaps he was entitled to no part of the estate. How can that be averred against the decree in which the plaintiff had the same opportunity of being represented and heard as himself?

The evidence, written and oral, and offered by the plaintiff himself, is most abundant to show that both the parties and the Court used every means that diligence or caution could suggest to arrive at a sound judgment. If the decree were re-opened, absolute certainty could not be attained. John Hurt and James Hurt, Tabitha Hurt and Nancy Hurt, were brothers and sisters of the whole blood of the intestate, and were made parties by publication. Their death has been presumed, and the Court has properly acted upon the presumption, and after this lapse of time, the action of the Court in relation to the subject matter of the controversy must be regarded as final. "*Interest reipublicæ ut sit finis litium.*"

It is ordered and decreed that the bill be dismissed.

The complainant appealed, and now moved this Court to reverse the circuit decree, on the grounds:

1. Because the complainant is the legal heir of Joel Hurt, deceased, and could not in justice and equity be deprived of his property without being heard.

2. Because the decree of the Court disposing of the property of Joel Hurt, deceased, to the defendants, was *ex parte*, and not binding on the complainant.

3. Because the decree was contrary to law and equity, and a violation of the Constitution of the State, and of the United States.

Bobo and Edwards, for appellant.

Dean, contra.

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\*The opinion of the Court was delivered by

WARDLAW, Ch. In conformity to the procedure prescribed by 12 section of the Act of 1784, (7 Stat. 210,) the present plaintiff, resident in Kentucky, was regularly made a party defendant to the suit, in which the decree was rendered of which he now complains. Under the Act a person, absent from the State but having property within it, may be made a defendant to a suit in Equity here bringing that property into litigation, although he be the sole defendant. *Bowden v. Schatzell*, Buil. Eq. 361 [23 Am. Dec. 170]; *McKinne v. City Council of Augusta*, 5 Rich. Eq. 55; *Kinloch v. Meyer*, Speers Eq. 428. In such case the Act makes him strictly a party, as fully bound by the proceedings as a party served with process of subpœna. In this respect the Act is altogether different from the Act of 1823, (6 Stat. 212,) which provides a remedy at law in cases of joint contract where one of the contractors resides without the limits of the State, for the latter Act contains an express proviso that the proceedings shall have no effect so far as the party out of the State is concerned. I suppose, too, that proceedings at law against partners, under the Act of 1792, (7 Stat. 281,) would affect only the property within the State of the firm and of the partner served with process, and that the absent partner is merely a nominal defendant. Such is the intimation of opinion in *Simonds v. Speed*, 6 Rich. 390, although the point is reserved from judgment. But the Act of 1784 contains no such saving to an absent defendant to a suit in Equity, and declares on the contrary in 13 section, that "the decree shall stand absolutely confirmed against him, his legal representatives and all claiming under him," unless he avail himself of a petition for re-hearing, within four years after decree, if he be without the limits of the United States, and within two years if he be within any of the other States except South-Carolina. The jurisdiction of this Court cannot be extended, upon any sound principle, to the case of one named as a defendant, where neither his per-



son nor his property which is the subject of litigation, is within the State; but in the suit

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in which \*a decree was made against the present plaintiff, the property in controversy, according to his pleading now, belonged to him in whole or in part, in respect to which property he was under the Act a regular party. He made no application to the Court for relief by petition for re-hearing or otherwise within two years, the term of limitation applicable to his case, after the decree had been pronounced and fully executed. Statutes of limitation create positive and conclusive bars, which cannot be avoided in any particular case from considerations of inconvenience or hardship in their operation. Cases of hardship must arise under every such statute. If one in the condition of the plaintiff is entitled to be heard after two years against a decree, the Act is a nullity, and he can be barred only by the presumption arising from the lapse of twenty years. It is always unsafe to look beyond the judgment of the Court into the reasons which may have influenced the Judge who pronounced the judgment. Frequently sound conclusions are attained upon false premises. If a judgment or decree be dependant for force or extent on the reasons which may be assigned for it, then it must be examinable without limitation as to time for any error of fact or of law. Inattention of parties, perversity of witnesses, mistakes of counsel and judges, frequently defeat or diminish the right in forensic contests; but it is much more important to the commonwealth that an end should be put to litigation, than that every case should be rightly decided and for right reasons. If the operation of the 'ideo consideratum est' be proportioned to the soundness of the argumentation on which it is based, then there is a wilderness for the march of writs of error, motions for new trial, petitions for re-hearing and bills of review.

It does not appear upon what facts and reasons the Court proceeded in the decree of June, 1850, to exclude the plaintiff from succession to the estate of his intestate brother; and where we are left to conjecture, we may adopt any hypothesis consistent with the pleadings, which will sustain the decree. If we suppose that proof was made that plaintiff released his interest to those who took under

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the decree, or that he was illegitimate, \*then he was rightly excluded. Error may still remain as to the mode and measure of distribution directed by the decree, but that is error not affecting him if he be excluded altogether. His cause of complaint is that the half brother was admitted to any share, and not that such share was too small. But the inquiry as to error is immaterial. Wherever the Court has jurisdiction as to the subject and parties, its judgment must be conclusive on all parties and privies, notwithstanding

any error of fact or of law, until it be reversed, or be vacated for fraud. The bill in this case makes no charge of fraud in procuring the decree, and it is framed for reclamation of the money paid under the decree, and not for vacating the decree itself; and if it had been framed to set aside the decree, only one (besides the plaintiff) of the original parties is properly before the Court.

The plaintiff in his bill alleges by way of excuse from the bar of the Statute, that he had no notice of the publication or of his brother's death, until a time within a year before filing the bill. If he be understood by this negative pregnant as admitting notice of the publication for a full year before filing this bill, then he confesses laches for two months and more before the bar of the Statute was complete. But it is unnecessary to take any such narrow view. The Statute does not require proof impracticable in most cases, of actual notice of the suit to an absent defendant; and puts publication in a newspaper for three months in place of service of process to answer. In the present instance, unusual efforts were made to bring before the Court all persons claiming shares in the estate, by publication calling them in, made in three newspapers in as many States, and continued for two years after the order pro confesso.

It is argued that the decree in the former case is not against the present plaintiff, but only in favor of other parties to the suit, and is therefore not binding on him. A decree directing an estate to be distributed among particular parties to the suit, is necessarily a decree against the claims of all other parties to the suit. *Dyson v. Leek*, 5 Strob. 143.

The third ground of appeal suggests that

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the circuit decree \*violates the Constitutions of the State and of the United States. It does not appear to us that any constitutional question is involved in the case.

It is ordered and decreed, that the appeal be dismissed, and the circuit decree be affirmed.

JOHNSTON and DUNKIN, CC., concurred.  
Appeal dismissed.

## 6 Rich. Eq. 121

THOMAS C. MATHIS and Wife and Others v.  
CHARLES HAMMOND, Ex'or, of Allen  
Anderson, Junior, and Others.

(Columbia. Nov. and Dec. Term, 1853.)

[Wills  $\hookrightarrow$  52.]

Testator devised and bequeathed certain property, real and personal, to his mother for life, with remainder to R. A. in fee, and "if R. A. should die without a lawful child, his legacy, both real and personal, shall go to" five persons, naming them, "or the survivor or survivors of them, or their lawful children, if any they may have." R. A. died before the testator, never having had a child:—*Held*, that the lapse of R.



A.'s interest did on [not] affect the limitation over.

[Ed. Note.—Cited in *Presley v. Davis*, 7 Rich. Eq. 107, 62 Am. Dec. 396; *Johnson v. Harrelson*, 6 S. C. 341; *Clark v. Clark*, 19 S. C. 352.

For other cases, see *Wills*, Cent. Dig. § 2167; Dec. Dig. § 852.]

The question, Whether the limitation over is void for remoteness, referred to the Court of Errors.

Before Dunkin, Ch., at Edgefield, June, 1852.

So much of the circuit decree as is necessary to a full understanding of the question made in the Court of Appeals, is as follows:

Dunkin, Ch. The will of Allen Anderson, the younger, bears date 13th September, 1844. By the first clause he devises and bequeaths all his property to his mother, to use as she may think proper, during her natural life. The second clause is as follows: "I give to my nephew, Robert H. Anderson, son of George Anderson, at the death of my said

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mother, all the \*lands which I now own in the State and district aforesaid, and one-half of all the balance of my estate." By the third clause he gives the remaining one-half of his said estate to the five children therein named, of his deceased brother, James Anderson. The fourth clause is thus: "It is my will if Robert H. Anderson should die without a lawful child, that his legacy, both real and personal, shall go to the above named five children of James Anderson, viz: "Indiana, Louisiana, Andrew, James Allen and Ignatius Anderson, or the survivor or survivors of them or their lawful children, if any they may have." Fifthly: "It is further my will that none of my personal or real estate be sold for a division, but five good and respectable men be chosen by the legatees or their representatives to make the division as above directed." Robert H. Anderson died without issue, in September, 1849, some eight months prior to the death of the testator.

The question is, Whether the estate given to Robert, lapsed in consequence of this event, passed to the children of James Anderson, deceased. It is very clear that under the second clause Robert would have taken a vested remainder in fee in the realty, and an absolute interest in a moiety of the personalty expectant on the determination of his grand-mother's life estate. If no further provision had been made, then, in the events which have happened, Allen Anderson, Jr., would have died intestate as to this portion of his estate. But after disposing, in the third clause, of the other moiety of his personal estate, the testator, in the fourth clause, makes the provision before recited. It has been frequently remarked that death is a certain event, and that any expression of contingency in regard to it is not strictly accurate. The contingency must therefore refer to dying at some particular time (which is contingent) rather than to dying at any

time (which is certain and inevitable). But "dying with or without a lawful child" is purely contingent, and cannot be restricted to a particular time, unless it seems to have been the intention of the testator to refer to the death of the legatee at a particular time.

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The latter construction was \*adopted, after much difficult deliberation in *Vidal v. Verdier Sp. Eq.* 402.

The expressions here used are, "It is my will, if R. H. Anderson should die without a lawful child, that his legacy both real and personal, shall go to the above named five children, &c., or the survivor or survivors of them, or their lawful children, if any they may have." If Robert had survived both the testator and tenant for life, and had then died without a lawful child, it would be difficult to doubt the intention of the testator that, in that event, Robert's legacy, both real and personal, should go to the children of James Anderson. The argument is, that the testator intended to provide for the event which has occurred, and to prevent the effect of a lapse in consequence of the death of Robert in his own lifetime. If the contingency contemplated had been merely the death of Robert, the hypothesis would have much force. But the contingency is the death of Robert without a lawful child. The testator has made no provision, however, for the child of Robert, and if Robert had died in the testator's lifetime, leaving a child, neither the child could take anything, nor could the children of James Anderson take. The only objects of the testator's bounty, after his mother, were his nephew Robt. H. Anderson, and the children of James Anderson. He had already given his real estate and the moiety of his personalty to Robert, and the residue to the children of James. If he intended to provide for the contingency of Robert's death, without a lawful child in his own lifetime, why not have declared that, in such event, his whole estate should be divided among the children of James Anderson. This would have been the simple and natural expression. On the contrary, if he contemplated Robert to have received his estate, and taken an absolute interest, subject only to defeasance by his death without a lawful child, his apparent purpose would be effected by the language used. If Robert left a lawful child, such child might take the estate of his father, not from the testator, but from his own father. If Robert died without a

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lawful child, \*the remainder over would take effect in the children of James Anderson.

I am spared the necessity of further discussion of this topic, by the recent decision of the Court in *Lesly v. Collier*, 3 Rich. Eq. 125. Taking this view of the subject, I am of opinion that Allen Anderson, Jr., died intestate as to his real estate and a moiety of his personalty, and it is so declared.

From this decree an appeal was taken by

the defendants on several grounds, all of which were abandoned but the following:

Because by the proper construction of the will of Allen Anderson, junior, the legacy given to Indiana, Louisiana, Andrew, James Allen and Ignatius Anderson, did not lapse upon the death of Robert H. Anderson in the testator's lifetime.

The case was argued at May Term, 1853, and re-argued at this Term.

Petigru, Bonham, for appellants.  
Carroll, Bauskett, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. This is an appeal from a decree delivered by Chancellor Dunkin, at Edgefield.

The portion of the decree from which the appeal is made relates to the will of Allen Anderson, junior, executed in September, 1844; the material clauses of which are as follows:

"First. I give, &c., to my beloved mother, Mary Anderson, during her life, all my property, both real and personal," &c.

"Secondly. I give to my nephew, Robert H. Anderson (son of George Anderson), at the death of my said mother, all the lands which I now own in the State and district aforesaid," (Edgefield district,) "and one-half of all the balance of my estate."

"Thirdly. I give the remaining half of my said estate to the five children, hereinafter

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named, of my deceased brother, \*James Anderson, viz: Indiana, Louisiana, Andrew, James A. and Ignatius Anderson."

"Fourthly. It is my will, if Robert H. Anderson should die without a lawful child, that his legacy, both real and personal, shall go to the above named five children of James Anderson, viz: Indiana, Louisiana, Andrew, James A. and Ignatius Anderson, or the survivor or survivors of them, or their lawful children, if any they may have."

Robert H. died, an infant, and never having had issue, in September, 1849; then the testator died in May, 1850; and lastly Mary, testator's mother and devisee for life, died in February, 1851.

In a contest whether the death of Robert lapsed his interests under the will, so as to prejudice and destroy the limitations of those interests over to the five children of James, the Chancellor decreed the affirmative of that proposition; and adjudged that the property covered by so much of the will as related to the subject became intestate and distributable.

From this judgment an appeal was taken on various grounds, all of which were abandoned and struck out by counsel, except a single one, which maintains that the lapse occasioned by the death of Robert, in the lifetime of the testator, does not affect the limitation over.

We are all of opinion that the proposition

maintained in the decree, and just stated, is untenable, and that if the limitation over is free from other objections than lapse, it must prevail.

Upon general principles it would seem that where a testator gives property in succession to two persons, there is evidence of such a state of his affections as would warrant the inference of an intention on his part, that the secondary object of his bounty would have induced a direct gift to him if the primary object had never existed, or were out of the way. The difference made between them exhibits a mere preference of the one over the other: but both are preferred over the heirs or distributees; otherwise there is no motive to make the will.

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\*Before proceeding further in this opinion, it may be proper to state that when an estate granted out is coupled with a condition upon which it is to cease (not to go over, but merely to cease and determine,) this is always regarded as a mere condition. If the condition be not performed, in a case where the devisee is required to be active,—(as where the condition is an act to be performed by him,)—though his estate is liable to forfeiture, yet no one can take advantage of his omission but the heir; and if he be himself the heir, he may elect not to enter and terminate his estate under the devise. And though he be not the heir, yet if he forfeit the estate, so that the heir might enter, Equity will interpose to protect him, if compensation can be made to the party entitled to the performance of the condition. Not so, however, if there be a limitation over: not even if the condition be expressly stated as a condition, instead of an executory devise. In such case, if the condition be not performed, it is always treated as a conditional limitation; differing in no essential from an executory devise. See 1 Pow. on Devises by Jarman 112 (\*193) note 4; and id. 114 (\*196) and notes 7 and 8.

In note 8 above referred to, taking notice of the case of Avelyn v. Ward (1 Ves. Sen. 420), it is observed, "This case furnishes an instance of a rule of construction, applicable to conditional limitations, of extreme importance. It is this: That although the estate,—on the conditional determination of which the executory limitation is limited to take effect,—never arises, and, therefore, in strictness, the contingency does not happen; yet such limitation over will, nevertheless, take place,—the first estate being considered only as a preceding limitation, and not a precedent condition."

In Avelyn v. Ward the testator devised his real estate to his brother B. and his heirs, upon the express condition that within three months after his decease, he should execute and deliver a general release to his trustee; and if his brother should neglect to give such release,—then he devised the estate to



C. in fee. B. died before the testator. It was, therefore, contended that the devise over did not take effect, as it was a strict

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condition, \*and before any breach could happen the estate must first vest in B. But Lord Hardwicke regarded it in the light of a conditional limitation, not a mere condition, and supported the limitation over. He said he knew of no case "of remainder, or conditional limitation over of a real estate, whether by way of particular estate, so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation,—but, if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes effect."

In the commentator before referred to (1 Pow. on Dev. by Jarman, 114, 115, 116, 117, 118, 119, (\*196–204,) note 8, the cases are well collected and commented on: and the commentator deduces these conclusions:

1. Wherever an executory limitation is founded on the failure of the preceding devisee to do certain acts after the testator's death, it will not be defeated by the death of such preceding devisee in the testator's lifetime.

2. Where an estate is limited to a person, though not in esse, and limited over in case he omit to do certain acts, or in the event of his dying under 21, or without issue, the devise over will take effect, though the preceding devisee never came into existence.

3. It is not universally true, as laid down by Lord Hardwicke, in *Avelyn v. Ward*, that "if the precedent limitation, by what means soever, is out of the question, the subsequent limitation takes place: for if the events upon which the estate is to shift from the first devisee, be such as may happen as well in testator's lifetime as afterwards, and the first devise lapse by the first devisee's death, in the devisor's lifetime,—under circumstances which, had they happened after the testator's decease, would have vested the property in the first devisee, to the exclusion of the executory or substituted devisee,—it is clear (such is the opinion of the annotator) that such executory limitation is defeated,—though the precedent limitation is "out of the case."

See also those cases where the first bequest is made on condition to promote a spe-

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cial purpose, and given over only on \*condition that that purpose is not effected, and the first devisee effects the object or purpose and then dies in the lifetime of the testator: though his legacy lapses, it shall not go over, the ulterior limitation being prevented from taking effect by the very terms on which it was granted.(a)

But the truth of the proposition on which

(a) 1 Rep. Leg., ch. 8, sec. 3, pp. 327, 329.

the appellants depend in this case, is too clear to require further discussion.

This does not, however terminate the case. It has occurred to some of the Judges that the limitation over, though not affected by lapse, may be too remote. That question has been accordingly argued here; and the Court being divided in opinion on it, it is ordered that it be sent to the Court of Errors. Let the case, therefore, be docketed in that Court, for the determination of that question.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

## 6 Rich. Eq. \*129

\*SARAH FRY, by Next Friend v. JOHN FRY, ABNER BUCKALEW and WM. R. ROBINSON.

(Columbia. Nov. and Dec. Term, 1853.)

[Trusts  $\Leftrightarrow$  204.]

Petition against A. B., J. F. and W. R. charged, that A. B. held the legal title to certain lands subject to a parol trust for the ancestor of petitioner; that J. F. as attorney of A. B. conveyed the lands to W. R. without valuable consideration and subject to the trust. The petition was taken pro confesso against A. B. and J. F.; and the proof was that the conveyance to W. R. was not for valuable and bona fide consideration:—*Held*, that J. F. and A. B. by allowing the petition to be taken as confessed, admitted the trusts; and W. R. not being a purchaser for valuable and bona fide consideration, the conveyance to him was set aside.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 277–279; Dec. Dig.  $\Leftrightarrow$  204.]

Before Dunkin, Ch., at Lancaster, June, 1853.

This case was first heard by his Honor Chancellor Johnston at June sittings, 1852, who pronounced the following decree:

Johnston, Ch. The case is stated in the petition and the answer of the defendant Robinson, with the exhibits; the petition having been ordered pro confesso, against the defendants, Fry and Buckalew.

The defendant Buckalew, on 26th October, 1844, obtained a conveyance, reciting a consideration of \$400 from Mary Byrd, (both parties residing in Tennessee,) for all her right, title and claim "in the estate of her husband, Joseph Byrd, who died in South Carolina, to have and to hold, to the said Abner Buckalew, his heirs, executors, administrators and assignees forever; and the said Mary Byrd," "by these presents, authorized and empowered the said Abner Buckalew to sue for and recover in her name, the said real estate, or property, or any part thereof, or its proceeds, and apply the same to his own use, or collect the same without suit for his own use," &c.

Coming to this State, he instituted suit in this Court against two persons by the name of House, for the recovery of Mrs. Byrd's third of a tract of land lying on the Catawba



Falls, the suit being brought in his own name: and by decree pronounced in June, 1848, recovered a certain portion of said land with rents accrued.

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\*In his bill, on that occasion, Buckalew stated: "Your orator further shows that Mary Byrd, the widow of Joseph Byrd, resides yet in Tennessee, and lives with your orator, (who intermarried with Elizabeth Byrd, one of the children aforesaid); that she was desirous of selling or disposing in some way, for money, her interest in the land, and procured your orator to come into this state for that purpose. To enable your orator to do so more easily and satisfactorily, instead of executing a power of attorney, or constituting your orator her attorney in fact, formally, she executed to him a deed, dated the 26th of October, 1844, by which she granted, bargained, sold and transferred to your orator all her right, title, claim and interest, which she had in law or equity, in the estate, real and personal, or mixed, of the said Joseph Byrd; a copy of which is herewith exhibited," &c.

This passage of the bill is noticed in the decree: which was in favor of Buckalew.

On the 24th of September, 1845, Buckalew, by deed duly executed, constituted John B. Fry, the husband of the plaintiff in this case, (who is a daughter of Mary Byrd,) his attorney in fact, "for me and in my name, to sell and convey to any person or persons, their heirs and assigns forever, (who will purchase the same) by general warranty, all the lands I own in South-Carolina, and especially a tract of land conveyed to me by Mary Byrd, and take and receive the consideration money for the same, or take notes for the same at his discretion. He may also bring suits," &c.

This power of attorney was delivered by Fry to Mr. Clinton, who thereupon brought suit, as has been stated.

On the 12th February, 1850, which was after the decree, Fry, who had been for some time absent from this state, in Florida, called upon Mr. Clinton for the power, in order to sell the land. Mrs. Byrd was then dead, and Mr. Clinton, before delivering the power to him, made the following endorsement upon it:—"Buckalew was only an attorney to sell, and could not make an attorney to sell. Mrs.

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Byrd (Fry says) is dead, and all \*power to sell is at an end. My fee in the case of Buckalew v. House, is \$500.

"M. Clinton, Feb. 12, 1850."

Mr. Clinton states that this statement as to his fee was intended to defeat the power of Fry to sell; and that in fact he had no such charge.

On the 18th of the same month, (Feb. 1850,) Fry executed a deed for the land, and an assignment of the rents recovered, to the defendant Robinson. This deed was executed in Wimsboro', in Mr. Hammond's office. It

was proved by one of the subscribing witnesses, who says he was called in merely to attest it, and was only present for the time necessary to see it executed. He saw no money paid. The consideration recited for the conveyance of the land is \$500, and that for the assignment of the rent is \$200. The power of attorney is recited in the instrument conveying the land. The petitioner claims the land, &c., as heir of her mother Mary Byrd, and alleges that the deed executed by Mrs. Byrd to Buckalew, was intended as a mere power of attorney; that there was no power to appoint the sub-attorney Fry; that both powers were determined by Mrs. Byrd's death, before this sale was made; that in fact the purchaser was aware that Fry's power was revoked at the time he took his conveyance, and that he paid no consideration for it, and should not in Equity be allowed any benefit under it. All these allegations are denied by Robinson in his answer. The evidence taken will appear in my notes.

I have no doubt Robinson is chargeable with the notice endorsed on the power by Mr. Clinton. A purchaser is always affected by constructive notice of whatever is to be found in his chain of title. There was enough in this case, therefore, to put Robinson upon the inquiry. But the facts stated in Mr. Clinton's endorsement are not to affect him further than they are legally true. It is asserted in that endorsement that Buckalew was a mere attorney to sell: that he was clothed with a mere power, without title or interest. But when by this statement, Robinson was driven to examine the deed, it was what the deed said, and not what Mr. Clin-

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ton thought of it, that must govern. \*The deed gave a title and not a power; and a title (whether subject to a trust or not) is not revoked by the death of the grantor.

The distinction is very clear between a legal interest conveyed in property, and a mere power conferred for the disposition of it. This, also, appears in the statement in Buckalew's bill. If Robinson looked at that, he found that the title was in Buckalew, not a power merely, but a title; and though the title was to be executed with a view to the benefit of Mrs. Byrd, that was a trust only, and did not impair the legal title. In fact, it is asserted in the bill substantially, that the title was vested, in order to enable Buckalew to exhibit and sell the land as his own. Then, Buckalew being the legal owner, Fry was his attorney, and not the attorney of Mrs. Byrd, and her death could not impair his power. It could only be revoked by Buckalew, and he did not revoke it.

I doubt whether parol evidence is competent to show that the deed from Mrs. Byrd to Buckalew was intended for anything else than the absolute conveyance—which on its face it purports to be. My impression is, that deeds are subject to such evidence, only

when by accident, surprise, or fraud, they are prevented from completely exhibiting the real intention of the parties. If this is so, no trust could be proved by parol in this case deflecting the intention of the deed to affect the purchaser. But I shall determine nothing on this point, but reserve it for further evidence to be taken by the Commissioner, along with evidence on another point, which I shall send before him for inquiry.

That point is whether the purchaser paid or passed a valuable consideration when he took his conveyance. If he did not, it is clear he cannot hold the land. Buckalew and Fry, by allowing the bill to be taken as confessed, admit that the land was still, at least, subject to a trust for the benefit of Mrs. Byrd; and unless Robinson took his conveyance for valuable and bona fide consideration, he is not entitled to take it unaffected by the trust to which it was liable in their hands.

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\*His assertion of payment of valuable consideration is for him to prove; and I will allow him, (in consideration of the sickness of Mr. Hammond at the hearing,) to prove it, if he can, before the Commissioner.

The case, when this proof, (and any other that can be made in the case, upon the points reserved) is prepared, can be presented at the next term for final adjudication. Until that time, the questions which I have indicated are reserved.

At June sittings, 1853, the Commissioner submitted his report as follows:

"The decree of Chancellor Johnston, pronounced June Term, 1852, states this case so very fully and clearly, that the Commissioner will proceed at once to the consideration of the point referred, which is: 'Whether the purchaser paid or passed a valuable consideration, when he took his conveyance.' The decree states that Robinson's assertion of payment of valuable consideration, is for him to prove before the Commissioner.

"John Z. Hammond, (who drew the conveyance or assignment,) was examined on the part of defendant, Robinson. He states that he was present at the execution, saw money handed from Robinson to Fry, did not pay much attention to them, does not know the amount—several bills; saw Robinson and Fry with bills in their hands counting; just saw it was money; did not see the denomination of the bills; understood the money as being a payment for the land. Fry left for Florida next morning. This was done in the office of Mr. Hammond, in Winnsboro'; he was engaged at the time in drawing the assignment for rents. The power of attorney from Buckalew to Fry was before him at the time; did not hear the contract between Fry and Robinson for either the land or rents. David Elkin and John M. Buchanan are the subscribing witnesses—the former, Mr. Hammond states, is a cosmopolite, now living in

Florida, the last he heard from him, and the latter now resides in Orangeburg district.

"Defendant Robinson also offered a receipt

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dated 18th Feb\*ruary, 1850, (same day of conveyance,) from Fry to him for \$500 in full of all demands, and for land, with the description thereof. This paper was objected to by the solicitor for petitioner, as evidence, on several grounds, as being antedated, given after litigation was moved; the receipt not in the handwriting of Mr. Hammond; as being a fresh-looking paper, and seems as if it was sent by mail, and smells strong of fraud. This receipt purports to be 'in complete discharge of the consideration money due me (Fry) from the said Robinson,' for the 96 acres of land described in conveyance.

On the Part of Petitioner.—D. M. Tilman states he knows the land well—worth from ten to twelve dollars per acre now, and would have brought ten dollars per acre in 1850. Heard Robinson say it would help to make up a bad trade, in buying the Hill Island Fishery. Fry, before the sale, had been to the West, and came back, then to Florida and back, and then sold to Robinson; he was slipping about, and did not make himself public; was apprehensive of a warrant for bigamy against him; was afraid to go for power of attorney, but sent to Mr. Clinton for it. Robinson well acquainted with Fry before he bought—Fry a man not to be depended on; no confidence to be placed in him; he told witness, his wife the petitioner was dead, that he saw her die, told her last words, and shed tears at the recital. Fry has been in this country recently. Petitioner a woman of good character and very poor.

"Capt. John S. Perry knows the land—it adjoins him; worth from ten to fifteen dollars per acre; nearly all of it would bring a bale of cotton per acre when cleared; it is now in woods.

"James Broughton knows the land; would not take twenty dollars per acre for it, if it belonged to him.

"John G. Houze, in March after the purchase, heard Robinson say, in speaking about the purchase, that he had let Fry have money enough to carry him home—was then living in Florida, whither he had taken his second wife.

"James Wall, examined by commission, was in treaty with Fry for same land—be-

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fore the purchase of Robinson, was prevented from what Mr. Clinton said: that Fry had no right to sell; told Robinson so; and that Mr. Clinton said: 'the land belonged to Mary Byrd's heirs.' Robinson, after the purchase, told witness that he did not wish a better right than Fry's deed with his power of attorney annexed."

"Defendant objected to all the testimony, not being upon the point referred.

"From this testimony it will be seen that the value of the 96 acres of land has been es-



timated at from \$960 to \$1920. At ten dollars per acre would be \$960; at twenty dollars per acre \$1920. The consideration expressed in the deed from Fry to Robinson, is \$500; what sum Robinson actually paid to Fry, does not appear. Mr. Hammond saw money passed and paid, but does not know the amount. The decree says: 'His assertion of payment of valuable consideration is for him to prove,' 'and I will allow him (in consideration of the sickness of Mr. Hammond at the hearing) to prove it if he can before the Commissioner.' Has he proved it? The consideration, \$500, expressed in the conveyance, was before the Court—that was not satisfactory or sufficient. It is what I regard the Court as terming 'his assertion of payment of valuable consideration.' Has he proved the payment of that sum, or any other ascertained sum of money? except that Mr. Hammond saw bills of money paid, but no precise or definite sum stated; if he, by his own declaration to Houze is left to fix the sum, it was only money enough to carry Fry to his home in Florida. The receipt of the same date, however fair, speaks but the language of the deed, and is no higher evidence of actual payment of valuable consideration,—'a valuable consideration is an equivalent for a thing purchased.' (Bouvier Law Dictionary.) Is the uncertain sum proved by his own witness and himself an equivalent for a tract of land worth not less than \$960, and probably worth \$1920? Regarding as I do, the onus probandi as resting upon the defendant, under the decree, I am not satisfied that he (Robinson) has proved that he paid or passed a valuable consideration when he took his conveyance."

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\*The defendant, Wm. R. Robinson, excepted to the report, on the following grounds:

1. Because the Commissioner having ascertained that the defendant Robinson made a payment of money to the defendant Fry, for the land, described in the pleadings, should have reported that a valuable consideration for said land passed from said defendant Robinson to said defendant Fry.

2. Because upon the testimony taken by the Commissioner, he should have reported that a valuable consideration passed from the defendant Robinson to the defendant Fry, for said land.

Dunkin, Ch. The Court concurs in the conclusions of the Commissioner; the exceptions are, therefore, overruled.

It is ordered and decreed that the deed of 18th of February, 1850, be set aside; that the defendant, Wm. R. Robinson account for any sums received by him, under the assignment of that date, and that he also account for the rent of the premises since the date of the conveyance. It is further ordered, that leave be given to amend the pleadings, by making the distributees of Mary Byrd, or others, if

necessary, parties thereto, preparatory to a final order for partition and distribution.

The defendant Wm. R. Robinson, appealed from both the decrees, on the following grounds:

1. Because Chancellor Johnston, in his decree filed 29th June, 1852, erred, it is respectfully submitted, in deciding that the assertion of payment by the defendant, Robinson, of valuable consideration for the land in dispute, was for him to prove before the Commissioner; when the said defendant, in his answer, responsive to the charges in the petition, alleges the payment of the consideration expressed in the deed of Fry, as the attorney of Buckalew to him, which allegation is uncontradicted by evidence.

2. Because the said deed imports on its face evidence that a valuable consideration passed from the defendant Robinson to Fry, as attorney aforesaid.

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\*3. Because Chancellor Dunkin, in his decree filed 18th of October, 1853, it is respectfully submitted, erred in overruling the exceptions of the defendant Robinson to the Commissioner's report, filed 11th of June, 1853, and in confirming said report.

4. Because the Chancellor, in said decree, erred in setting aside the deed of the 18th February, 1850, from Fry to Robinson, when there was no evidence of the revocation of the power of attorney made by Buckalew to Fry; no evidence of the existence of any trust whatever, in relation to the land, nor evidence of fraud on the part of Robinson in procuring said deed.

5. Because the defendant Robinson had no notice of the revocation of the power of attorney from Buckalew to Fry; nor of the existence of any trust in relation to the land, even if any such revocation was ever made, or any such trust ever existed.

Hammond, Moore, for appellants.  
Clinton, contra.

PER CURIAM. We concur in the decrees, and it is ordered that they be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN, and  
WARDLAW, CC., concurring.  
Appeal dismissed.

## 6 Rich. Eq. \*138

\*ELIZA FEWELL and Others v. ELIZA M. FEWELL.

(Columbia. Nov. and Dec. Term, 1853.)

[Wills ⇐ 614.]

Devise of land, to the use of R. during his life, and in no case to be taken for debt, and at his decease to descend to his lawful heirs: *Held*, that R. took an estate in fee simple, and



not merely an estate for life with remainder to his heirs.

[Ed. Note.—Cited in *Swann v. Poag*, 4 S. C. 18.

For other cases, see *Wills*, Cent. Dig. § 1399; Dec. Dig. ☞614.]

Before Wardlaw, Ch., at Chambers, November, 1853.

This bill was filed by the plaintiffs, against the defendant, for partition of a tract of land lying in York district, to which they allege in their bill, that they, the plaintiffs and defendant, being the only heirs at law of Robert Fewell, deceased, are entitled, under the following clause of the will of John Fewell, viz: "I hereby confirm and make over to the use of my son Robert, the land on which he now lives, during his life, and in no case to be taken for debt, and at his decease to descend to his lawful heirs."

A motion for confirmation of the return of the Commissioners, recommending a sale of the land for partition, was refused by his Honor, at Chambers, in the following decree:

Wardlaw, Ch. This motion is refused. It is very clear that by operation of the rule in *Shelley's case*, the will of John Fewell gave the land sought to be divided to Robert Fewell, in fee simple. The bill states that Robert Fewell died in June, 1853, but it does not state whether he died testate or intestate, solvent or insolvent, nor whether there be any representative of his estate. The pleadings seem to assume that the widow and children of Robert took as purchasers under the will of John; whereas, in my judgment, they can only take as devisees or distributees of Robert; and in that view a case is not stated for partition of the land as Robert's estate. Devisees or distributees take subordinately to the claims of creditors of the deceased, and have no right to partition until the debts be paid, or secured to be paid. Creditors are allowed by our Act a year from the death of their debtor, for presentment of their demands, and ordinarily partition is not safe

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within that term. The personal representative, for the security of creditors, should always be made a party in proceedings for partition. *Swift v. Miles*, 2 Rich. Eq. 154. And where partition of lands is sought within a year from the death of ancestor or testator, the procedure of the Court requires an administrator, already bound by bond, by answer, or some writing more obligatory than the declarations of his counsel in a bill, to acknowledge sufficiency of personal assets in his hands, for payment of all debts and expenses, and in the case of an executor requires even more stringent security in behalf of creditors.

It is adjudged and decreed that the order of the Commissioner for a writ of partition in this case be revoked. It is further ordered that the plaintiffs have leave to amend their bill as they may be advised.

The plaintiffs appealed on the ground:

Because it is submitted that Robert Fewell took only a life estate in the land, under the will of John Fewell, and upon the death of the said Robert plaintiffs and defendant became entitled to the remainder in fee.

Moore, for appellants.

PER CURIAM. This Court concurs with the Chancellor: and it is ordered that his decree be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN, and WARDLAW, CC., concurring.  
Appeal dismissed.

#### 6 Rich. Eq. \*140

\*JOSEPH PARHAM v. SAMUEL McCRAVY and Others.

(Columbia. Nov. and Dec. Term, 1853.)

[*Limitation of Actions* ☞100.]

Bill to enforce a parol trust in land and negroes against a purchaser, alleging that defendant knew of the trust when he bought: *Held*, that plaintiff was barred by the statute of limitations—more than four years having elapsed since the purchase.

[Ed. Note.—Cited in *Myers v. O'Hanlon*, 12 Rich. Eq. 208; *Billings v. Clinton*, 6 S. C. 105; *Beattie v. Pool*, 13 S. C. 384; *Smith v. Linder*, 77 S. C. 541, 58 S. E. 610.

For other cases, see *Limitation of Actions*, Cent. Dig. §§ 323, 480-493; Dec. Dig. ☞100.]

[*Limitation of Actions* ☞100.]

It is not enough to prevent the bar of the statute of limitations that plaintiff did not discover evidence by which he could establish the fraud until within four years. It is the knowledge of the fraud within four years which prevents the bar.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 323, 480-493; Dec. Dig. ☞100; *Cancellation of Instruments*, Cent. Dig. § 53.]

Before Dunkin, Ch., at Spartanburg, June, 1853.

The decree of his Honor, the Circuit Chancellor is as follows:

Dunkin, Ch. Drury Parham, being the owner of a tract of land on Dutchman's Creek, containing some two hundred and eighty acres, on 23d July, 1836, made a deed of gift of the same to his son, Young Parham, reserving the use and possession during the life of the donor and his wife. The deed was duly proved and recorded on 25th October, 1836. In the will of Drury Parham, executed sometime afterwards, this deed is referred to, and the gift recognized and confirmed. The will was proved in solemn form on 11th July, 1842. The widow survived until the early part of 1844, when James M. Harrison was employed by Young Parham to go and take care of the plantation, and of two negroes, Ned and Priss, and also of Young Parham's sister, (of infirm mind,) who were living there. In October, 1844, Young Parham being on the eve of removal to the West,

sold the place for four hundred dollars to the defendant, Samuel McCravy. On 25th February, 1845, McCravy brought an action at law (trespass quare clausum fregit) against the complainant, and judgment was rendered for the plaintiff, McCravy, Spring, 1846. On 24th April, 1850, this bill was filed, in which it is alleged that Young Parham held this land, as well as a negro, Ned, on a secret trust for the complainant, who had been a person of intemperate habits, and that the defendant, McCravy, had purchased the land, and become possessed of the negro, with a

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knowledge of the trust. \*The complainant excuses his laches in pursuing his rights, on the ground that "heretofore, he has not known that the said Samuel McCravy was informed of the trust which was attached to the property, but that he has recently been informed that he did know all about it."

The defendant denies all knowledge of the fiduciary holding of his vendor, if any such trust ever existed, which he in no manner admits; and he interposes the plea of the statute of limitations to the plaintiff's supposed equity.

It is very difficult to determine what the plaintiff avers to be the terms of the parol trust, and still more difficult what were the terms of the trust as testified to by the witnesses. Plaintiff alleges that a deed was made of the land and negro Ned, to Young Parham, "with a parol trust that the same should be kept for use and benefit of the plaintiff, and the plaintiff should have the profits arising from the rent of the land and the hire of the negro, or, that the plaintiff should have the use of them in such mode as might be thought most advisable."

This is very indefinite; but the evidence to sustain the allegation is still more vague. From the evidence of Lewis Bobo, in whom the plaintiff places great reliance, it would amount to little more than an understanding that the plaintiff was to have a home on the premises, and this witness in concluding his evidence, says: "he thought that Young Parham had a good right to the tract of land, and that it was as he pleased, whether he sold the land or not." And he was actually an attesting witness to the deed from Young Parham to the defendant. So, whatever may have been the loose declarations of Young Parham, it is very difficult, in opposition to the evidence of Maj. Smith, who was intimately acquainted with testator's views, to infer that any parol trust existed in contradiction to the plain language of the will and deed.

On the subject of the Statute, too, the plaintiff encounters difficulties—more than four years had elapsed since the recovery against him at law—nearly six years since the alleged fraud between Young Parham and the defendant, McCravy, to defeat

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\*plaintiff's rights. Plaintiff avers that he

only recently ascertained that McCravy was aware of the alleged trust. Charles Bogau is the principal witness to prove McCravy's knowledge. He is the brother-in-law of the plaintiff—the husband of his sister—he deemed it important in October, 1844, to fix McCravy with the knowledge of what Young Parham had said. Can it be supposed that until 1850 he never told the plaintiff? He did not say so in his testimony, nor was anything said to create a belief that the plaintiff had obtained any information recently which he had not in 1844. But on 10th June, 1845, while the defendant, McCravy, was prosecuting his action of trespass against the complainant, he (the complainant) was arrested under an execution at the instance of a creditor, E. J. Adicks. In order to entitle himself to the benefit of the prison bonds Act, he filed a schedule, in which was included as follows: "All the interest which I have, which is legally assignable, in the tract of land whereon I now live, as also in a negro man named Ned, the interest as I understand it, is that the said tract of land and negro, were given in trust for my use and benefit. I have heretofore assigned to William Pollard my interest in said negro, for and on account of his standing my security to Thomson & Tucker for \$25, and for \$8 or \$10 more, which I owe said Pollard." This schedule was filed on oath on 20th June, 1845, and on 30th June, the assignment was duly executed to the plaintiff in the execution—*v.* J. Adicks—and the defendant was discharged. The interest thus assigned was sold by the sheriff under the assignment, 5th August, 1845, for inconsiderable sums, as appeared by the evidence upon this subject as adduced by the plaintiff himself. No suggestion is made that E. J. Adicks was in any manner implicated in this matter. Whatever equity the plaintiff may be supposed to have possessed, passed to his assignee on 30th June, 1845, and when the defendant McCravy recovered a verdict at law, in 1846, the plaintiff may well have supposed that he thenceforth had no cause of action. But in conclusion, the Court can perceive no ground to impugn the evidence of the witness Thom-

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as Taylor. \*He proves that prior to the sale by Young Parham to defendant McCravy, in 1844, the defendant was importuned by the plaintiff to conclude the bargain with Young Parham. He insisted on it, that the defendant would get a bargain, and gave his reasons why he wished defendant to purchase rather than another, &c., and that during this time, he, the witness, never heard the plaintiff say a word about any claim to the land in his own behalf.

It is ordered and decreed that the bill be dismissed.

The complainant appealed, and now moved this Court to reverse the circuit decree on the grounds:



1. Because the case was fully made out by the complainant, that Young Parham had taken the title from his father, D. Parham, for the land and negro referred to, with a trust for the use and benefit of the complainant.

I. That complainant was put upon the land by Young Parham in obedience to, and in pursuance of the trust.

II. That the defendant, Samuel McCravy, had notice of it, and the case made, shows that he purchased subject to the trust.

III. That the statute of limitations or lapse of time, had no proper application to the case.

2. Because the defendant purchased the land subject to the complainant's right, and he submits that the case made goes clearly to show that fact.

Bobo & Edwards, for appellant.  
Dean, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. We concur generally in the views of the Chancellor. On one point, only, is it deemed necessary to add anything to what he has said in the decree. I allude to the statute of limitations.

The plaintiff's counsel has brought to our view the case of *Bradley v. McBride*, de-

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cided in April, 1832; and recently \*reported in *Richardson's Equity Cases*, 202. The Court, consisting of two Judges, says in that case: "The statute of limitations begins to run against a fraud from the time it is discovered. The time within which the statutory bar against a fraud is complete, must be governed by the nature of the claim against which it is set up. If it is for the enforcement of a parol contract, or the recovery of personal property, the time within which the statute has directed that actions of assumpsit, trover or detinue, shall be brought, is the rule in Equity. If it is for the recovery of land, then the time limited for the bringing of actions at law, for its recovery, is the time within which a bill in Equity, to be relieved from a fraud defeating the complainant's title, must be filed. The sale in this case, was made in 1822; and the fraud, if any, was then consummated. In 1824, the statute of limitations as to lands, was extended to ten years. (6 Stat. 238). The complainant, not being barred at the time the statute was extended, was entitled to the benefit of its extension; and could, at any time within ten years of the sale, have brought this suit."

A note is appended to this case of *Bradley v. McBride*, (Rich. Eq. Cases, 202,) in the following words: "In *McDonald v. May*, (1 Rich. Eq. 91,) it was held that the plaintiff, in such a bill was entitled to but four years. But that decision was made, seemingly, without much consideration, and with-

out knowledge of the case of *Bradley v. McBride*."

I do not know how it appears that the decision referred to was made upon sight consideration: unless the inference is drawn from an omission to argue the point or refer to authorities in the judgment of the Court.

The fact is, that whatever doubts might have existed on the subject, (and I conceive there was very little room for any) had been cleared up in two cases, at least, decided after that of *Bradley and McBride* and before that of *McDonald and May*; which decisions ruled the very point to the hand of the Court before which the last mentioned case came up, and rendered it unnecessary to enter upon an elaborate examination of it.

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\*The first of these cases was that of *Eigleberger v. Kibler*, reported in 1 Hill, Eq. 113 [26 Am. Dec. 192]. This was heard on Circuit in July, 1832, and brought up by appeal in January, 1833, before the two Judges who had decided *Bradley v. McBride*, and before Chancellor Harper, who did not sit in that case. The subject was a fraudulent deed for land. It was held on the circuit that ten years were not necessary to bar the remedy; but that four years were sufficient. The judgment, on appeal, was delivered by Mr. Justice O'Neill, who had delivered the opinion in *Bradley v. McBride*. He says: "The statute runs from the discovery of the fraud; and the relief sought is not to recover the land, but to be paid a debt out of it. It is in the nature of an action of deceit. The injury of which the creditor complains, is, that by the fraud of his debtor, he cannot be paid. This is purely a personal, and not a real action: and the statute runs from the discovery of the fraud, as the accrual of the cause of action; and at the expiration of four years, its bar is complete." The whole Court concurred.

The second case subsequent to that of *Bradley v. McBride*, was that of *Farr v. Farr*, reported 1 Hill, Eq. 387. A deed had been made of realty and personalty. The complaint was, that it had been obtained by fraud, misrepresentation and concealment, of material facts. It was held to have been sanctified by the statute of limitations: and on appeal, the judgment was delivered by Chancellor Harper (the whole Court concurring). He said "the complainants come to be relieved against a fraud: to set aside a deed, &c. I am not aware that there is any doubt about the rule, that a party coming to be relieved against a fraud, must come within four years, (in England six years) from the time the fraud is discovered. In *South Sea Company v. Wymondsell*, (3 Pr. Wms. 143,) it is ruled that the bill must allege that the fraud was discovered within six years before exhibiting it; and the fact must correspond with the allegation." "The subject is fully



considered by Lord Redesdale in *Hovenden v. Annesley*, (2 Sch. & Lef. 607)."

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\*The Court which decided *McDonald v. May* in 1843, merely followed these decisions: which were reported and well known: and though they may never have known, or have forgotten, *Bradley v. McBride*, lost nothing by their ignorance of it.

The Chancellor infers from the evidence that the plaintiff in the present case had notice of the transaction of which he complains as a fraud more than four years before he filed his bill: and the circumstances render his conclusion reasonable. Indeed, he does not aver in his bill that he came to the knowledge of the fraud within four years: but only that (though he may have known it) he did not discover evidence by which he could establish it until within four years. (a)

It is ordered, that the decree be affirmed, and the appeal dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Appeal Dismissed.

(a) *Prescott v. Hubbell*, 1 Hill, Eq. 217.

#### 6 Rich. Eq. \*147

\*JAMES N. BADGER v. ROBERT HARDEN  
and DELIA ANN, His Wife.

(Columbia. Nov. and Dec. Term, 1853.)

[*Perpetuities* ⇐4.]

Bequest as follows: "I do loan unto my daughter, D. A., during her natural life," certain slaves, "and their increase: and at her death, I do give and bequeath said slaves and their increase, unto the lawful issue of her body, should she leave any, forever; and in the event of her decease without issue, I then, and in that case, loan said slaves and their increase unto R. H.," (her husband,) "during his natural life, and at his death, I do give and bequeath said slaves and their increase, unto my nephew, J. N., and his lawful children, forever?" *Held*, that the limitation over to J. N. was valid, and contingent only upon the death of D. A., without leaving issue.

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. § 30; Dec. Dig. ⇐4.]

Before Wardlaw, Ch., at Barnwell, February, 1853.

The whole case is stated in the decree of his Honor, the Circuit Chancellor, which is as follows:

Wardlaw, Ch. The object of this bill is to obtain bond from the life-tenants for the forthcoming of certain slaves at the termination of the life estate, to secure the enjoyment by the remainderman.

Nathaniel Badger died in 1842, leaving of force his will, dated February 7, 1842, whereby he provided, among other things, as follows: "I do loan unto my daughter, Delia Ann Harden, during her natural life, the following named slaves," (naming sixteen,)

"and their increase; and at the death of my said daughter, I do give and bequeath the said slaves and their increase, unto the lawful issue of her body, should she leave any, forever; and in the event of the said daughter's decease without issue, I then, and in that case, loan the said slaves and their increase unto Robert Harden, during his natural life, and at his death I do give and bequeath the said slaves and their increase, unto my nephew, James N. Badger, and his lawful children, forever."

Upon the death of testator, Robert Harden, who was appointed executor, assumed the execution of the will by making probate thereof, paying the debts of testator, and taking possession for himself and wife aforesaid. The defendants are without children. Late-ly the defendant, Robert Harden, has incur-

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red some liability as surety, has sold his plantation in this State, and threatened to remove with the said negroes to Georgia.

The defendants, in their answer, admit the will and probate, and the sale of the plantation, and some expression of purpose to remove beyond the limits of the State, which, however, they say, was jesting, and not according to their real design; but they contest the plaintiff's rights under the will, and insist that their estate is absolute.

The first and principal question in the case is, whether the claim of the plaintiff is valid within the rule against perpetuities. It may be observed that the testator gives an estate for life expressly to his daughter, and to her husband, if he should survive her, and employs the terms "loan" and "lend," to designate the gifts for life, and "give" and "bequeath" to designate the contingent absolute interests to the issue of his daughter and the plaintiff. The limitation over in the first instance, is to the issue of the daughter "at her death," if "she should leave any," necessarily importing that the issue, if they took at all, must take within the prescribed limit of lives in being, and twenty-one years afterwards. *Buist v. Dawes* [4 Strob. Eq. 37]; *Forth v. Chapman*, 1 P. Wm., 663.

Then the gift to the daughter's husband is, "in the event of my said daughter's decease, without issue, then, and in that case, to Robert Harden during his natural life;" in which the term issue is manifestly employed, according to the prior use of the word as issue left at her death. *Dehay v. Porcher*, 1 Rich. Eq. 270. And this is confirmed by the gift over to him being for life. *Fearne* 488; 2 Jarm. Wills 363; 3 Mylne & Cr. 127. Finally, the gift over to plaintiff is to take effect contingently "at the death" of the husband—at the termination of a life in being. *Buist v. Dawes*. I am of opinion that the limitation contingently made to the plaintiff by this will, is not liable to the objection made of remoteness. Whether it will take

effect may possibly depend on the double contingency of Robert Harden surviving his wife, and her death without leaving issue; but I suppose that the plaintiff's rights are

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contingent only upon the death of \*Delia Ann Harden without leaving issue, and the opposite view was not taken at the hearing.

The remaining question in the case as to the sufficiency of the plaintiff's apprehension of hazard to his rights from the conduct and declarations of the defendants, is settled by the admissions of the answer. The defendants admit preparation to remove beyond the jurisdiction, and threats of removal, which however jestingly intended, must conclude them, especially as they contest the plaintiff's rights.

It is ordered and decreed, that the defendant, Robert Harden, give bond to the Commissioner of this Court in double the value of the slaves mentioned in defendant's Exhibit A, conditioned that said slaves, with the increase of the female slaves, shall be forthcoming at the termination of the life estate of the survivor of defendants, to be delivered to the plaintiff or his representatives, if the defendant, Delia Ann Harden, should not leave issue alive at her death. It is further ordered, that defendant Robert Harden, pay the costs.

The defendants appealed, and now moved this Court to set aside the decree on the grounds:

1. Because they respectfully submit that His Honor erred in deciding that the limitations in the Will of Nathaniel Badger were not too remote.

2. Because it is respectfully submitted that His Honor erred in deciding that the plaintiff's rights were contingent only upon the death of Delia Ann Harden, without leaving issue.

Hay, Bailey, for appellants.

A. P. & J. T. Aldrich, contra.

PER CURIAM. This Court concur in the judgment of the Circuit Court, and the appeal is dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurring.

JOHNSTON, Ch., absent at the hearing.  
Appeal dismissed.

6 Rich. Eq. \*150

\*ELISHA PALMER v. SARAH PALMER  
and Others.

(Columbia. Nov. and Dec. Term, 1853.)

[*Equity* ⚡271.]

Plaintiff had leave to amend his bill, and he left an amendment in the Commissioner's office which was not filed. No subpoena to answer the amendment was taken out. At the trial

he moved for leave to file the amendment nunc pro tunc, which was refused, and a decree was pronounced, dismissing the bill on its merits. Without questioning the correctness of the decree, he appealed from the order refusing him leave to file the amendment, and moved that the decree be vacated, and the cause sent back for re-hearing, with leave to file the amendment: Motion refused.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 560; Dec. Dig. ⚡271.]

Before Dunkin, Ch., at Union, June, 1853.

The brief on which the appeal in this case was brought before the Court, is as follows:

"On the eighteenth day of June, eighteen hundred and fifty-two, the following order was made by Chancellor Johnston, viz:

Elisha Palmer,

v.

Sarah Palmer, et al. } Bill for Partition, &c.

"On motion of Herndon, Solicitor for complainant, Ordered That he have leave to amend the bill in the above stated case, upon the payment of the costs occasioned by the amendment.

"(Signed)

J. Johnston.

"June 18, 1852.

"The above is certified by the Commissioner, D. Goudelock, to be a true copy of the order.

"The Commissioner further certifies as follows, viz:

"Mr. Herndon lodged an amended bill in the office of the Commissioner, on the 20th May, 1853, which the Commissioner did not file for reasons stated at the hearing.

"D. Goudelock."

"At the hearing of the case, it appeared that the amendment had not been marked 'filed' by the Commissioner. The Complainant's Solicitor moved that it be filed nunc pro tunc, which motion was refused by Chan-

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cellor Dunkin, presiding, and he dismissed the bill; from which ruling the plaintiff appeals, on the following grounds, viz:

"1. Because it is submitted that there is error in the ruling of the Court, That the plaintiff should not have leave to file the amendment nunc pro tunc, as it was the accidental omission of the Commissioner to file it when lodged in his office, and the plaintiff should not be prejudiced by such omission.

"2. Because, under the circumstances, the decree should be vacated, and the cause sent back for a re-hearing, with leave to amend the pleading."

Herndon, for appellant.

Dawkins, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. The bill, in this case, was filed for the partition of lands whereof Thomas Palmer died intestate. The plaintiff lays claim to one-third of the land by purchase from the widow, and to a distributive



share of the remaining two-thirds as one of the children of the decedent. The bill states the death of the intestate, describes the premises of which he seeks partition, and states the names and number of children left by the intestate, all of whom are made defendants.

On the part of James Palmer, (one of the children) who had died, and whose family were made defendants in his right, a defence was set up that he (James) had purchased, at sheriff's sale, all the interests of the plaintiff in the premises, which he sought to have partitioned off to him; and that the plaintiff had, by other conveyances, parted from all right in the premises.

After the bill was filed, the plaintiff obtained an order of the 18th of June, 1852, giving him leave to amend his bill, and on the 29th of May, 1853, deposited with the Commissioner an amendment setting forth that two of the persons (Mrs. Ortner and another) stated in the bill to be children and distributees of Thomas Palmer, were illegitimate, and therefore not entitled to distributive shares. No subpoena was taken out

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to answer the \*amendment; nor was any order published against these children, who lived out of State.

At the hearing, nothing was said of this amendment until the cause was on trial. In the course of the hearing, the plaintiff's counsel moved to file it, nunc pro tunc. Mrs. Ortner's counsel objected, on the ground, that his client had no notice of it, up to that moment, nor had she an opportunity to answer it. The motion was refused. The cause proceeded, and resulted in a decree, (which accompanies this opinion,) (a) establishing

(a) The circuit decree in this case, is as follows:

DUNKIN, Ch. The purposes for which these proceedings were instituted, will most properly appear from a full copy of the bill filed 29th April, 1851. The matter to which the Court deems it most necessary to address itself, is the claim of the complainant to the land on which the defendants, Sarah Palmer, Samuel Sumner and his wife, Charlotte Sumner, are alleged to have committed waste, and against whom, as well as against the other defendants, a writ of partition of said premises is craved. It may be, however premised, that it is only in reference to these premises that any specific relief is asked. It is conceded that the land originally belonged to Thomas Palmer, (the father of the plaintiff,) who died about the year 1800, leaving a widow, Elizabeth, and several children. The widow died in 1846. The plaintiff insists that he is entitled to the widow's one-third, under a deed from her, dated in 1834; and, also, to a distributive share of the other two-thirds. The defendants above named, are the devisees of James Palmer, deceased, a brother of the plaintiff. His will was admitted to probate, 19th February, 1845.

The deed of January, 1834, is an absolute conveyance to the plaintiff by his mother, of her one-third of the tract on which "she then resided, and to which she was entitled, as the widow of her late husband, Thos. Palmer, de-

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\*the fact, that by sheriff's sale, and various conveyances, the plaintiff was stripped of all interest in the land, and of course of all right of partition; and the bill was dismissed.

It is altogether unnecessary to consider whether the plaintiff was entitled to his motion to file his amendment, so long as that decree remains unreversed. The plaintiff has not ventured to appeal from the decree; and it is certainly very extraordinary on his part to ask this Court, as he does in his 2d

ceased." On the 5th July, 1843, the Sheriff of Union District, under and by virtue of an execution against the complainant, Elisha Palmer, at the suit of Edwards and Ganing levied on "all the interest of the said Elisha Palmer, in two hundred and eighty acres of land belonging to the estate of his father, whereon his mother then lived;" and on the 7th February, 1843, the same was duly sold, and purchased by James Palmer, for the sum of one hundred dollars, who accordingly paid to the sheriff the purchase money, which was applied to the eldest executions in his office against Elisha Palmer, being those of John T. Murrel and William R. Wilhem. So far as the Court can perceive, this would be an end of the complainant's case in this Court, as made by the bill. Whatever interest he had in the premises, was purchased and paid for by the party under whom the defendants derive title. But the plaintiff put in evidence, a paper in these words, "South-Carolina, Union District: I, James Palmer, have bid off Elisha Palmer's interest in his mother's land, for one hundred dollars, which interest I bind myself to let Elisha Palmer have his interest back when he pays me the sum of one hundred dollars. This 10th Feb. 1843.

(Signed)

James Palmer,  
C. Wilson."

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\*Clinton Wilson testified that he drew the body of the paper—that it was signed by James Palmer, and delivered to the plaintiff, but that the name, C. Wilson, was not his signature. Although this paper was thus in evidence, it constitutes no part of the pleadings, or of the plaintiff's case, as made in the bill. It is not charged that any such agreement was made—or, that the plaintiff had complied with it—or that he was ready to comply with it. The defendants insisted that if any such agreement was made, it was nudum pactum. But they further insisted that the money had never been returned. The plaintiff offered in evidence from the record of the Court of Sessions, the copy of a receipt in the following words: "Received of Elisha Palmer, in full of all demands, from beginning of dealings up to this date, October 10th day, 1844, (signed) James Palmer." It appeared from evidence of A. W. Thomson, Esq., that after the death of James Palmer, his widow, Sarah Palmer, who had administered with the will annexed, instituted a suit in the sum. pro. jurisdiction, against Elisha Palmer on a note given to the testator. On the trial, this receipt was offered in evidence. The genuineness of the paper was challenged, witnesses were examined, and a decree was given for the plaintiff, Sarah Palmer, adm'x. Mr. Thomson further testified, that "it seemed to him, that after the trial of the sum. pro., Elisha Palmer was in the act of leaving the Court House, with the receipt—that it was taken from him, and impounded. Witness was not sure, not distinct about it—is confident that the receipt has never been in his (witness') possession since the trial of the indictment, and thinks it was correctly



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ground, to vacate a decree, whose correctness he does not question, and equally extraordinary to desire us to allow an amendment to be filed, touching the portions of the distributees, in the face of a solemn and unquestioned adjudication, that he has no interest in the matter.

It is ordered that the appeal be dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

copied in the indictment." After the trial on the sum. pro., Elisha Palmer was indicted for forgery. Several witnesses were examined, and the defendant was found not guilty. The Clerk of the Court testified that he had searched the office, and found the indictment warrant and recognizances, but had never been able to find the original receipt.

The witness, Clinton Wilson, further testified that, in February, 1843, after the purchase by James Palmer, he (witness) bought from Elisha Palmer, his interest in the land under the deed of 1834. It was assigned to McLure and Wilson in February, 1843. Witness was aware that James Palmer had consented to let Elisha Palmer have the land back at the bid, and the witness bought, thinking Elisha Palmer would be able to pay the bid. They afterwards found their assignment was of no account, and have set up no claim to the land.

On the 7th January, 1847, the complainant, Elisha Palmer, being in jail, under a ca. sa., issued under the suit of Edwards and Gaming, filed under oath a schedule "of all his goods and effects, and, also of all the choses in action that he owned, or was entitled to in any manner whatever." This consisted, besides some unimportant articles, "of all the right, title and interest, I may have in all that piece, parcel or

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tract of land, whereon James Palmer lived and died, or of any other land that I may have." On the following day, (8th January, 1847,) the plaintiff, by an instrument under his hand and seal, assigned and set over to the said Edwards and Gaming, the contents of his said schedule subject to prior liens.

This evidence would present very serious difficulties, if the plaintiff had presented in his bill any case arising out of the paper, 10th February, 1843. But the plaintiff has presented no such case. His interest in the land was sold by the sheriff, and the proceeds applied to the payment of his debts, nearly ten years before his bill was filed. Afterwards his right under the deed of 1834, was assigned for valuable consideration, to McLure & Wilson, and finally, all right in law and equity was assigned to Edwards & Gaming in January, 1847. Under this state of facts, it is unnecessary to pursue other inquiries presented by the evidence which would too probably prove more painful in the investigation than difficult of solution. The plaintiff is evidently a person of feeble intellect; nor is the cunning ascribed to him by some of the witnesses, at all inconsistent with a low grade of understanding. His folly, or his fault, has involved him in a maze of litigation, and it is not surprising that he should become confused as to his own position. But the Court is unable to extricate him. His own acts have, unfortunately for him, furnished the most conclusive reply to the arguments advanced in his behalf.

It is ordered and decreed that the bill be dismissed.

6 Rich. Eq. \*155

\*ANGUS P. BROWN and LAURENCE S. BROWN v. ISAAC A. WOOD. THE SAME v. WILLIAM ASHLEY.

(Columbia, Nov. and Dec. Term, 1853.)

[Evidence  $\hookrightarrow$  372.]

Where a deed offered in evidence as an ancient deed, is proved to be thirty years old, it is not necessary to show that it is produced from the proper custody, and that possession has been had under it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1616; Dec. Dig.  $\hookrightarrow$  372.]

[Evidence  $\hookrightarrow$  372.]

Where a deed is admitted in evidence as an ancient deed, it must be admitted as formally executed by signing, sealing and delivery.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1614; Dec. Dig.  $\hookrightarrow$  372.]

[Vendor and Purchaser  $\hookrightarrow$  239.]

To sustain a plea of purchase without notice, it must appear that the legal title was purchased.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 592; Dec. Dig.  $\hookrightarrow$  239.]

[Execution  $\hookrightarrow$  41.]

The interest of a cestui que trust in slaves cannot be sold under a fi. fa.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 91; Dec. Dig.  $\hookrightarrow$  41.]

[Estoppel  $\hookrightarrow$  98.]

A father had a life interest as cestui que trust in slaves, with remainder to his children. The slaves were levied on and sold by the sheriff as his property. He attended the sale, and represented that his title was good:—Held, that the children, who were not present, were not bound by his misrepresentations, although they knew of the intended sale; and further, that they were not bound to appear at the sale and make proclamation of their interest.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 290; Dec. Dig.  $\hookrightarrow$  98.]

[Slaves  $\hookrightarrow$  7.]

Where a father makes a gift of slaves by deed, in trust after his (the father's) death, for his son for life, with remainder to his son's children, the rights of the children, the remainder-men will not be defeated by any constructive fraud supposed to arise from the son's ostensible ownership, and the circumstances that the deed was not recorded in the Secretary of State's office, and that the creditors of the son and purchasers from him had no notice of it.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. §§ 20-29; Dec. Dig.  $\hookrightarrow$  7.]

[Slaves  $\hookrightarrow$  7.]

A deed of gift of slaves in trust is not required to be recorded in the Secretary of State's office.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 28; Dec. Dig.  $\hookrightarrow$  7.]

[Slaves  $\hookrightarrow$  7.]

A conveyance of all the slaves of which a grantor is possessed is good, and will carry all which he is proved by extrinsic evidence then to possess.

[Ed. Note.—Cited in Green v. Jacobs, 5 S. C. 282.]

For other cases, see Slaves, Cent. Dig. §§ 20-29; Dec. Dig.  $\hookrightarrow$  7; Deeds, Cent. Dig. § 74.]

Before Wardlaw, Ch., at Barnwell, February, 1853.

The facts of this case are fully stated in the circuit decree, which is as follows:

Wardlaw, Ch. The plaintiffs are the sur-

living children of Jabez G. Brown, deceased, and by these bills, filed December 27, 1852, claim as remainder-men, under a deed of their grandfather, Bartlett Brown, to be entitled to certain slaves purchased by the defendants severally at sales made by the sheriff, under executions against the said Jabez G. Brown.

The deed in question bears date, October 20, 1821, and has the form of an indenture signed and sealed by Bartlett Brown and James Overstreet, whereby, "the said Bart-

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lett Brown, as \*well for the love and affection which he hath, and beareth to his children, Michael Brown, Barnett H. Brown, Benjamin B. Brown, Jabez G. Brown and Cynthia W. Calhoun, the wife of James Y. Calhoun, Esq., and for settling and assuring the premises hereinafter mentioned, and in consideration of one dollar to him, the said Bartlett Brown, paid by the same James Overstreet, at and before the delivery of these presents, he, the said Bartlett Brown, hath given, granted, bargained, sold, assigned, and set over unto the said James Overstreet, his heirs, executors, administrators and assigns, all and singular, the lands, houses, hereditaments, negro slaves, household goods, rights, credits, and all other the goods and chattels, real and personal, of him, the said Bartlett Brown, whereof he is seized or possessed, interested in, or entitled unto, and the estate, right, title, interest, property, claim, and demand whatsoever, of him, the said Bartlett Brown, of, in or to the same, or any parcel thereof, to have and to hold the said lands, houses, hereditaments, negro slaves, household goods, &c., unto the said James Overstreet, his heirs, executors, administrators and assigns, from henceforth, forever. In trust, as is hereafter mentioned—that is to say, in trust, the said James Overstreet, his heirs, executors, &c., shall and will permit the said Bartlett Brown, to have, hold, possess, enjoy and take to his own use, the real and personal estate hereby granted for so long a time, as the said Bartlett Brown shall live, and from and immediately after his decease, in trust, for the sole and separate use, behoof and benefit of the said Michael Brown, Barnett H. Brown, Benjamin B. Brown, Jabez G. Brown, and Cynthia W. Calhoun, equally, share and share alike, for and during the term of their, and each of their several and respective natural lives, and no longer; and upon and from, and immediately after the decease of the said Michael Brown, Barnett H. Brown, Benjamin B. Brown, Jabez G. Brown, &c., or any or either of them, then the respective part or parts, share or shares of him, her, or them, so deceased, in trust, for the only sole and separate use, behoof and benefit of his, her, or their child or children,

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who shall or may \*be living at the time of

his, her or their deaths, respectively, and if, and in case any one or more of them, the said Michael Brown, Barnett H. Brown, &c., shall depart this life without leaving any child or children living at the time of his, her or their death; then as to the original part or parts, share or shares, of him, her or them, so departing this life without leaving any child or children living, as well as any or other part or parts, share or shares, as by virtue of the present clause shall have become vested in, or accruing unto him, her or them, so departing this life, without leaving any child or children as aforesaid; in trust for the only sole and separate use and behoof of the survivor or survivors, and the child or children of any or either of them who may have departed this life, and for, and upon no other trust, use, interest or purpose whatsoever."

Then follows a provision, that if Michael Brown, Barnett H. Brown, &c., should die before Bartlett, the child or children of him, her or them, so departing this life, should be entitled to all the property which might have vested in the parents of such children, if they had survived Bartlett.

One of the disputed facts of the case, affecting the execution by delivery of the deed, is the date of Bartlett Brown's death. Dr. D. M. Lafitte testifies, that he attended the said Bartlett Brown during his last illness, and as the last entry on the doctor's day-book, is of a visit at night on November 12, 1822, (which entry was produced,) he thinks his patient died the next day, November 13, 1822. B. H. Brown, a son of the deceased, testifies that he was a member of the Legislature from Barnwell district, in which his father resided, at the session in Columbia, beginning on the fourth Monday in November, the 25 day 1822, and that he received information of his father's death in Columbia, during the first or second week of December of that year, and before the middle of the month. James Overstreet left Barnwell, S. C., for Washington, to take his seat in Congress in November, 1821 and died on his return at Charlotte, N. C., on May 24, 1822. Soon afterwards William Overstreet administered upon his estate; and on the death of

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William \*Overstreet, in 1828, John A. Owens became administrator de bonis non.

The indenture of B. Brown and James Overstreet purports to have been "signed, sealed and delivered" in the presence of the attesting witnesses, Jacob C. Kittles, William D. Brown, and Robert D. Bradley. Probate of the execution thereof was made December 11, 1822, by Bradley, before Dr. Lafitte, then a justice of the quorum, reciting, that the witness saw the parties sign, seal and deliver the instrument; the deed was recorded in the Register's office for Barnwell, on December 13, 1822. Dr. Lafitte, with the instrument before him, testifies, that the body of the probate and his sub-



scription as magistrate, are in his proper hand-writing, and that he does not doubt that the probate was made according to its purport; but that he does not recollect the occasion, nor the person or residence of Bradley, although a man of that name was son-in-law of Kittles, who then lived near Brown, and who is now dead. He further states, that he pursued a formulary in writing the probate, and did not then know that delivery was essential to a deed, and was not accustomed to interrogate affiants as to delivery, but that he always read over affidavits to deponents, and was ready to make alterations according to their suggestions. By other witnesses, were proved the hand-writing of Bartlett Brown and James Overstreet to the deed, and the signatures of the attesting witnesses, Bradley, Kittles, and W. D. Brown, and the death of Kittles, and the residence of Bradley in Florida, and of W. B. Brown in Georgia. The last witness moved from Barnwell to Screven County, Georgia, about forty-seven miles from Barnwell C. H., about January 1, 1853; he promised the plaintiff's counsel to be present at the trial, and give testimony; and in a letter of February 14, 1853, which was admitted as evidence, stated that he had no recollection of the execution of the deed, nor of its disposition afterwards.

The deed from Brown to Overstreet was found by Mr. Owens, the solicitor of the plaintiffs, in the office of the Register of

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\*mesne conveyances for Barnwell, in the summer of 1852, after having been lost sight of for many years.

Bartlett Brown executed a last will and testament, dated October 10, 1815, and attested in due form by three witnesses, whereby he devised as follows: "After paying all my just debts, I wish for all my lands, negroes, stocks of horses, cattle and hogs, and every other species of property which I am, or may be possessed of at my death, to be equally divided among my following named children, to share and share alike, namely, my sons, Michael Brown, Barnett H. Brown, Benjamin B. Brown, and Jabez G. Brown, and my daughter Cynthia W. Brown, all of the district and State aforesaid, each to share and share alike, of all my personal and real estate. I do, in like manner, constitute, make, ordain and appoint my friends, James Overstreet and John B. Best, and my two sons, Michael Brown and Barnett H. Brown, sole executors of this, my last will and testament, &c." This will was admitted to probate, December 26, 1822, and Michael Brown, Barnett H. Brown, and John B. Best, were on that day qualified as executors. On December 26, 1822, O. D. Allen, the Ordinary of Barnwell, issued a warrant to five appraisers, whereby he empowered them to appraise all the goods and chattels which should be shewn unto them by the executors, as the goods and chattels of Bartlett Brown,

and to make an inventory thereof, &c. On January 14, 1823, the appraisers filed with the Ordinary an "Inventory of all the goods and chattels, and personal estate, of Bartlett Brown," which, among other things, sets forth thirty-two head of negroes, (without naming them,) valued at \$300 per head, and various other personal property, estimated in the whole at \$11,698.50. On December 26, 1822, the Ordinary, on petition of the executors, granted them leave to sell part of the estate which they did not wish to divide among the heirs, such as horses, cattle, hogs, &c. On January 15, 1823, the executors sold the said horses, cattle, &c., for \$1,783.16; and among the purchasers are all the legatees and many other persons. On January 17, 1823, on which day there seems to have

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been made a general \*division of the estate of the testator among his children, Jabez G. Brown signed an instrument of writing, which is in the following words: "Received, Barnwell district, South-Carolina, January 17th, 1823, from Michael Brown, Barnett H. Brown, and John B. Best, executors of Bartlett Brown, deceased, the following named negro slaves, viz.: Sophia, Dilly, Dick, Rufus, Juda, and Richmond; also, one tract of land, to wit: the tract known and designated in the division as 'the Diamond Hill tract,' containing two hundred acres, being in full for my part and interest in the personal and real estate of my father, Bartlett Brown, with the exception of whatever may be my interest in the sales of part of the personal property sold, after the just debts are paid, and the affairs of the estate closed by the executors." On the same day, Benjamin B. Brown signed a similar instrument for his share of the property. At the same time, a paper was signed by Michael Brown, B. H. Brown, James Y. Calhoun, B. B. Brown and Jabez G. Brown, which is in the following words: "We, the undersigned, do agree, that each one of us has permission to sell and give good titles to either of the lands or negroes, drawn by us in the division of the estate of our father, Bartlett Brown, without hindrance or molestation of either one of us to the prohibition of the others,—witness our hands: signed and agreed to in the presence of each other, this seventeenth day of January, 1823." B. H. Brown testifies, that this last agreement was executed in conformity to the wishes of Benjamin B. Brown, to disembarass him from the provisions of the deed of Bartlett Brown; Benjamin B. Brown being childless, after having been married for several years. Benjamin B. Brown died in 1832, without issue, leaving a wife surviving him, and a will, duly executed, dated April 10, 1827, whereby he directed his debts to be paid, &c., and bequeathed to his wife, Experience G. Brown, the following negroes, viz: Mourning, Mary, Anne, Anne Mariah, George, Charity, Paul, Titus and Dick, with their increase; also his planta-



tion, the ensuing crop, a horse, mare, &c. The balance of his property, if there should be any after the payment of his debts, he directed to be equally divided among his three brothers; and to his sister, Cynthia

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\*W. Calhoun, he left ten dollars. Of this will, he nominated Barnett H. Brown and John J. Mixon, executors. This will was admitted to probate on November 5, 1832, and B. H. Brown and John J. Mixon then qualified as executors. The property mentioned in the will is the same he got from Bartlett Brown's estate, with increase, and this property, notwithstanding his will and the agreement of January 17, 1823, (among the legatees of his father,) and the resistance of his widow, was divided under the deed of Bartlett Brown, among his surviving brothers and sisters, to whom, by said deed, it is given not for life, but absolutely. The witness, B. H. Brown, assigned as the reason for Benjamin's leaving only ten dollars to his sister, Cynthia W. Brown, (now Nobles,) that she had refused to sign the agreement giving authority to sell and make good titles, and her name is not with the rest to that agreement, though that of her husband, James Y. Calhoun, is there.

Between the years 1830 and 1849, Jabez G. Brown became greatly embarrassed in his affairs, and judgments to a very large amount were obtained against him; among them, was a confession to B. H. Brown for \$37,806.10, and according to the testimony of Seth Daniel, deputy sheriff for Barnwell, the judgments including this confession were more than enough to cover all his property, but otherwise, if, as was conceded, this confession was intended merely to secure B. H. Brown as surety for Jabez G. Brown, according to an accompanying statement in the sheriff's office.

For two years and a-half before February 4, 1850, the sheriff of Barnwell had advertised extensively in newspapers, sales' day after sales' day, that he would sell the property of Jabez G. Brown, to satisfy the executions against him, and had for various reasons postponed the sales; and from these frequent advertisements and postponements, his intention to sell had become notorious; and at length, February 4, 1850, he sold twenty-nine negroes, and on March 4, of the same year, he sold eighteen more negroes, making forty-seven in all. Among the negroes sold on February 4, 1850, were Sophy

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and Nanny, purchased by the defendant, Isaac A. Wood, for \$770; and Charlotte, purchased by the other defendant, Wm. Ashley, for \$675. To these purchasers the sheriff executed bills of sale, and delivered the negroes, and from them received the purchase money. Sophy, purchased by defendant Wood, was received by Jabez G. Brown from Bartlett Brown's estate, and Nanny (also purchased by Wood), is the child of Sophy. Charlotte,

purchased by defendant Ashley, is also a child of Sophy, and derived by J. G. Brown in the same way, from his father's estate. At the sale of these negroes, J. G. Brown encouraged bidding by stating that the property was valuable, and that his title to it was good, and free from any incumbrance whatever; and this he loudly proclaimed to the bidders generally, from an elevated position near the auctioneer; and Barnett H. Brown, on the day of the sale, made like statements to one of the purchasers, and at the trial avowed he would have so stated to all inquirers, as he had forgotten the limitation of the deed to the grand-children of the donor. The negroes brought a full price for title to them in fee. On the part of the defendants, three witnesses stated their belief that the plaintiff, L. S. Brown, was present at the sale at which the defendants bought; and it appears that Angus P. Brown, the other plaintiff, though not present, was aware of the sale, inasmuch as he procured one of the negroes then sold, to be bought for him. On the part of the plaintiffs, two witnesses, who were examined in Charleston by commission, stated that they were fellow-clerks in the store of Bancroft, and that they believed the plaintiff, L. S. Brown, was in Charleston on February 4, 1850, principally because entries purport to have been made by him on that day, in the books of his principal, of sales made by him. This testimony was objected to by the defendants, on the ground that the books were not produced. Another witness, W. E. Calhoun, a cousin of the plaintiffs, testifies that he did not see L. S. Brown at the sale, and thinks he would have seen him, if he had been there. And B. H. Brown testifies, that he does not remember the presence of his nephew, L. S. Brown, on the day of

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sale, and thinks he must have seen him \*and remembered his presence, if he had been present. One witness testifies, that J. G. Brown was an affectionate father, and communicative of his affairs to his children, and another says, he was chary in talking of matters of business to his family. The plaintiffs are of the respective ages of about twenty-seven, and twenty-five years; they generally lived with their father, and when absent, were so but for short intervals.

Angus P. Brown married in October, 1847, and since that time has lived apart from his father, but visited him frequently. The witness, James C. Brown, who is the cousin of the plaintiffs, and who is equally interested with them under the deed of Brown, states that he is of about thirty years of age, and knew of the old deed before the sale of February 4, 1850.

In 1844, Mr. Owens, the solicitor of these plaintiffs, filed a bill in this Court, in which J. G. Brown is the plaintiff, the object of which was to restrain the creditors of Nobles, and in that bill, the deed of Bartlett Brown

is set forth; the case was struck from the docket in 1847.

Jabez G. Brown died in April, 1852, and Mr. Owens is his administrator.

The plaintiffs pray specific delivery from Isaac A. Wood, of the slaves Sophy and Nanny, and an account of their hire since the death of Jabez G. Brown; and like delivery and account from William Ashley of the slave Charlotte, and her increase.

The defendants, in their answer, deny knowledge of the deed, and insist on plenary proof of its execution. They also plead, that they are bona fide purchasers for valuable consideration without notice; and insist that the plaintiffs knew of the deed and of the sale, and that whether they were present at the sale or not, they were bound to apprise the bidders at the sale of the existence of said deed; and that even if the deed be good between the parties to it, it is inoperative as to subsequent purchasers for want of express notice to them, or of constructive notice from recording in the proper office of the Secretary of State; and that the omission so to record the deed was gross negligence equivalent to intentional concealment, enabling J.

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G. \*Brown to deceive and defraud the community. And they further insist, that even if the deed had been properly recorded, it would not have been notice to purchasers, inasmuch as it does not specify and particularize the property intended to be conveyed by it; and that the plaintiffs ought to be remitted to their remedy at law, inasmuch as their claim is inequitable and unconscionable; that it would be unjust to permit the plaintiffs to take their full distributive shares of their father's estate increased by the purchases of defendants, and at the same time to compel the defendants to deliver up the property purchased by them; and that if a specific delivery is decreed, the administrator of J. G. Brown should be ordered to account with the defendants for the purchase money and interest, and that said administrator is a necessary party to the proceedings.

The defendants dispute, in the first place, the execution—particularly the delivery of the deed of Bartlett Brown of October, 1821. In general, a deed must be proved by one of the subscribing witnesses, if there be any; but this rule of evidence is inapplicable where the deed is thirty years old, and is free from just grounds of suspicion: in which case it proves itself as an ancient deed; or where the subscribing witnesses are dead, or beyond the jurisdiction of the Court, in which case secondary evidence is admissible. It is objected to the admission of the deed in question as an ancient deed, that it is not produced from the proper custody which was in the representatives of the trustees; and that it was recorded in the Registry of Barnwell, long after its date, and after the death of the grantor; and that the property con-

veyed was divided among the children of Bartlett Brown according to his will, and not according to this deed. Considering the circumstances corroborating the genuineness of this deed—that the subscribing witnesses attest that it was signed, sealed and delivered—that one of these witnesses makes probate of its formal execution,—that it was admitted to registry more than thirty years ago—that it was acted upon in the division of Benjamin B. Brown's estate, and set up in the equity suits of Brown v. Peyton and No-

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bles v. Peyton, and that there \*has been no possession inconsistent with it—none of the circumstances of suspicion suggested seem sufficient to overcome the intrinsic proof of this document as an ancient deed. As to the date of Bartlett Brown's death, I give effect to the testimony of his son, Barnett H. Brown, rather than to that of Dr. Lafitte. Still, there is nothing in the testimony of the son, hindering the conclusion that the father was dead before the recording or probate of the deed. I suppose that the deed may have been proved and recorded after the death of the grantor, at the instance of some of the donees, and may never have been reclaimed from the Register until 1852. Granting this, and likewise that the deed may have remained in the possession of the donor during his life, I should still infer delivery, in the absence of contrary proof, from the signing and sealing by the donor and trustee, and from the assent of the beneficiaries in remainder, to be implied from the benefit conferred upon them.

Under the circumstances stated, the fact that the deed comes from the custody of the Register creates little suspicion, and the fact that the children of the donor divided his property according to an anterior will, in subservience of their own interest, and in sacrifice of the rights of their surviving issue, has even less weight. If the proof went no further, I should hardly reject this deed, but when additional evidence is offered that two of the witnesses are dead, and the third out of the State, and that the signatures of the settlor and trustee, and of all the subscribing witnesses are in their proper handwriting, the proof of execution is complete, even if it were a recent deed.

No other objection to this secondary evidence is made, except that W. D. Brown, one of the subscribing witnesses, was within the jurisdiction four or five days after the plaintiffs' bill was filed, and that he now resides in Georgia, within fifty miles of the place of trial; and yet, that he has not been examined by commission. I think the plaintiffs are under no legal obligation to take his testimony by commission. They could not, under Rule 19, (Mill Comp. 56,) take his examination by commission before he left the State;

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and might afterwards avail themselves of his removal beyond the jurisdiction, not pro-



cured by them, to resort to secondary evidence of his attestation.

They seem to have acted in good faith in obtaining his promise to attend the trial, and in admitting on the trial his written statement, (his examination could have gone no further) that he remembered nothing of the execution of the deed. Proof of his handwriting as an attesting witness overcomes his failure to remember the transaction. I consider the execution of the deed as abundantly proved.

The defendants next insist that the interest of the plaintiffs under the deed is merely equitable, to which their plea of purchasers without notice is a complete answer and defence. The property in question is personalty as to which the estate of the trustee is intact by the statute of uses, (27 Hen. viii. c. 10). Granting, however, that a trust in personalty would be executed in the beneficiaries whenever a use in land would be so executed, the case of *Gadsden v. Cappedeville*, (Car. L. J. 343, 3 Rich. 467), apparently contrary to the reasoning of Chancellor Dargan's circuit decree in *William v. Holmes*, 4 Rich. Eq. 475, would require me to hold that the estate abided in the trustee. The estate here is conveyed expressly in fee to the trustee, to his heirs, executors, administrators and assigns, and in part for the sole and separate use of a married woman still living, and still a wife by second marriage. In the case cited, Chancellor Harper, in a decree, affirmed by the Court of Appeals, says: "That the idea does not seem to be warranted by any authority, that though the legal estate were executed in fee to the trustees, yet when the objects of the trust were accomplished, the fee might shift and become executed in the cestui que use. It is not enough that the purposes of the trust have been satisfied during a particular estate, or that no object is to be effected by giving the trustees a larger estate. If the gift be to them and their heirs, there must be something positive to restrict them to a particular estate, or inconsistent with the notion of their taking a fee. The whole fee was conveyed to the trustees, and the estate remained in them, at all events during the

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\*life of the donor, and there is nothing to divest it afterwards. I am of opinion, that in no case could there be such a partial execution of a use. The estate is one, and must be executed in the trustee or the cestui que trust. As observed by Lord Hardwicke, in *Gibson v. Rogers*, "this Court will not make fractions, and consider them as trustees for only part of the inheritance." Under the deed in question, the estate, even in the land, abides in the representative of the trustee so far as the interest of Mrs. Calhoun (now Mrs. Nobles) is involved; and if it abide in the trustee as to her portion, I suppose upon the authority of the case cited, it is not exe-

cuted in the beneficiaries jointly interested with her. Such would be my decision, if the subject of controversy had been land; but the case is much stronger as to personalty, where the estate of the trustee is unaffected by the statute of uses. In my judgment, the estate of the plaintiffs is equitable only; still, the case of *Bush v. Bush*, 3 Strob. Eq., 131, recognizes the right of the equitable owner of slaves to come into this Court for specific delivery of them.

Admitting that the estate of the plaintiffs is merely equitable, to which the plea of purchasers without notice would be a good defence, the defendants fail in proving that they have purchased any legal estate in the slaves in question. The 10 section of the Statute of Frauds, 29 Car. ii. c. 3, which authorizes a sheriff to take in execution for the debt of a beneficiary, lands and tenements held in simple trust for him, is inapplicable to equitable interests in personalty. *Scott v. Scholey*, 8 East. 486; *Rice ads. Burnett*, Speers Eq. 585 [42 Am. Dec. 336]. I am of opinion that the sheriff had no authority to seize or sell the slaves in question, and that the purchasers bought nothing.

It is further urged for the defendants, that the plaintiffs themselves, or at least those under whom they claim, had been guilty of fraud concerning the deed, or in the sale of the slaves in question. I conclude from the evidence, that neither of the plaintiffs was present at the sale, or concurred in the assertion of right in fee by Jabez G. Brown, and that the purchase by one of the plaintiffs through an agent of one of his father's

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\*slaves, (not one of the slaves under the deed,) does not commit him to the validity of the sale in fee of the negroes embraced in the deed. Doubtless all the parties believed, however erroneously, that Jabez G. Brown had some interest in the slaves liable to seizure and sale under execution; the mere acquiescence of the remaindermen in the sale does not make them participants in his fraud, even if there were intentional fraud on his part, which is not clear. It was urged, that from the peculiar relation of father and children, the plaintiffs are bound by the misrepresentations of the parent. In *Teasdale v. Teasdale*, Sel. Ch. Ca. 59, a father who permitted a son to settle in fee a jointure upon his intended wife in an estate to which the father unknowingly was entitled in fee after a life estate in the son, was held to be concluded by his acquiescence, because, if the father had known of the fee in himself, he would probably have joined in the settlement in fee, or at least it would have been insisted that he should have so joined as a condition of the match. But the converse relation of son to father is altogether different in its consequences, and I am not aware of any case which held the son bound under like circumstances. Besides, here the sons do not



claim at all under the father, but claim as purchasers from the grand-father. It was however insisted that the grand-father was guilty of some fraud in omitting to record the deed, and thus apprise subsequent creditors and purchasers of the rights of the remaindermen. It is assumed in *Bush v. Bush*, 3 Strob. Eq. 131 [51 Am. Dec. 675], and recognized in other cases, that such a deed as that now in question, is not required by our law to be recorded. Granting that under the Act of 1698, the deed should have been recorded in the Secretary of State's office, the fact of recording bears only on the question of notice to the purchasers, and I have already determined that question to be immaterial in this case.

Again, it is urged, that the deed of Bartlett Brown is inoperative, because it does not specify by name and age the particular slaves intended to be conveyed by it. The 47 section of the County Court Act, of 1785, di-

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recting memorials to be registered \*in the Secretary's office, of mortgages, deeds of trust, &c., of lands and negroes, does not require that the memorial shall contain the names and ages of the slaves; but I do not regard that section of force under the cases above referred to; and I suppose the deed must be governed by common law principles. *Id certum est quod certum reddi potest*. A conveyance of all the slaves of which a grantor is possessed, will carry all which he is proved by extrinsic evidence then to possess. It is clear, in the present case, that the slaves in controversy were either actually possessed by Bartlett at the date of this deed, or are the issue of some of those then in his possession.

It is further said in behalf of the defendants, that it is inequitable that the plaintiffs should reclaim from them the slaves in controversy, and at the same time take their full share in their father's estate; and therefore, that the administrator of Jabez G. Brown is a necessary party to the suit. I repeat, however, that the plaintiffs do not claim the subject of controversy under their father; and I add, that if the defendants have any equity, (which, by the way, is very doubtful,) to be reimbursed from Jabez G. Brown's estate for the purchase money of these slaves, it was their duty to bring it forward by bill. It cannot be set up by answer.

If the deed in question were regarded as a testament on account of the reservation of a life estate in the donor, (which, after *Jagers v. Estes*, [2 Strob. Eq. 343, 49 Am. Dec. 674,] I am not authorized to hold,) all the consequences in favor of the plaintiffs would result which have been deemed to follow the instrument as a deed, if the same had been admitted to probate in the Ordinary's office; and if I had taken this view, I should have suspended the suit until probate might be had.

The results of the case are hard upon the defendants, and I have considered their defence with indulgence, but I am reluctantly compelled to declare that the case of the plaintiffs is not of such inequitable character as to deprive them of the remedy which they seek.

It is ordered and decreed that the defend-

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ant Isaac A. Wood \*deliver to the plaintiffs the slaves Sophy and Nanny, and any increase of them subsequent to his purchase on February 4, 1850, and that he account to the plaintiffs for the hire and value of said slaves from the date of J. G. Brown's death; and in like manner that the defendant William Ashley deliver to the plaintiffs the slave Charlotte, and subsequent increase, if any; and account for hire from the date of Jabez G. Brown's death.

It is further ordered, that the account on the principles stated be taken and reported by the Commissioner of the Court.

The defendants, Isaac A. Wood and William Ashley, appealed on the grounds:

1. Because the deed from Bartlett Brown to James Overstreet cannot be admitted as an ancient deed—the possession proved having been under the will of the said Bartlett Brown, and therefore adverse to the deed.

2. Because there was no proof of the delivery of the deed, and the evidence disclosed such strong grounds to suspect that it never had been delivered, as should have induced the Chancellor to reject it.

3. Because the Chancellor should have dismissed the bill for the fraud of the plaintiffs, in this: that being aware of the sale, they failed to apprise bidders of the deed, though they well knew of its existence.

4. Because the deed is not of a form calculated to give notice, inasmuch as it is too general, and does not set forth the number, names and ages of the slaves, and therefore the Chancellor should have rejected it.

5. Because the defendants being bona fide purchasers, for valuable consideration, without notice of the deed, should under the circumstances, have been protected in their purchases, and the Chancellor should have decreed that the legal title was transferred to them by operation of law, for constructive fraud.

6. Because the Chancellor should have ordered the administrator of J. G. Brown to be made a party, and decreed that he should account to the defendants for the purchase

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money and \*interest, as an equitable set off to the delivery of the negroes to the plaintiffs.

7. Because the omission to record the deed in the office of the Secretary of State was evidence of fraud, sufficient to have required the Chancellor to dismiss the bill on that ground.

8. Because the evidence was uncontradicted that the possession of the negroes, unexplained to the defendants, enabled J. G.

Brown to appear as the real owner, thereby getting credit, and seducing purchasers, and the decree should therefore have been for the defendants.

9. Because according to the plainest principles, not only of equity, but even of common law, the title to the negroes was in Jabez G. Brown, and the decree should therefore have been for the defendants.

10. Because the decree is contrary to equity, contrary to common law, and contrary to evidence.

[For subsequent opinion, see 6 Rich. Eq. 359.]

Aldrich, Bellinger, for appellants.

Owens, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. Upon some of the points in this case brought under our review by the appeal, we are content with the reasoning of the Chancellor in the circuit decree, but it is proposed to add some observations as to the execution of the deed, and as to the effect of J. G. Brown's possession.

Where a deed is not liable to suspicion as to its date, if it purports to be thirty years old, it proves itself. The purpose of requiring proof as to a deed seemingly ancient, that it is produced from the proper custody, and that possession has been had under it, is to give assurance that it is truly ancient, and not antedated. In the present instance, the deed has been recorded in the registry of mesne conveyances for Barnwell more than thirty years, and the settlor and trustee who executed the indenture, (the signatures of whom are proved,) have been dead more than thirty years: so that the deed is necessarily

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of the \*age requisite for intrinsic proof. Where a deed is admitted in evidence as an ancient deed, it must be admitted as formally executed by signing, sealing and delivery. It is unnecessary to dwell on this point, as sufficient secondary evidence has been offered to prove the execution of the deed in question, if it be not self-proving.

It is proper to discuss more fully the effect of J. G. Brown's possession of the slaves in controversy under a deed not recorded in the Secretary of State's office. It has been earnestly urged upon us, that the decree in this case is in conflict with recent decisions of the Law Court in *Ford v. Aiken*, 4 Rich. 121, and *Burgess v. Chandler*, *Ib.* 170. If we supposed there was any such conflict, we should either conform to the judgment of the other Court, or send the case to the Court of Errors. The administration of justice between two Courts, professing to proceed on the same principles in matters of concurrent jurisdiction, would be justly unsatisfactory, if a party in the same state of facts should succeed or fail accordingly as by choice or compulsion he might be before one or the other of the tribunals. The great object of

establishing a Court of Errors was to redress this mischief of conflicting decisions in the two Courts. But there is no conflict in the present instance. The judgments in the cases cited, are not inconsistent with the decree under review. *Ford v. Aiken* and *Burgess v. Chandler* decide, that where a father-in-law delivers slaves to a son-in-law, the law raises the presumption of gift; and that if the father-in-law, by some secret arrangement, give the delivery the form of hiring or loan, and reserve the absolute title to himself, he is guilty of constructive fraud or of concealment, having all the consequences of intended deceit, as to subsequent creditors of the son-in-law, who extended credit on the faith of his ownership of the slaves. This is not new doctrine. It has been asserted by this Court, in *Garrett v. Bank of Hamburg*, 1 Strob. Eq. 66; *White v. Palmer*, *McM.* Eq. 115; *Edings v. Whaley*, 1 Rich. Eq. 301. The presumption of gift in such case, arises from the relation of the parties, and the duty

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of the \*father to provide for the maintenance and settlement in life of his children; and, as between the parties themselves, it cannot be rebutted by any subsequent modification of the gift against the will of the son-in-law; nor as to his subsequent creditors by contemporaneous modification of which they have no notice, actual or constructive. But the presumption of gift from mere custody of slaves, does not arise in the case of strangers in blood, not even in the case of step-father and son-in-law. *Willis v. Snelling*, 6 Rich. 283. Nor where the possession is derived from a stranger, is there any allocation for constructive fraud upon the creditors of him in possession. In such case, it is a question of intentional fraud. If one having the legal title, deliver possession to a stranger, with the purpose of enabling him to commit a fraud on purchasers or creditors; or if he wilfully allow the possessor to claim the property, and treat it as his own; he is guilty of express fraud, and cannot re-claim the property against one wrongfully deceived. *Brooks v. Penn*, 2 Strob. Eq. 120. Where a father delivers possession of a chattel to a married daughter, and by secret reservation of title to himself, endeavors to obstruct the *jus mariti*, he obviously violates the policy of the State, in prescribing registration of marriage settlements; and properly fails in a contest with creditors of the son-in-law who have trusted to his apparent ownership. But in a case where the duty of maintenance does not exist, where the Legislature has not prescribed notice to creditors by registration or otherwise, and where no deceit is intended, it would be preposterous to hold that the owner could not maintain his title against the creditors of him in custody of a chattel, although they may have had no notice of the title in another. If A. should hire a slave to B., a stranger, for a week, or for years, without any intentional fraud, it would not be pre-



tended that B.'s possession of the slave gave his creditors any right to purchase the chattel for the satisfaction of their debts, although they may have had no notice of the bailment, and may have rashly inferred from his mere possession, that B. was owner. It is conceded in the argument here, that the

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notion \*of constructive fraud from the mere transfer of possession so as to defeat title, has no application except as to dealings between father and son, or son-in-law. But it is argued that Bartlett Brown, the donor in the deed, by omitting to record the deed in the office of Secretary of State, enabled his son Jabez, who afterwards came into possession of the slaves, to commit a fraud upon his creditors, and incurred the consequences of constructive fraud.

The argument lacks the necessary grounds of fact, that the donor transferred the possession of the slaves to the son while title abided secretly in himself, and that the law requires such a deed to be recorded in the Secretary of State's office.

Bartlett Brown retained possession of the slaves during his life time, and as long as any title continued in him or his representatives by operation of the deed. He obtained, and he sought, no advantage from his own wrong. He transferred no possession to his son, which the security of creditors required him to keep, on pain of forfeiting all title and advantage to himself. He did not knowingly permit his son to acquire any delusive credit by possession of the property.

If there was any obligation by law to record the deed, the duty was imposed upon the trustee, and not the donor. If the law does not require recording of such deeds in the Secretary of State's office, registry there would not operate as constructive notice to creditors; and so far as good faith is involved in measures for giving notoriety to the deed, and thus preventing the life tenant from deluding creditors by his possession of the property, recording the deed in the Clerk's office in Barnwell, was better adapted to the end, than recording it elsewhere. That was the proper office for recording as to the lands conveyed by the deed, and in that District all the parties resided. Incautious creditors frequently suffer by the constructive notice to them, arising from the legal registry of instruments of title; and they suffer, in the same lack of actual information, where notice of title separate from possession of the chattel, is not required to be given to them. No contrivance

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of man can make the state \*of the title, where it is not co-incidental with possession, so notorious as the fact of possession. It is clear, and it is conceded in the argument of appellant's counsel, that no statute of the State requires a gift of slaves by deed of trust to be registered in any office; but it is

insisted, that as the law requires certain conveyances of personalty, for certain ends, to be recorded in the Secretary's office, this permits the recording there of all conveyances of personalty, and makes the omission of the donor to avail himself of the permission in the special case of a father giving to a child or son-in-law, a constructive fraud upon the creditors of the donee in possession. Before the Act of 1843, concerning mortgages, which does not apply to this case, the only Act of this State, now in force, relating to registry of transfers of personalty other than marriage settlements, was the Act of 1698, (2 Stat. 137,) which includes only sales and mortgages of negroes and other chattels. This trust deed is neither sale nor mortgage. As to sales and mortgages, the Act does not absolutely require recording. It merely postpones a sale or mortgage not recorded in the Secretary's office to a subsequent sale or mortgage which has been so recorded. An unrecorded conveyance of personalty, not infected with fraud, is good against any posterior title except a sale or mortgage made by the same grantor, and properly recorded. According to the construction given in *Youngblood v. Keadle*, 1 Strob. 122, the Act was intended to guard against double sales or mortgages by the same person; and it was held there, that a bill of sale made by one to whom A. had transferred a slave by parol sale and delivery, had no precedence under the Act to A.'s prior unrecorded mortgage; and the bill of sale was treated as the Act of a third person. Here the bills of sale under which defendants claim were made by Jabez G. Brown, through his agent, the sheriff, and in no proper sense can be treated as the acts of the grantor in the trust deed. See *Bush v. Bush*, 3 Strob. Eq. 131 [51 Am. Dec. 675]. The will of Bartlett Brown was revoked by the deed as to the estate conveyed by the latter; and in no view is a will to be regarded as a sale or mortgage within the meaning of the Act of 1698.

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\*The plaintiffs themselves have been guilty of no fraud concerning the deed or the property conveyed by it, unless it may be in not making proclamation of their interest in the slaves on the occasion of the sheriff's sale. But they were not present at the sale; they did not procure their father's possession of the slaves; they are not bound by his misrepresentations made while they were absent; they probably supposed that the life estate of their father was liable to sale; and their equitable right, contingent on their surviving their father, was not then vested in title or possession. Under these circumstances, they are not affected by the fact that purchasers were not apprised of their claim under the deed.

If any person committed a fraud, it was the life-tenant, and it would be a strange re-



sult, that his deceit, without collusion with the remaindermen, should defeat their estate, and enlarge his own into a fee, even for the benefit of his creditors. He would make profit from his own wrong. And however we may be disposed to protect creditors, we should not encourage, for their benefit, speculating frauds by tenants of particular estates against those entitled to the fee.

It is ordered and decreed, that the appeal be dismissed, and the circuit decree be affirmed.

DUNKIN and DARGAN, CC., concurred.

JOHNSTON, Ch., absent at the argument.  
Appeal dismissed.

NOTE.—The following circuit decree of Ch. Johnston, valuable for collecting all the Acts concerning registry, and his comments on them, is here appended as a note to *Brown v. Wood*:  
REBECCA DOPSON, Adm'x.

of Jos. R. Dopson, et al.

v.  
JANE HARLEY and JOHN A. HAYS,  
Adm'ors of Jas. Harley, et al.

} In the Court of Equity,  
} Barnwell District.

[This case is also cited in *Jones v. Hudson*, 23 S. C. 501; *McGee v. Jones*, 34 S. C. 151, 13 S. E. 326, as to notice.]

The above cause came to trial before Chancellor Johnston, on the 1st February, 1852. The bill stated that in 1798, one Edward Harden made a voluntary conveyance of certain slaves to his near relation, Joseph R. Dopson, in trust for the joint use of the plaintiff Rebecca, wife of said Joseph R. Dopson and the other plaintiffs, her children, and one Robert Miller, a nephew; that Joseph R. Dopson, during his

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life, disregarding his character as trustee, sold some of the slaves contained in the said deed, and that all the purchasers had notice of the deed of 1798; the bill then prays for a delivery of the negroes, and for an account of their hire.

The defendants pleaded that they were innocent purchasers, for valuable consideration, without notice, &c.

The said deed was dated the 24th November, 1798, and was recorded in the office of Register of Mesne Conveyances for Beaufort District, on the 1st November, 1799, and nowhere else.

"I shall now enquire," says the Chancellor, "whether the defendants and those under whom they claim had notice of the deed, premising that wherever in tracing a title in defendants, you first come upon an innocent purchaser having no notice, from that moment the title is considered sacred in Equity; under which principle, a purchaser with notice, from one without notice, is protected in this Court. The plaintiffs insist that the defendants and those under whom they claim, are fixed with notice—1. By rumor—2. By certain public proceedings—3. By recording the deed; and 4. By actual personal notice. I know of but two kinds of notice: actual or personal, and constructive or implied. Under one or the other of these heads, the different modes in which it is contended the defendants were notified of the deed must fall."

The Chancellor then goes on to argue that constructive notice cannot be implied from rumor, however general. Passing from that, he decides that no notice is to be inferred from the public proceedings relied on, consisting of a decree relating to the property pronounced after the purchases; and then he takes up the question of recording.(a)

(a) *Rutledge v. Smith*, 1 McC. Ch. 405; *Irby v. Vining*, 2 McC. 379-380. *Bank v. Humphreys*, 1 McC. 388-90.

"To operate as constructive notice," he proceeds, "the recording must have been in the office pointed out by law, and the deed must be of that from which it is calculated to impart the notice intended by law. The deed in question was recorded by the Register of Mesne Conveyances for Beaufort, the 1st November, 1799. That was the only recording, either of the deed itself, or of any abstract or memorial of it, that ever took place within this State or elsewhere. In my opinion, the deed was not properly recorded.

"An Act was passed on the 16th June, 1694, entitled 'An Act for the better and more certain keeping and preserving of all registries and public writings of this part of this province.' I have not the means of ascertaining its contents, or knowing whether there exist any other traces of the Act than the title, which is to be found in the 7th page of the titles of the Acts of Assembly preceding the Public Laws, and is numbered 106.

"By the Act of 1698, (Pub. Laws, 3; 1 Brev. Dig. 165-6,) it is declared that that conveyance of lands and tenements, which should be first recorded in the Register's office in Charleston, then the only office of that kind in the province, (and the same, I apprehend, which is in subsequent Acts styled 'the Register's Office of the Province,') should be preferred over all others: And that that conveyance of negroes, goods or chattels which should be first recorded in the Secretary's office in Charleston should be preferred over all others: under which Act, by the way, it has been adjudged(b) that the term 'Chattels' was not intended by the framers of the Act to include chattels real; conveyances of which must be recorded by the Register.

"The Act goes on to subject these two officers to damages for false certificates to enquirers concerning the conveyances recorded in their of-

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fices respectively. This statute clearly makes the Register's the proper office for recording conveyances of realty, and as clearly points out the Secretary's as the proper office for recording conveyances of personality, expressly including negroes.

"The next Act on the subject of recording is that of 1731 (Trott's Law; P. L. 131. 131(c). It relates altogether to lands; but perhaps something may be gathered from it. The 18th clause declares that the officer of Register, (styling it 'the office of Register of this Province,') established for recording mortgages and conveyances of lands, shall be continued distinct from all other recording or other offices, among which is mentioned that of Secretary of State, whose duties we have already seen in the Act of 1698. This legislation still leaves the Secretary's the proper office for recording conveyances of negroes; unless, indeed, by a strained construction, one particular kind of conveyance of them (mortgages) might be recorded with the Register. No admissible construction would include such conveyances as Harden's deed of 1798.

"The 22 Article of the Constitution, adopted 26th March 1776,(d) provides that the Register of the Province be chosen by joint ballot of the General Assembly and Legislative Council, but does not alter his duties.

"The 29 Article of the Constitution of 1778, (e) provides for the election by joint ballot of the Senate and House of Representatives, of a Register of Mesne Conveyances for each district (District Courts had in the mean time, particu-

(b) *Ex Parte Leland*, 1 N. & McC. 460.

(c) See note to *Peay v. Pickett*, 3 McC. 323.

(d) Published with the Acts of 1823, p. 154. This is the oldest revolutionary constitution in the Union. It contains a very full enumeration of the causes of the revolution, coinciding with those set out in the declaration of independence adopted by the General Congress several months afterwards.

(e) *Idem*, 160.

larly in the Act of 1769 (P. L. 268; 1 Brev. 218)(f) been established): but the Article of the Constitution last mentioned leaves the duties of the Register the same as before. We shall see hereafter, that no Register was by law, in obedience to this Constitution, given to Beaufort, until 1786.

"Then comes the County Court Act of 1785 (P. L. 385); from the operation of which, by its 57th section, the district of Beaufort, (in its whole extent, as defined by the 2 sect. of the Act of 1769,) P. L. 269; 1 Brev. 219, is exempted, together with the districts of Charleston and Georgetown.

"The 45th section, P. L. 381; 1 Brev. 171, enacts that within times, therein limited, conveyances for lands, tenements and hereditaments shall be recorded in the office of the Clerk of the County Court, within whose county the lands lie; at the same time declaring that such conveyances shall not be admitted to record, except upon proof of their execution in open Court, by the acknowledgment of the grantors, or by the oath of two witnesses. This section also declares the effect of recording conveyances of lands.

"The 47th section, P. L. 382; 1 Brev. 172 (the only one in which personality is mentioned,) is as follows: 'And to the end that persons who are inclined to lend money upon the security of lands or negroes, or to become purchasers thereof, may more easily discover whether the lands or slaves offered to be sold or mortgaged, be free from incumbrances: Be it further enacted, that a memorial of sales and conveyances, mortgages, marriage settlements, deeds of trust, whereby any lands or slaves residing in this State, charg-

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ed, encumbered \*or passed from one person to another, shall be registered in the Secretary's office, in books to be kept for that purpose, which memorial shall contain the date of the deed of conveyance, the names, surnames and additions of the parties thereto, the consideration mentioned therein, the lands conveyed, settled or mortgaged, and where the same lies, and the number, names and ages of the slaves, if any be sold, settled or mortgaged: And the Clerks of all and every of the County Courts, within this State, are hereby required, twice in every year—in the month of January and June,—to transmit memorials of all such deeds, settlements, mortgages, or other conveyances, as shall have been proved and recorded in their respective Courts, the preceding half year, to the Secretary's office, to be there registered as aforesaid.'

"An Act of 1786, (P. L. 400, No. 1418,) declares that in obedience to the Constitution (of 1778,) a Register of Mesne Conveyances shall be appointed for Beaufort, to possess 'like powers and authorities with those exercised by the Register in Charleston,' that is, (I apprehend,) the powers conferred by the Act of 1698. A Register is at the same time given to Georgetown."

"Another Act of 1786, P. L. 401, No. 1419, relating to the subject of recording, only goes to amend the Act of 1785, by providing a different mode of proving deeds in certain cases, in order to their being recorded in the County Courts.

"The Act of 1788, P. L. 453; 1 Brev. 173, further amends the Act of 1785, by entitling deeds to record in the County Courts, upon acknowledgment of their execution by the grantors before a Judge of the Superior Courts, or the oath of one witness before a justice, out of Court.

"The Act of 1785 is further amended by that of 1789, P. L. 485; 1 Brev. 173-4, which extends the time for recording conveyances for lands.

"Stopping the investigation at this point of time, it appears to me, that in 1789, such a deed

as that of Harden could not be recorded in the Register's office for Beaufort.

"The Act of 1698, gave the registration of such deeds to the Secretary of State. There is nothing in any succeeding ordinance to take them from him, except the 47th section of the County Court Act. Upon that section it may be observed, that it does not positively require that such deed should be recorded in the County Courts. The law could have been fully satisfied, for any thing contained in that section, if such deeds had been recorded in the Secretary's office, although never recorded in the County Court. In other words, if the Act of 1698 had been observed, nothing more could be required by virtue of the section referred to. But if the whole deed was not recorded in the Secretary's office, agreeably to the Act of 1698, then it was required by that section, that at least a memorial should be registered in that office; in which case the enquirer must be sent to find the deed set out at length in the County Court, to which the memorial would refer him.

"The Clerk of the County Court could not refuse to record a deed for lands, because the 45 section of the Act under examination declared that deeds for lands should be recorded in his office. He might have refused to record deeds for negroes, because the 47 section, (the only one which relates to conveyances of personality,) does not declare that such deeds shall be recorded in his office. In that case, the grantor would have been driven to register his deed at large in the Secretary's office. If, however, the Clerk undertook and did record, in which case, he became quasi the agent of the grantee, then a

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memorial \*was positively required to be recorded in the office of Secretary. In either case, the Secretary's office was made by law the point whence notice was to issue to subsequent creditors and purchasers. It was essential that some such central point of warning should be established, as related to personality; which being transitory in its nature, (and the evidence of right as to which, lying mostly in possession,) it might be carried from district to district, and from county to county, and purchasers under such circumstances would not otherwise have been safe without consulting the records of every County Court in the State.

"That the Secretary's office was intended as a central point for extending notice, and that the County Courts were not intended, but through this central point, to communicate notice, may be inferred from another circumstance. The 47th section of the Act of 1785 does not declare the effect of recording the deed in the County Court, or the memorial in the office of the Secretary, and the effect cannot be learned unless we call in the aid of the Act of 1698. Putting the 47th sect. of the Act of 1785, and the Act of 1698 together, I infer that the Legislature, by both, meant, that all deeds of personality should, in some shape or other, be recorded by the Secretary; and when recording took place there, in that case, and in that case only, should the recording have an effect to work a preference among deeds for the same property. A recording in the County Court alone, worked no preference."

The Chancellor proceeds to argue, that even admitting that the County Court Clerks were bound to record deeds such as the one under consideration,(g) and that such recording operated constructive notice, still that would not authorize recording them by the Register of Mesne Conveyances in Beaufort District, (where no County Court was ever established,) or raise an implication of notice from such reading. He maintains that the offices of County Court Clerk and the District Register of Mesne Conveyances were distinct; that their duties were different as respects this subject of recording; that the

(g) Compare 1 Faust 17 with do. 19 20. Et Vide P. L. 475—No. 1570.

(f) And see note to 1 Brev. 215.



duties of the Register were defined by the Act of 1698; those of the Clerk, by the Act of 1785, and that the duties of the Clerks of County Courts were limited by the extent of the county Court system; that the only case in which the Secretary's office was not the only proper office for recording conveyances for negroes, was where County Courts existed; and that in no case, had a District Register the right to record such conveyances.

It may not be out of place here to state that County Courts were abolished in 1799, (see 7 Stat. 291.)

"That District Registers of Mesne Conveyances" proceeds the Chancellor, "had no such right," (the right to record such conveyances), "appears, I think, by a legislative exposition of the recording law. It will be recollected that the three districts excepted out of the County Court system were Charleston, Beaufort and Georgetown. Of these, Charleston always possessed a Register. In 1786, Registers were given to Beaufort and Georgetown also, possessed of the same powers as those exercised by the Register of Charleston. What powers, in relation to recording were thus conferred on the Registers of Beaufort and Georgetown? Did they extend to the recording conveyances of negroes or any other species of personalty? If they did, why was it deemed necessary to confer that right on the Register of Georgetown, as the Legislature did by the Act of 1791?(h).

"Up to the passage of that Act, no Register of Mesne Conveyances in the State, and after it, none but the Register of Georgetown could rightfully record conveyances of negroes.

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"In 1799 the Clerks of the District Courts for every district except Georgetown and Charleston, were by statute (i) constituted, in virtue of their clerkships, Registers of Mesne Conveyances for their respective districts; but their duties were left, as by the Act of 1698, to extend only to the recording of conveyances for land. And thus, I believe, matters remain to this day; the Legislature still electing, under the Constitution of 1778, the Register of Georgetown and Charleston; while those of other districts, being Clerks of the District Courts, are elected by the people.

"My opinion, then is, that since the abolition of the County Courts, (which took place on the 1st January, 1800,)(j) the only proper office for registering conveyances of personalty is that of the Secretary of State, excepting only conveyances of that description in Georgetown, which by special statute may be recorded by the Register of that district.

"Granting, however, that the Register of Beaufort was the proper recording officer, in the first instance, for Harden's deed, there would be several difficulties in implying notice from the registration there.

"The first difficulty is, that no memorial of the deed was recorded with the Secretary of State;

"The second is, that the deed was not proved before it was admitted to record;

"The third is, that the deed recorded is not of a form calculated to give the notice intended to be produced by recording.

"Upon the first, my opinion is, that the registration of a memorial with the Secretary is indispensable; and that creditors or purchasers will not be disturbed in this Court unless notice has been extended to them by the means afforded for extending constructive notice. Registers act for the benefit of the claimants under the deeds recorded by them, and not for the benefit of but against subsequent creditors and purchasers. It follows, then, that as between an equitable claimant and subsequent creditors and purchasers, the Register, although a public officer, is to be considered the agent of the equitable claimant,—rather than that of subsequent creditors and purchasers,—for the transmission of the memorial to the Secretary; and on his failure to transmit it, the equitable claimant rather than the creditors or purchasers, should suffer in the first instance, and be thrown, for relief, on his remedy against the defaulting officer."

The Chancellor then considers the second difficulty, (that the deed was not proved before it was admitted to record,) and then passes on the third objection, to wit: that the deed is not of a form calculated to give the notice intended to be produced by recording.

In regard to this objection, he says, "I think it is substantial. The Act of 1785 requires that the memorial, and of course, the deed, should set forth the names and ages of the slaves. Some description of the slaves, to make them known when carried from place to place for sale, was absolutely necessary, in order to put purchasers on their guard. The age and name of a slave would, in general, answer this salutary purpose. The deed from Harden does not state ages of any of the slaves. The Act, if insisted on, by the plaintiffs, must be shewn by them to have been strictly complied with—constructive notice cannot otherwise be implied.

"Before I quit this subject of recording, I may be allowed," says the Chancellor, "to say, that I have not found any decision in which recording conveyances of personalty by the Register has been held good. I do not know how to

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interpret some expressions used \*in Harrison v. Strother, 1 Bay. R. 332. In that case, the deed recorded by the Secretary was preferred. Still, it must be admitted, the language of the report is very vague. The deed recorded by the Secretary was certainly 'first recorded,' and being recorded by the Secretary, was recorded 'somewhere in the State.'

"The result of this investigation is, that constructive notice cannot arise from the recording of the deed of 1798. The only remaining inquiry upon the subject of notice, is, Was there actual personal notice?"

The Chancellor then proceeds to conduct this inquiry at considerable length, and finally decides that some of the defendants had actual notice, and that others had not. In regard to the former class, he gives relief, and in regard to the latter, he dismisses the bill, and so sustains the plea of purchase for valuable consideration.

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(h) 1 Faust, 89; 1 Brev. 176.

(i) 2 Faust 318; 1 Brev. 119.

(j) 2 Faust, 265.





CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT CHARLESTON, SOUTH CAROLINA—  
JANUARY TERM, 1854.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,  
“ BENJ. F. DUNKIN,  
“ GEO. W. DARGAN,  
“ F. H. WARDLAW.

6 Rich. Eq. \*183

\*JOHN H. TUCKER v. BENJ. F. HUNT and  
Others.

(Charleston. Jan. Term, 1854.)

[Payment ⇐66.]

Bond due February 11, 1830, secured by mortgage of real estate, was assigned by W. M. to the Bank, as collateral security to a note drawn by the obligor, and endorsed by W. M. In 1838, the Bank recovered separate judgments on the note against the drawer and endorser, and at the same time obtained from the law Court an order for foreclosure of the mortgage—there being no judgment on the bond. W. M., the endorser, afterwards satisfied the judgments on the note, and took back the bond and mortgage. In 1852, proceedings were instituted by the legatees of W. M. for payment of the bond: *Held*, that the order of the law Court for foreclosure of the mortgage was sufficient to rebut the presumption of payment of the bond arising from the lapse of time.

[Ed. Note.—Cited in *Harper v. Barsh*, 10 Rich. Eq. 152.

For other cases, see *Payment*, Cent. Dig. § 188; Dec. Dig. ⇐66.]

Before Wardlaw, Ch., at Charleston, June, 1853.

The circuit decree is as follows:

Wardlaw, Ch. On February 11, 1825, Benj. F. Hunt gave to Charles T. Brown five bonds,

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each in the penalty of \$40,000, \*and conditioned for the payment of \$20,000, with interest from the date, payable respectively, on February 11, 1826; February 11, 1827; February 11, 1828; February 11, 1829, and February 11, 1830; and to secure the payment, mortgaged to Brown, the Richfield plantation, and one hundred and sixteen slaves. The bond due in 1826, seems to have been paid by the obligor to the obligee. The remaining four were deposited by Brown, in

the Branch Bank of the United States at Charleston, about June 14, 1826, as collateral security for a note made by him to the Bank, for \$18,500, and endorsed by William S. Smith; and on the day mentioned, B. F. Hunt signed a certificate that he had made no payments on the bonds, except such as were endorsed thereon, and agreed that future payments should be made, after due notice to the Directors of the Bank. On June 21, 1828, Brown wrote a letter to Hunt, in which he proposed to release a large portion of his debt, if the latter would make arrangements to pay promptly some of Brown's debts which were pressing. This led to a negotiation between the parties, which resulted in an agreement, according to my view of the evidence, that the plaintiff, Tucker, should be substituted to the rights and interests of Brown in the bond due in 1827, to the extent \$14,548.45, the balance of this bond being extinguished by payment or other arrangements not explained; and that the sum due on the three remaining bonds, \$69,748, should be extinguished by the payment of \$49,748, upon certain debts of Brown, namely: \$18,500 to the U. S. Bank; \$7,500 to the Bank of the State; \$5,600 to the State Bank; and \$18,148 to Mr. Ball. In pursuance of this agreement, B. F. Hunt, in October, 1828, received, "as agent of Mr. Brown, until the negotiation is concluded," his bonds from the bank of the U. S., delivered three of them to W. S. Smith, October 8, 1828, to procure blank assignments from Brown, and afterwards received them again from Smith. Brown assigned to William Aiken, without recourse to himself, the two bonds payable in 1828 and 1829, and so much of the mort-



gage as might be necessary to secure the payment of the two bonds; and also assigned to

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\*William Matthews, without recourse to himself, the bond payable in 1830, and so much of the mortgage as might be necessary to secure the payment of this bond. The assignment of the bonds to Aiken bears date October 6, 1828, and the assignment of the bond to Matthews, bears date October 9, 1828; the assignments of the mortgage being undated. This assignment of bond and mortgage to Matthews, proceeded from an arrangement, by which the note of Hunt, endorsed by Matthews, to the United States Bank, for \$18,500, was given in substitution and payment of the note of Brown, endorsed by Smith, and was intended as collateral security to Matthews for this endorsement, and for the endorsement by Matthews, of another note made by Hunt for \$9,900, which latter was further secured by a separate mortgage on different estates in St. James, Santee. Matthews deposited the bond in the Bank, and assigned the mortgage to the Bank without date, as collateral security for the payment of the note of \$18,500. On April 21, 1836, the two notes of Hunt endorsed by Matthews, previously kept up by partial payment and renewals, were protested for non-payment; and on June 10, 1837, the Bank of Charleston, which had succeeded to the assets of the Branch Bank of the U. S., obtained separate judgments upon these notes against Hunt and Matthews, and on November 23, 1838, lodged *fi. fas.* for \$19,976.44. At the date of the judgments, the Bank of Charleston also obtained an order (of doubtful regularity) for the foreclosure of the mortgage on Richfield, and the plantation in St. James, Santee, which foreclosure, however, was never executed. In the years 1840 and 1841, Mr. Matthews, through his financial agent, B. P. Colburn, paid off the judgment of the Bank of Charleston against him; the last payment on the debt being January 29, 1841, although a payment of \$100 for sheriff's commissions, was made July 9, 1841. At the time of making the last payment on the debt, Mr. Colburn obtained from the Bank, possession of the bond and mortgage assigned to Mr. Matthews, and having informed Mr. Matthews of the fact of his possession of these instruments, retained possession of them until Au-

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gust 12, 1848, \*when he delivered them to Lawton, executor of Matthews. No payment on the bond itself appears to have been made after February 11, 1826, to which date the interest was paid. From some time before 1840, until the death of Mr. Matthews, on July 22, 1848, there was no friendly intercourse between Col. Hunt and himself. Mr. Matthews, by his will, gave to the children living at the death of his daughter, Susan B. Hunt, wife of Col. Hunt, to be equally divided between them, all bonds, notes, judgments,

mortgages, or other securities or evidences of debt, held by him against their father. On December 6, 1848, Lawton, executor of Matthews, filed his bill in this Court for instruction, in the management of his testator's estate, against Mrs. Hunt, her children, and others; and amongst other things, claimed that at testator's death, a large sum of money was due and unpaid to testator by his son-in-law, B. F. Hunt, and prayed an account of said debt, and the judgment of the Court, whether the principal only, or the aggregate of principal and interest, or what portion thereof, should contribute to the payment of the debts and legacies of the testator. Mrs. Hunt, in her answer to this portion of the bill, after disclaiming interest in the matter, says, "that there were many and bitter controversies between her husband and father, in which the parties differed so much as to cause an estrangement for many years. And, as in his will, her father has restored to her family property which her husband claimed, and with which he is fully satisfied, so that the controversy is ended, she denies the right of any stranger to re-open these controversies; and the bequest of all claims against their father to his children, she and all her family consider as a peace offering to her family; and she most solemnly eschews all foreign interference, as the claims were mutual, and not admitted, and nothing but a protracted controversy could ascertain any balance, and that would be a specific legacy, and liable only on failure of other assets, which are ample to satisfy all other demands." The answer of the children of Mrs. Hunt says, "that they have read the answer of their mother, Susan B. Hunt, and that they approve and adopt the same so far as it

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\*extends; and that in relation to the bequest to them of all accounts and demands against their father, B. F. Hunt, they are cognizant of mutual claims between him and the testator, which for many years prior to his death, caused an estrangement and cessation of intercourse between them, &c. In the latter part of his life the testator became satisfied that their father had dealt fairly by him, and that his conduct had been such as ought to have maintained those friendly family acts of mutual kindness, which had so happily existed during many years after their domestic connections were formed, and so testator frequently admitted, and as they fully believed, with a view to prevent any person interfering, or in any way moving all or any of the matters between them, the testator gave all demands against their father to these respondents as a legacy, after so bestowing his estate as to cover all the disputed matter between him and his son-in-law; and as any balance, if due, would diminish the means of their father, whose estate in the course of nature, will devolve on these defendants, between whom and their

parents no diversity of interest is felt, all participating from their youth in the common means of all, they, therefore, utterly deny any power in the executor to do more than assent to, or refuse the legacy, leaving it to be settled by the parties, and thus carrying out the will of the testator. These defendants as residuary legatees of the estate left for life to their mother, thus fully agree and unite in her views stated in her answer, &c." Col. Hunt demurred to the bill, because no specific claim within the limited jurisdiction of a Court of Equity was made against him. The Court decreed on this point ([*Lawton v. Hunt*] 4 Strob. Eq. 9) in the following terms: "It was stated at the hearing, that painful differences had existed at one time between the testator and Col. Hunt, in relation to their pecuniary transactions. I think that a careful analysis of the language of this clause, will warrant the inference that the testator did not speak of an ascertained debt, or interest bearing fund, as due by Col. Hunt, but that he referred to all the evidences of demands adjusted or unadjusted, which the testator held, or which

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might be found in his possession; \*these he transferred to the children of his debtor for as much as they might be worth. It was thus rendered an account easy of adjustment; it was a peace offering which the Court would be solicitous to respect, and which any other construction might very easily convert into a firebrand of litigation and discord. To effect the purposes of the testator, the gift should take effect immediately and entirely." Under this decree, the executor of Matthews delivered the bond, mortgage and other evidences of debt by Col. Hunt, to testator Matthews, to Master Laurens, and these papers have been recently found by Master Tupper, amongst the papers of his office, but not regularly transferred to him as successor of Master Laurens, and they are produced at the trial by Master Tupper. Col. Hunt, in the course of *Lawton v. Hunt*, also received through the master payment of about \$2,000 for professional services rendered by him to Mr. Matthews in his life time. The present bill, by Tucker against Hunt and others, was filed December 27, 1851, and the amendment thereof, directed by the decree of Chancellor Dargan, and bringing, for the first time, into litigation the validity of Hunt's bond assigned to Matthews, was filed July 31, 1852. This bill is taken pro confesso against Col. Hunt, but the children, the mother being now dead, answer, claiming the bond of their father, assigned to Matthews, and by him devised to them. In 1849, James B. Campbell became owner of the two bonds originally assigned to William Aiken, and after a correspondence between him and Col. Hunt, in which Col. Hunt asserted the subsistence of the bond assigned to Matthews, it was agreed by

Col. Hunt and his children, except George, that the bonds assigned to Aiken and Tucker, should have some precedence over the bond assigned to Matthews; but I must refer to the correspondence and agreement for the extent of the preference and further particulars. Under these circumstances, the question is submitted to me, whether the bond assigned to Matthews is a subsisting debt, and entitled to the security of the mortgage given by Hunt to Brown.

The presumption of payment of a bond,

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arising from the \*lapse of twenty years after its maturity, is not a presumption of law, absolutely irrebutable to be made by the Judge, but it affords evidence of the fact of payment, always conclusive in the absence of partial payment, or other rebutting circumstances, upon that portion of the tribunal which determines facts. In a Court of Equity, the Chancellor, in determining the facts, should give effect to the presumption, wherever a Law Judge ought to direct the jury to draw the conclusion of payment. In *Stover v. Duren*, 3 Strob. 450 [51 Am. Dec. 634], it is said, this is one of those strong presumptions which shift the burden of proof, which from frequent occurrence, have become familiar to the courts, and which being constantly recommended to juries from motives of policy, have acquired an artificial force, and become as important as presumptions of law. "When, by the expiration of full twenty years, the presumption of payment has acquired an artificial force, so that it stands in place of belief, an admission that the payment has not in fact been made, cannot, of itself, destroy the effect which considerations of policy have given to a certain lapse of time, whether the payment has or has not been made." In the present case, the presumption of satisfaction, from the lapse of twenty years, is much corroborated by the dealings between Brown and Col. Hunt, concerning the satisfaction of the bonds, by the careless treatment afterwards of this bond as an instrument of debt, by the answer of the present claimants in *Lawton v. Hunt*, amounting very nearly to a disclaimer of all interest and right in the bond, and by their permitting in that suit certain claims of the obligor to be paid without interposing any set off on account of this bond. In *Blake v. Quash*, 3 McC. 340, the Court approves a remark cited from 1 Selw. N. P. 589, in substance, that where the lapse of time has been less than twenty years, the fact of the obligee's having settled an account of the obligor's, in the meantime, without bringing forward his bond, may be sufficient evidence of satisfaction of a bond. See also *Best on Presumptions* 42, 188; *Buchan v. James*, Speer's Eq. 379; *Foster v. Hunter*, 4 Rich. Eq. 20; *McQueen v. Fletcher*, 4 Rich. Eq.

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161. \*The circumstances relied upon in this



case, as rebutting the presumption of payment from lapse of time, seem to me insufficient for the purpose. The recent acknowledgments by Col. Hunt, of the subsistence of the debt, have very little weight, when we consider that the rights of other claimants of the subject mortgaged have intervened, and that these acknowledgments are in practical subservience of his own interests through the interests of his children. The judgment of foreclosure in 1837, was not between the obligor and the obligee, and it has been satisfied by Matthew's payment of the debt. *Noonan v. Gray*, 1 Bail. 437. The possession by the assignee of the obligee, of the bond uncanceled, deserves less consideration than is usually given to the fact, when we regard the relations of the parties, and the indifference shown to the instrument of debt. It is adjudged and decreed, that the bond of B. F. Hunt to C. T. Brown, assigned to William Matthews, and by him bequeathed to the children of Mrs. Hunt, is satisfied and extinguished.

The defendants, William M. Hunt, Benjamin F. Hunt, jr., George B. Hunt, and William Mootry, and Jane B., his wife, appealed on the following grounds:

First.—Because, upon the statement of the facts of the case made by his Honor, it is manifest that no presumption of payment and satisfaction of the bond of B. F. Hunt, assigned to William Matthews, and by him devised to the defendants, the children of Mrs. S. B. Hunt, deceased, can arise, as it thereby fully appears;

1. That the assignment of this bond was made to W. Matthews as an indemnity against his endorsement of B. F. Hunt's note for \$18,500, discounted by the U. S. Bank—which note was regularly renewed, and the renewals constantly held by the said Bank until transferred to the Bank of Charleston, by which last named Bank, the said debt was constantly kept current by regular renewals until 1836, when the last renewal was protested, put in suit, and judgment recovered, both against the drawer and endorser in 1837,

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and finally paid by W. Matthews, \*the endorser in 1840 and 1841, at which time, and not before, the endorser could look to this bond for his indemnity;

2. That W. Matthews, the endorser, did claim and receive of the Bank of Charleston upon his final payment of his endorsement in 1841, the said bond, and held it as his indemnity until his death;

3. That the bond could not be presumed to be satisfied while the Banks held it as a collateral security for the obligor's note, endorsed by W. Matthews, which was regularly renewed, and their delivery of the said bond to the endorser upon his paying up the note in full, was no satisfaction thereof, but in fact was conclusive evidence that he was to hold it for his indemnity against this pay-

ment; and not more than seven years elapsed from the time W. Matthews was thus re-possessioned of the said bond, until his death in 1848—a period far too short to raise the presumption of payment, especially when the relationship existing between the obligor and Mr. Matthews is considered.

Second.—Because the answers of the defendants in the case of *Lawton v. Hunt*, is no evidence of satisfaction, because they only assert the existence of unadjusted mutual claims between the testator, W. Matthews, and Col. Hunt, and nowhere admit the payment of this bond; and all such deductions from the vague terms of these answers, would be manifestly erroneous, when it is considered that the children of the obligor only insisted that they alone should have the right to adjust and settle the mutual claims with their father, who was their Solicitor and adviser in the cause, and drew up the answers for them.

Third.—Because the payment of \$2,000 to Col. Hunt for professional services rendered to Mr. Matthews in his life-time, made by the Master in the case of *Lawton v. Hunt*, (if it be not a mistake of his Honor, the Chancellor, as is here respectfully suggested,) would not aid the presumption of payment, when the relationship of Col. Hunt to these appellants, and the fact that he was the Solicitor of themselves and of their mother in the said cause, are considered, if it were all charged to them, but as it was charged to and paid out of the whole of

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the testa\*tor's estate, these appellants could not have been interested to object to such payment.

Fourth.—Because there is no evidence that either the complainant, Tucker, or the assignee of the other bonds, William Aiken, were ever informed, or had any reason to believe, that the bond held by Mr. Matthews had been paid; and at the time of the assignment of Mr. Aiken's bonds to Mr. Campbell, Mr. Campbell recognized the bond held by the appellants, and insisted upon a waiver of the lien in his favor, which was given by all of them except George B. Hunt, (who did not waive,) and the complainant has claimed the benefit of this waiver.

Fifth.—Because third parties cannot insist upon the presumption of payment, from lapse of time, in a cause where the obligor is party, and makes no such defence, unless a direct charge and full proof be made of collusion between the obligor and the holders of the bond, and then the Court should go no further than to disallow the claim of the holders, so far only as to secure the interests of such third parties; but in this case no charge of fraudulent collusion between the obligor and the holders of the bond has been made, and no evidence thereof produced.

Sixth.—Because it is respectfully submitted that his Honor erred in his conclusion



that the judgment of the Bank of Charleston against B. F. Hunt, was satisfied by the payment of the judgment against W. Matthews, the endorser—first, by overlooking the important fact in evidence before him on the trial, in writing, that Mr. Matthews had stipulated for the assignment of the judgment against Col. Hunt, before he paid the debt, which was considered by the Solicitors and Attorneys of the Bank, and a memorandum thereof made in writing; and next, because he followed the rule at law when he should have conformed to the rule in equity, viz.: That the surety paying the debt of his principal, has a right to require the assignment of all the securities held by the creditor—which rule is fully recognized in the case of Thomson v. Palmer, 3 Rich. Eq. 146.

Seventh.—Because, if the payment of the judgment of the Bank of Charleston against Mr. Matthews, satisfied the judg-

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ment against Col. Hunt, then it is clear Mr. Matthews became entitled to claim payment and indemnity from Col. Hunt at that time, and was then at liberty to resort to the bond to secure that indemnity, and to call upon the Bank to re-deliver the same to him, which he did at that time—after which, no lapse of time has occurred to warrant presumption of payment.

McCrady, Campbell, for appellants.

James Simons, for plaintiff.

The opinion of the Court was delivered by

DARGAN, Ch. This Court does not differ from the Chancellor who tried the cause, in his exposition of the principles which have a bearing on the question involved in this appeal. These he has correctly and lucidly explained. But in his application of these principles to the facts of the case, this Court is of the opinion that an error has been committed.

The bare lapse of twenty years from the time a bond or other specialty becomes payable, without acknowledgment of the continuance of the obligation, partial payment, or other rebutting circumstance, raises a presumption of payment, which operates as fully in discharge of the debt, as proof of actual payment and satisfaction. It is a presumption of fact, which unrepelled, is as obligatory upon the Court, as a presumption of law. It stands in the place of belief, and its force cannot be superseded, but by the proof of facts tantamount to a distinct admission of the existence of the debt within the twenty years. A period less than twenty years, aided by strong corroborative circumstances, has been considered sufficient to raise the presumption of payment. The authorities cited by the Chancellor in his circuit decree, most abundantly sustain these general propositions. A citation of similar authorities might be greatly extended. In-

deed, these principles of law are too clearly and definitely settled to admit of doubt or controversy at the present day.

The bond of Benjamin F. Hunt to Charles

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T. Brown was \*due, and payable more than twenty years ante litem motam. And the question which remains to be considered, is a question of fact; namely, whether the obligor has distinctly admitted the continued existence of his obligation within the period of twenty years before the present owners of the bond have presented their claim to payment in this suit. To illustrate the judgment of the Court upon this question, it will be necessary for me to give a brief history of such portion of the facts of the case, elicited upon the trial, as bear upon this issue.

In the year 1825, Benjamin F. Hunt purchased from Charles T. Brown and wife, a plantation called Richfield, in Georgetown District, and one hundred and sixteen negroes, together with the stock on said plantation. The consideration was \$120,000. Of this sum, \$20,000 was paid in cash, or equivalents. To secure the payment of the remaining \$100,000, Hunt executed to Charles T. Brown five bonds; each in the penal sum of \$40,000; and each conditioned for the payment of \$20,000, with interest payable annually, from the date of the bonds. The date of the bonds is the 11 February, A. D. 1825. To secure the payment of these bonds, with the accruing interest, Hunt executed to Brown, a mortgage of the Richfield plantation and the negroes purchased with it. The mortgage bore the same date with the bonds, and was duly registered. On one of these bonds; namely, that due the 11 February, 1826, is admitted to have been paid by Hunt, in some way not explained.

Charles T. Brown was indebted to the Branch Bank of the United States, in Charleston, in the sum of \$18,500, by his note, on which William Smith was endorser. About the 14th June, 1826, Brown deposited with the Bank the four outstanding bonds of Hunt, as collateral security upon his debt to that institution. While the bonds were thus in the possession of the Bank, Brown being pressed by his creditors, entered into an arrangement with Hunt, for the prompt payment of his debt, in consideration of which prompt payment, Hunt was to have 20 per cent. discount. In pursuance

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of this agreement, Hunt as\*sumed a debt of Brown to John H. Tucker, (the plaintiff,) amounting to \$14,598 45 cents, for which he gave to Tucker five bonds, payable at different periods. This sum was applied to the bond payable the 11 February, 1827, and together with other payments and discounts, was in full satisfaction of said bond. The litigation arising upon this transaction, was the subject of a former decree of this Court.

In further fulfillment of the arrangement

for prompt payment, Hunt was to pay, or to assume upon himself in discharge of Brown, the debt of the latter to the United States Bank of \$18,500, secured by the indorsement of Wm. Smith, as before stated. To effect this part of the arrangement, Hunt gave his own note to the Bank, for the whole amount of Brown's indebtedness, with the late William Matthews as his indorser; and thus Brown was discharged from that liability. While the bonds were still on deposit with the Bank, Brown, on the 6 October, 1828, assigned two of them to William Aiken; namely, the bond due on the 11 February, 1828, and the one due on the 11 February, 1829, for the consideration (as it is said) of \$36,000. He also assigned to Aiken, at the same time, so much of the mortgage as was necessary to secure the payment of the said two bonds. On the 9 October, 1828, Brown assigned the remaining bond due 11 February, 1830, and so much of the mortgage as was necessary to secure the payment thereof, to William Matthews, as collateral security for his indorsement of Hunt's note to the Bank given in substitution of Brown's debt, and also for his indorsement of another note of Hunt's in Bank for \$9,900; which latter note was further secured by the mortgage of other estates in Saint James, Santee. Whether the assignments to Aiken and Matthews are to be regarded as assignments in fact, or a re-issue by Hunt, of his bonds, I do not mean to insinuate an opinion. I am only discussing the question whether the bond assigned to Matthews is subject to the presumption of payment from the lapse of time. I state now only such of the facts as in my judgment are explanatory of, or pertinent to that issue.

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\*Matthews having become the assignee of the bond last due, made an assignment thereof without date to the Bank as collateral security on the note of \$18,500. On 21 April, 1836, the two notes of Hunt endorsed by Matthews, previously kept in Bank by partial payments, and renewals, were protested for non-payment. And on the 10 June, 1837, the Bank of Charleston, which had succeeded to the assets of the Branch Bank of the United States, obtained separate judgments upon these notes against Hunt and Matthews, for the sum of \$19,976 44 cents; and on the 23 of November, 1837, lodged writs of fieri facias to enforce payment of the same.

The foregoing history is preliminary to the statement of a fact of great importance. It is a fact, which has a direct bearing upon the only issue which the Court is now considering, and deciding; and upon which it will turn. That issue, it will be remembered, is whether the debt secured by the bond assigned to Matthews, is subject to the presumption of payment arising from the lapse of twenty years after it was due; or whether there be any rebutting circumstance to repel that presumption, which must otherwise necessarily arise.

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The Act of Assembly of 1781, (5 Stat. 169.) gives to the Law Court jurisdiction to foreclose mortgages in certain cases where judgments have been recovered in that Court, upon debts secured by mortgage. The conditions upon which this jurisdiction is to be exercised by Law Courts, are, that the mortgagor must be still in possession, and that there are antecedent judgments, (one or more,) against the mortgagor, prior in date to that upon which proceedings in foreclosure are to be had, and posterior to the date of the mortgage.

The Bank of Charleston having obtained judgment against B. F. Hunt for \$19,974 46, on his note endorsed by Matthews, as aforesaid, proceeded under the provisions of this Act, to foreclose the mortgage of Hunt given to secure the payment of the bond to Brown, which had been assigned to Matthews, and

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\*by him assigned to the Bank, as collateral security upon the note. In these proceedings, Hunt was duly notified according to the provisions of the Act, of the intended foreclosure; and made default. Whereupon the Bank of Charleston, the plaintiffs in the cause, did actually obtain, in the year 1838, from the Law Court, an order for the foreclosure of the mortgage of the plantation called Richfield, and the negroes thereon subject to the mortgage. The order of foreclosure was never executed.

It has been objected, that this order for foreclosure at law was irregular and void. It was objectionable in one point of view. The mortgage was not given to secure the payment of the debt upon which the judgment was recovered, but was given to secure the payment of the bond, which, together with the mortgage, was lodged and assigned as collateral security to the note. The mortgagor did not covenant, that his lands and negroes should be subject to a lien for the payment of the note, but for the amount due upon the bond. I think, that Hunt, upon this ground, might have made a successful defence against the proceedings for foreclosure. He might have said, "*in hec fœdera non veni.*" I have never agreed, that my lands and negroes should be subject to a lien, to secure the payment of a debt upon which this judgment has been rendered. But he did not do this. He was duly notified, but made no defence. He suffered the order for foreclosure to go against him by default. Whether after this, the order for foreclosure was not valid and binding to all intents and purposes, is an entirely different question from that, which might have been raised, but was not raised, during the progress of the proceedings.

I am of the opinion, that this judgment of foreclosure having been rendered, and standing unreversed, became valid and binding upon the mortgagor. In support of this view, it may be remarked, that the Court of Law had jurisdiction upon the subject matter;



all the conditions existed upon which that jurisdiction was to be exercised; the proceedings were regular as to form; the mortgagor was duly notified; and the Court rendered a formal judgment of foreclosure. And

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if the Court committed \*an error as to a matter of fact, which might have caused a reversal of its judgment on appeal, it would constitute no ground afterwards for its being vacated, or for its being considered void and of none effect.

Here, then, was the judgment of a Court of competent jurisdiction for the foreclosure of the mortgage, in a proceeding in which Hunt was a party, and had regular notice. This occurred in the latter part of the year 1838, and may be considered a distinct and unequivocal admission by Hunt at that time of the existence of the debt; or at least of so much thereof as was equal to the sum recovered by the Bank in that cause. How would he have acted in these proceedings, if the debt secured by the mortgage had there been paid? How would any man have acted under similar circumstances?

These proceedings at law for the foreclosure of the mortgage, amount to more than an admission by Hunt, that the debt then existed. It is a solemn judgment of the Court to that effect, and conclusive upon him. He could not afterwards bring into issue a question of fact so formally adjudged. From this period, (Nov. 1838,) to the time when the legatees set up in these proceedings, their claim upon this bond and mortgage, not more than fourteen years have elapsed. It follows, as a matter of course, from what has already been said, and such is the opinion and judgment of this Court, that no presumption of the payment of the bond which has been assigned to William Matthews, can arise from the mere lapse of time, or from the lapse of time aided by other circumstances. The circuit decree which decides this question differently, must be reversed. No other question that arises in the case, but this, is intended to be concluded by this decree.

Whether this bond may not have been satisfied by actual payments; whether any, or how much of the bond remains due, are questions which we do not mean to decide, and upon which we express no opinion. The question as to actual payments, or set-offs by Hunt against Matthews, the Chancellor on circuit did not consider. Those matters in

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the present stage of the \*proceedings, are not proper to be considered here. The facts are not before us. They must first be brought before, and considered by, a Court of original jurisdiction, with the aid of such instrumentalities as that Court affords.

In the meantime, the sale heretofore ordered, is not intended to be arrested, or delayed, but may go on according to the previous orders of the Court.

It is ordered and decreed, that the decree of the Circuit Court be reversed: and this decree upon the question herein decided, become the judgment of the Court.

It is further ordered and decreed, that the case be remanded to the Circuit Court, to be there again tried upon all issues of law and fact which properly arise in the proceedings, except such as are herein decided.

JOHNSTON and DUNKIN, CC., concurred.  
Decree reversed.

6 Rich. Eq. \*200

\*JAMES C. W. BRENAN and Others v. JOHN M. BURKE and THOMAS TROUT.

(Charleston. Jan. Term, 1854.)

[Creditors' Suit  $\S$  8.]

Where a plaintiff in execution, which is in the hands of the sheriff, is absent from the State, his creditor may file a bill against him and the defendant in execution, to subject the fund to the payment of the creditor's demand.

[Ed. Note.—Cited in Howard v. Cannon, 11 Rich. Eq. 25, 75 Am. Dec. 736.]

For other cases, see Creditors' Suit, Cent. Dig.  $\S$  12; Dec. Dig.  $\S$  8.]

[Creditors' Suit  $\S$  28.]

In such case without amending the title of the bill, so as to make it a creditors' bill, an opportunity may be given to other creditors of the plaintiff in execution to appear before the Master, and establish their demands.

[Ed. Note.—Cited in S. S. Farrar & Bros. v. Haselden, 9 Rich. Eq. 337.]

For other cases, see Creditors' Suit, Cent. Dig.  $\S$  115; Dec. Dig.  $\S$  28.]

[Creditors' Suit  $\S$  49.]

All questions as between the creditors are deferred until the coming in of the report upon their claims; and the defendant in execution, if he have any claim upon the fund as assignee or creditor, may establish it before the Master under the general order for creditors to present and prove their demands.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig.  $\S$  186-190; Dec. Dig.  $\S$  49.]

Before Dunkin, Ch., at Charleston, February, 1853.

Dunkin, Ch. This cause was formerly heard on demurrer. This admitted all the allegations of the bill, and was overruled by the Court on the authority of Kinloch v. Meyer, Speers' Eq. 427, and Bowden v. Schatzell, Bail. Eq. 360 [23 Am. Dec. 170]. The answers having been filed, the cause was for hearing in March, 1852, when Chancellor Johnston made an order "that plaintiffs proceed at law with their attachments, there pending, and that the bill be retained until said proceedings be had." In August, 1852, the proceedings in attachment were discharged by an order of the Court of Common Pleas. The answer of John M. Burke admits his indebtedness to the complainants, but not to the extent claimed. He says, that he is a citizen and resident of Pennsylvania, that his debts to the complainants were in



consequence of a contract which he had made in the Chattanooga Railroad Company, and that his solvency depends on the result of a suit now pending against said Company in reference to that contract; he insists that the complainants have a remedy at law, and that he cannot, in this Court, be compelled to pay one creditor in preference to another, or be controlled in the distribution of his effects amongst his creditors.

It has been stated, that the demurrer in

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this case was overruled on the authority of *Kinloch v. Meyer* and *Bowden v. Schatzell*. As early as 1834, it was held in *Young v. Young*, 2 Hill, 425, and *Murrell v. Johnson*, 3 Hill, 12, that the funds of a distributee of an intestate, in the hands either of the administrator, or the Ordinary, were not the subject of attachment. In *Kinloch v. Meyer*, decided in 1844, it was ruled that proceedings might be had against the administrator, in this Court, on the ground that no remedy existed at law, as the fund was not the subject of attachment. It was argued, however, that this case might be maintained, perhaps on other grounds than those assumed by the decree. But the general proposition was insisted on, that Equity acts only in personam, and that no proceedings in this Court could be maintained to recover a debt due by a person beyond the jurisdiction. From a very early period, it has been the practice of this Court to entertain jurisdiction in cases of Equity cognizance, although the defendant was beyond the limits of the State, provided he had property within the jurisdiction of the Court. Such was the case of *Telfair v. Telfair*, 2 De S. 271, where a defendant residing beyond the limits of the State, was decreed to a specific performance of a contract in relation to land in the State; and in *Winstanley v. Savage*, 2 McC. Eq. 435, Chancellor De Saussure, who was more familiar with the practice of the Courts in this State than any man then alive, says, that "the Act of 1784 did not mean to assume the power of calling all foreigners, however remote their residence, before the tribunals of this State; but that it merely meant to regulate the proceedings in cases where non-residents could be made amenable to the jurisdiction of the Court by holding property within the State, which does, undoubtedly, give jurisdiction both at law and in Equity: at law, by the attachment of the property of the foreign debtor; in Equity, by the mode prescribed by the Statute of 1784."

So, in *Taylor v. Williamson*, 1 McMull. Eq. 348, it seems not to have been supposed, either at the bar or on the bench, that the Court was restrained from proceeding, because both the defendants were beyond the

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jurisdiction of this Court, and that Equity could only act in personam; and, in *Garden v. Executors of Hunt, Cheves*, Eq. 42, the

bill was dismissed on the ground that both defendants were beyond the State, and that there were no assets of the testator or property of the defendants within the State. In *Kinloch v. Meyer*, and *Taylor v. Williamson*, the authority of *Bowden v. Schatzell* is distinctly recognized. The defendant, Schatzell, a citizen and resident of Kentucky, was indebted as survivor of Schatzell & Company, to the complainant, Bowden, on a cause of action, which, in this State, is regarded as a simple contract debt. I. & C. Bolton had attached funds in this State belonging to Schatzell & Company, for a debt due them by certain members of that Company—the whole fund had been paid into Court, and I. and C. Bolton had taken out a moiety thereof, on giving bond as required by the order of the Court. I. and C. Bolton were residents of the State of Georgia. The bill was filed to subject the fund to the payment of the complainant's demand. It was insisted that the Court had no jurisdiction—that there was plain and adequate remedy at law, and that the defendants were beyond the State. The case was very fully discussed by Chancellor Harper. It was ruled by him, that there were no other defendants than John P. Schatzell as survivor of Schatzell & Company, and I. and C. Bolton; and that under the Act of 1784, Schatzell was properly before the Court, and the demurrer of I. and C. Bolton was also overruled. He also held that "the Court might try and adjudicate the fact whether the complainant was a bona fide creditor of the firm of Schatzell & Company, and entitled to payment out of its funds," that it might establish the demand by its decree, and thus lay the foundation for an application to the Court of Law to order an assignment of the bond, or the transfer of the fund. "These facts," says the Chancellor, "the Court of Law cannot try, because it has no means of bringing the parties before it."

Accordingly, at the succeeding Circuit Court, the complainant established her demand by the adduction of the proper evidence—and Chancellor Johnston, who pre-

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sided, ordered I. and C. Bolton to pay over to the complainant the fund received by them, with interest. The case had been first heard by Chancellor Harper in February, 1829. An appeal was taken from both decrees, and the cause was heard in May, 1831, by the Appeal Court, then consisting of Chancellor Harper, Judge D. Johnson, and Judge O'Neill. Both decrees were again considered, and were affirmed, except as to the direction, that the amount of the bond of I. and C. Bolton should be paid over to the complainant. But it was decreed, that "the absent defendant, J. P. Schatzell, was indebted to the complainant in the amount of her demand, and was entitled to the fund in the custody of the Court of Common Pleas,

as well as to an assignment of the bond; and upon a proper shewing, the Court (of Common Pleas) would order them to be transferred," &c. Chancellor Harper had said, in relation to the objection, that John P. Schatzell was beyond the jurisdiction; the Act (of 1784) was made to remedy "the defect of the English practice." "Our Courts do not always act in personam." "An absent person, who has property within the State, may be fairly presumed to look after it, and to know what has become of it. The proceeding is made very notorious by advertisement," &c. "I think an absent person, who has property in the State, may be made a party in respect of that property, though there be no other party in the State." On this point, the judgment of the Appeal Court is explicit, "that the complainant could not make Schatzell a party was her impediment at law; and it is the business of the Court of Equity to remove such impediment. According to the opinion in which we concur, he might be made a party in Equity."

Whether that decision was well sustained, was expedient, or would in practice, be attended with inconvenience, is an inquiry which I do not suppose that I have any authority now to entertain. If any fundamental error exists, it may be examined and corrected elsewhere; I have only to ask whether, on the principles thus declared, the plaintiffs are entitled to the interposition of this

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Court. In *Blair v. Cantey*, \*2 Speers, 34 [42 Am. Dec. 360], it was held that the plaintiff's money in the sheriff's hands was not the subject of attachment; and in *Burrill v. Letson*, 2 Speers, 378, that a claim in the hands of the attorney could not be attached, and in the case now before the Court, it was admitted by the demurrer, as it has since been decided, that the plaintiffs have no remedy by attachment. Funds belonging to the absent defendant, Burke, are in the hands of the defendant, Trout. The answer of Burke admits that the plaintiffs are creditors, but not to the amount claimed. Upon the principles, then, heretofore recognized, John M. Burke may be properly impleaded in this tribunal in respect to this property. It is said this interferes with the control which the absent debtor should be at liberty to exercise; but it may be replied that his absence should not secure him any peculiar privilege or immunity. The case of *Burrill v. Letson*, and this case, both illustrate the inconvenience to which creditors here may be subjected. Burke makes a contract with the Chattanooga Railroad Company to the extent of \$450,000; in order to enable him to comply with his contract, he becomes largely indebted to persons in this State. The Company is sued by him, and, on the eve of a recovery, or immediately after the verdict, he goes to Pennsylvania, or California, or Kamtschatka, or "to parts unknown" (in the language of

the bill.) It is insisted that the creditors here, who may very well have relied upon this source for the payment of their debts, (and without it, defendant says he is insolvent,) have no remedy against this fund either at law or in equity, but must go in search of the person of their absent debtor. There may be practical difficulties in rendering this fund available, and there may be difficulty in adjusting the rights of conflicting creditors, but it is not perceived that the absent debtor will be in danger of suffering injustice from the decree of the Court in relation to this fund. See *Heath v. Bishop*, 4 Rich. Eq. 46 [55 Am. Dec. 654].

It is ordered and decreed that the defendant, Thomas Trout, pay into the hands of one of the Masters of this Court the amount of the judgment at law obtained against him;

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that the \*title of the complainants' bill be amended so as to make it in behalf of themselves and such other creditors of the absent debtor as may think proper to make themselves parties; and that it be referred to the Master to report upon the claims of such creditors as may appear and prove their demands, with leave to report any special matter.

The defendant, Thomas Trout, appealed from that part of the decree which directs him to pay into the Master's hands the amount of the judgment obtained against him:

1. Because the bill having been by the said decree made a bill for the benefit of all creditors, and that amendment having been made after answer, the defendant is entitled to file a new answer, and make a new defence against the present plaintiffs.

2. Because the bill being by the amendment made a new bill, for the benefit of all creditors, this defendant, although indebted to the amount of the judgment, is at the same time a creditor of the plaintiff in a larger amount, and is entitled to retain the amount in hand, in preference to other creditors.

J. M. Walker, for appellant.

Phillips, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. No appeal has been taken on behalf of the absent debtor, J. M. Burke. On the contrary, his solicitor insists on the benefit of the decree. The appeal is in behalf of the other defendant, Thomas Trout. Against him Burke had obtained a judgment in the Court of Common Pleas, and the execution to enforce the same is in the hands of the sheriff.

It was said by Lord Eldon, 16 Ves. 327, that "the Court must be always open to questions upon the carriage of the cause." And this remark was in reference to the subject of protecting the rights of creditors not specially included in the pleadings, and as to the mode of doing so. See *Story's Eq. Pl. § 903*,



note 2. In the decretal order, the plaintiffs were directed to amend the title of the bill, so as to make it in behalf of all the other creditors, &c.

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\*In the recent case of *Nelson, Carter & Co. v. Felder*, Ante p. 58 the Court had occasion to consider this whole subject, and it was then thought, that enough would be done by giving an opportunity to other creditors to present and establish their demands before the proper officer of the Court, although no direct opinion or judgment to that effect was expressed, or demanded by the case.

It is there stated that, of course, all questions as between the creditors must be deferred until the hearing of the report upon their respective claims.

So much of the decretal order as directs an amendment of the title of the bill is, therefore, rescinded. If the defendant, Thomas Trout, has, by assignment or otherwise, any claim on the fund ordered to be paid into Court, he will be at liberty to establish his rights under the decretal order, and they will be adjudicated at the hearing of the Master's report.

It is ordered and decreed that the decree of the Circuit Court as modified, be affirmed, and that the appeal be dismissed.

JOHNSTON and WARDLAW, CC., concurred.

Decree modified.

#### 6 Rich. Eq. \*207

\*SAMUEL CORDES and Others v. SAMUEL PALMER and Others.

(Charleston. Jan. Term, 1854.)

[Wills. 593.]

Testatrix, by her will, bequeathed nine negroes by name, to her son T. C., with limitation over in case of his death without issue. By a codicil which she declared to be a part of her will to all intents and purposes, she revoked and declared void so much of the bequest to T. C. as related to three of the negroes, naming them, and bequeathed to him three other negroes by name, in lieu of those as to which she had revoked the bequest: *Held*, that the negroes given to T. C. by the codicil were subject to the limitation declared by the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1307; Dec. Dig. 593.]

Before Wardlaw, Ch., at Charleston, June, 1853.

Wardlaw, Ch. It is submitted to the Court upon the ease made by the pleadings, to determine whether, under the terms of the will and codicil of Mrs. Charlotte Cordes, the complainants are entitled to certain negroes, derived by defendant's testator from Thomas Evans Cordes in his lifetime, and to an account for their hire since the death of the said Thomas Evans Cordes.

The bequest in the will, bearing on this question, reads as follows, to wit: "4th. I give, devise and bequeath to my son, Thomas Evans Cordes, to him and his heirs and assigns forever, the following negroes: Molly, Chance, Harriet, Maria, Solomon, Pub, Amy, Gabriel, and Juliana, together with the present and future increase of the females, and should he die without lawful issue, the said negroes shall return to my other surviving children.

"6th. All the rest and the remainder of my negroes I give, devise and bequeath to my three daughters, to them and their heirs and assigns forever, to be equally divided among them, share and share alike; and further, as it is my earnest desire to divide my property equally among my children, it is my will, that, if the shares devised to my daughters shall be found to be unequal in value to the negroes devised to my son, Samuel Cordes, the deficiency shall be made up to them in Bank shares; and it is further my will, that if the negroes named, and devised to my son Thomas Evans Cordes be found,

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by appraise\*ment, unequal in value to those devised to my son Samuel Cordes, the deficiency shall also be made up to him in Bank shares, so that all the shares of negroes may be equal in value."

The codicil reads as follows, to wit: "Whereas, I Charlotte Cordes, of the Parish of St. Stephens, District of Charleston, and State of South-Carolina, have made my last will and testament, in writing, bearing date —, have thereby given and bequeathed to my son, Thomas Evans Cordes, three negroes, namely, Pub, Amy, and Gabriel, and also thereby have given and bequeathed to my daughters, Catharine, Lavinia and Camilla Cordes, three negroes, namely, Judy, Cornelius, and Sibby. Now, I do, by this my writing, which I declare to be a codicil to my said last will, revoke and declare void and of no effect so much of my said will as is contained in the above mentioned bequest; and whereas, in and by my last will and testament I have given and bequeathed to my son, Thomas Evans Cordes, three negroes, namely, Pub, Amy, and Gabriel, and to my daughters, Catharine, Lavinia, and Camilla Cordes, three negroes, namely, Judy, Cornelius, and Sibby, I do hereby order and declare, that I give and bequeath to my son, Thomas Evans Cordes, three negroes, namely, Judy, Cornelius, and Sibby, in lieu of Pub, Amy, and Gabriel, and to my daughters, Catharine, Lavinia and Camilla Cordes, three negroes, namely, Pub, Amy, and Gabriel, in lieu of Judy, Cornelius and Sibby. And, lastly, it is my desire that this, my present codicil, be annexed to, and made a part of my last will and testament to all intents and purposes."

As to the will, it has already been made the subject of adjudication; and the limitation over to complainants of the negroes named in the original bequest, is not controverted. It is contended, however, that the three negroes, Judy, Cornelius, and Sibby, substituted for Pub, Amy, and Gabriel, are not subject to the same limitation. After hearing argument, and considering the cases cited by the counsel respectively, I have no hesitation in declaring that the substituted negroes, Judy, Cornelius and Sibby, were held by Thomas Evans Cordes upon the

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same \*limitations, and in all respects subject to the same conditions with the three named in the will for whom these were substituted by the testatrix, Mrs. Cordes, and that complainants are entitled to all negroes in the possession of defendant's testator at the death of Thomas Evans Cordes, who were included either in the original bequest to Thomas Evans Cordes, or in the codicil, and to an account for their hire since his death. It is therefore ordered and decreed that it be referred to

one of the Masters of this Court to inquire and report what negroes bequeathed to Thomas Evans Cordes under the will and codicil of Mrs. Charlotte Cordes, were in the possession of Solomon Clarke at the death of said Thomas Evans Cordes, or are now in the possession of defendants, his executors; what was their value at the time of said Thomas Evans Cordes' death, and what is now their value, and that he take an account of their reasonable hire, since the said death, and that he have leave to report such other special matter as may seem proper in the premises.

It is further ordered and decreed, that the Master inquire into and report the facts in regard to the time at which the claim of the complainants accrued, and how far the same may be affected by the plea of the statute of limitations.

The defendants, the executors of Solomon Clarke, appealed:

Because the codicil revoked the clause of the will, wherein the property is limited to complainants—and containing in itself no words of limitation, the defendant's testator acquired an absolute estate by purchase from Thomas Evans Cordes.

Martin, for appellants.

Hayne, contra.

PER CURIAM. We concur in the decree; and it is ordered that it be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

6 Rich. Eq. \*210

\*CATHARINE B. GIBSON v. LOUISA F. MARSHALL.

(Charleston. Jan. Term, 1854.)

[Dower ⇐99.]

Bill by the widow, in the occupation of the premises, against a purchaser after the death of the husband, with notice of the widow's claim, for an assignment or assessment of plaintiff's dower in a lot in the city of Charleston. The Commissioners certified that the lot could "be fairly and justly divided, having regard to the true and fair value" thereof; and they assigned to the plaintiff the houses and most of the high-land, leaving to the defendant a much larger portion, of market value equivalent to her interest, but yielding no rent. It was referred to the Master to take evidence and report upon the facts connected with the assignment, and upon his report of the evidence, the Chancellor on circuit confirmed the return:—On appeal, the circuit decision was sustained.

[Ed. Note.—Cited in *Stewart v. Pearson*, 4 S. C. 7; *Jefferies v. Allen*, 33 S. C. 271, 11 S. E. 764.

For other cases, see *Dower*, Cent. Dig. § 347; Dec. Dig. ⇐99.]

Before Dunkin, Ch., at Charleston, February, 1853.

Upon the report of the Master, in obedience to the order of reference made by his Honor Chancellor Dargan, at July sittings, 1852, (5 Rich. Eq. 259) the cause was now heard.

Dunkin, Ch. On the 2nd March, 1852, Chancellor Johnston set aside the writ for admeasurement of demandant's dower for irregularity in the form of the writ. The Act of Assembly directs that the Commissioners shall, fairly and impartially, according to the best of their judgment, admeasure and mete out to the petitioner, and put her in full and peaceable possession, of one-third part of the premises; but it is provided that "the Commissioners shall have power, and they are thereby authorized, in the admeasurement aforesaid, to have relation and regard to the true value of the lands in question: and when the same can not be fairly and equally divided, without manifest disadvantage, then to assess a certain sum in money, in lieu of the dower, to be paid," &c. The writ first issued did not set forth this authority of the Commissioners, if they should be of opinion that, having relation and regard to the true value of the lands in question, they could not be fairly and equally divided. The Commissioners had set out the dower by metes and bounds: but the Court refused to confirm the return and set aside the writ, because the mandate thereof "did not leave the Commissioners at liberty to perform

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their whole duty." A \*new writ was accordingly issued in conformity with the opinion of the Court thus declared, directed to five Commissioners, two to be named by each of the parties, and the fifth by the Master. There were two lots out of which dower was to be admeasured, to wit: one at the corner of Smith and Franklin streets, and the other



on Smith-street near Calhoun. On the former lot the Commissioners set out the dower by metes and bounds, being of opinion, as they state, in their return, that it could be fairly and justly divided; the other lot, they were of opinion, could not be fairly divided, and they assessed a sum in lieu thereof. In reference to the latter lot, the return had the unanimous concurrence of the Commissioners. Four out of five agreed as to the lot at the corner of Smith and Franklin streets: the fifth Commissioner dissented as to this lot, "thinking the same cannot be fairly divided."

On the filing of this return a motion was made, at the instance of the defendant, for an inquiry before the Master as to so much of the return as related to the lot in Franklin-street. The testimony has been accordingly reported by the Master; and the inquiry now is, whether, upon that testimony, the return of the Commissioners should be set aside. In the course of the argument much was urged in reference to the situation of the parties. In the solution of the question submitted, these circumstances should have no influence upon the judgment of the Court. The demandant is the widow of the testator. The defendant purchased the lot from the executors with the express notice that the demandant would insist on her right of dower. The objections to the return of the Commissioners must be considered precisely as if William C. Gatewood, or any other stranger, had purchased the lot from the executors, and the demandant had obtained her writ for admeasurement of dower. The Commissioners are selected by the parties themselves and by the Court. No question is suggested as to the intelligence or impartiality of the board thus constituted in this case. Their duty was "to admeasure and mete out to the demandant, and put her in full and peaceable possession of one-third part" of

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the \*premises described in the writ; but if, having relation and regard to the true value of the land in question, they should be of opinion that the same could not be fairly and equally divided, without manifest disadvantage, then to assess a certain sum in lieu of dower, &c. The Commissioners were well instructed by the previous action of the Court both as to their duty and authority. Thus instructed, they have discharged the gratuitous office thus imposed upon them and have certified their proceedings. It is, in some measure, due to them, as well as to the parties, that their return should be sustained and confirmed, unless the Court is well satisfied that their judgment is erroneous.

Several witnesses were examined before the Master besides the Commissioners. The discrepancy in their testimony is more in appearance than reality. The great preponderance of evidence is that, according to the market value of the entire lot, the Commis-

sioners have allotted no more than one-third to the demandant. This is substantially the evidence of Abram Jones, a witness well acquainted with the premises, and who was adduced on behalf of the defendant. And this is the distinct conclusion of the several witnesses sworn for the demandant. If W. C. Gatewood, Philip J. Porcher or T. A. Whitney, had been the purchaser at the executor's sale and occupied the position of the defendant, this evidence would be entirely conclusive against the objection to the return. He would have purchased with explicit notice that the dowress was entitled to one-third of the premises during her natural life, and intended to insist on her right. It appears from the pleadings that, at the death of her husband, (the late Colonel Gibson,) the demandant was residing on the premises. The Commissioners, by their return, have left her in possession, certifying their opinion, that the lot could be fairly divided, having regard to the true value thereof, and that only one-third in value had been set off to the demandant, to be held during her life. If a third person then had been the purchaser, and the market value of the portion allotted to the widow was fifteen hun-

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dred dollars, and that of the remainder of the lot was three thousand dollars, what ground of objection could be urged to the return? It is difficult to say that any witness impeaches the judgment of the Commissioners as to the relative market value. Certainly it is sustained by a decided preponderance of the evidence.

In admeasurement of dower to the widow in premises of which the husband has died seized and possessed, assessment is only an alternative in the event that the lands cannot be fairly and equally divided, having relation and regard to the true value thereof. If, in this instance, a third person had purchased from the executors, and the Commissioners had declined to set off the dower by metes and bounds, the Court would have some difficulty, on the evidence now submitted, to resist the claim of the widow to a review of such judgment. But the Commissioners, in accordance with the mandate of the writ, have allotted to the widow, and left her in full and peaceable possession, of what, on their oaths, they declare to be only one-third part of the premises, according to the best of their judgment.

It is ordered and decreed that the return of the Commissioners be, in all respects, confirmed and made the judgment of the Court.

The defendant appealed, and now moved this Court to reverse the decree, on the grounds:

1. Because the decree of Chancellor Dinkin, confirming the Commissioners' return made in this case, was erroneous, being opposed to the intention and provision of the Act of Assembly, which expressly enacts that in the admeasurement of dower, the Com-

missioners shall have relation and regard to the true value of the lands in question, and when they cannot be fairly and equally divided without manifest disadvantage, then they shall assess a sum of money, to be paid to the widow in lieu of her dower.

2. Because the decree was otherwise contrary to Equity.

Phillips, for appellant.  
Campbell, contra.

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\*The opinion of the Court was delivered by

WARDLAW, Ch. In this case the Commissioners, to whom a writ was directed for the assignment or assessment of the plaintiff's dower, in a lot in this city, with instructions conforming to the Act of 1786, (4 Stat. 742), have made a return, in which they certify their opinion to the Court that the lot "can be fairly and justly divided, having regard to the true and fair value of the same," and they assign specifically to the plaintiff the houses and most of the high land of the lot, leaving to the owner of the fee, the defendant, a much larger portion, of market value equivalent to her interest, but yielding no rent. The defendant objected to the confirmation of this return, and at her instance it was referred to one of the Masters to take evidence and report upon the facts connected with this assignment. Upon the Master's report of the evidence, the Chancellor confirmed the return; and the appeal is from this decree of confirmation.

The defendant insists, that the specific assignment to the widow for dower of the whole improved portion of the lot yielding rent is to her "manifest disadvantage," "having relation and regard to the true and real value of the lands in question," and therefore contrary to the provisions of the Act of 1786. I suppose the term "manifest disadvantage" in this Act may well receive the legislative interpretation of them given in the Act of 1791, (5 Stat. 162,) adopting explicitly the procedure provided in the previous Act for a different subject, the partition of the estates of intestates; and may be well construed to mean "without manifest injury to the parties interested or some or one of them." The Act of 1786 does not in terms refer to the Court of Equity, but long before the Act this Court had jurisdiction as to dower, and commonly issued commissions to particular persons for its assignment. In England dower is always specifically assigned, and by the Act of 1721 this Court is directed to conform to the usages and practices of the Court in South-Britain. In this State, however, before the Act of 1786, this Court was accustomed to commute dower into its value

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in money, and to ascertain this value on report of its proper officer, the Master: since the Act we have commonly substituted the

agency of Commissioners for the Master. Whatever may be the agency, it is the Court that assigns or assesses dower. It is true that the Act does not authorize assessment of dower until the Commissioners have determined that there cannot be specific assignment of dower, and provides that a specific assignment shall be binding and conclusive on the parties in interest. Still these general terms as to conclusiveness could not have been intended to oust or limit the judgment of the Court in supervising the acts of persons under its commission. *Payne v. Payne*, Dud. Eq. 124; *Beaty v. Hearst*, 1 McMul. 31; *Gibson v. Marshall*, (5 Rich. Eq. 254.)

The objection suggested by the defendant would have great, perhaps irresistible force, if she were in the condition of an heir or alienee of the husband, in possession of the premises. However highly favored may be the claim of dower, sometimes absurdly classed with life and liberty, it would be an outrage to eject a party in possession from his home in favor of the widow. But here the defendant purchased after the death of the husband with full notice of the claim of the dowress, who was in the occupation of the premises; and there is no proof that she purchased with the view of habitation on the premises. It is clear upon the evidence that the portion left for her is equivalent in market value to her share, and is steadily appreciating. If she bought for the sake of investment of funds, and a different conclusion cannot be drawn from the evidence, full justice has been done to her. It is proved that she is poor, and without the means of filling up and building upon the portion left for her; but it is not proved that she bought with this purpose. If any specific assignment can be sustained in the case, she certainly has a right inferior to the widow to the possession of the habitable portion. Under all the circumstances of the case, we find no sufficient cause for overruling the judgment of the Commissioners and the Chancellor as to the assignment of dower to this plaintiff.

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\*It is ordered and decreed that the appeal be dismissed, and the decree affirmed.

JOHNSTON and DUNKIN, CC., concurred.

DARGAN, Ch., absent at the hearing.  
Appeal dismissed.

6 Rich. Eq. \*217

\*JOHN LAURENS v. EDWARD S. LUCAS.  
(Charleston. Jan. Term, 1854.)

[*Specific Performance* — 95.]

In suit for specific performance by the vendor, the purchaser will not be compelled to take a doubtful title. In such cases, however, the Court acts on moral certainty, and the pur-



chaser will not be allowed to object to the title on account of a bare possibility.

[Ed. Note.—Cited in *Monaghan v. Small*, 6 S. C. 183; *De Saussure v. Bollman*, 7 S. C. 340; *Webb v. Chisolm*, 24 S. C. 487, 491; *Maccauw v. Crawley*, 59 S. C. 350, 37 S. E. 934.

For other cases, see *Specific Performance*, Cent. Dig. § 262; Dec. Dig. ¶ 95.]

[*Wills* ¶ 630.]

A devise after payment of debts confers an immediate vested interest, the words of apparent postponement being considered only as creating a charge; and the receipt by the executor of funds sufficient to pay the debts, relieves the estate of the devisee from the charge.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1464-1480, 1486, 1487; Dec. Dig. ¶ 630.]

[*Wills* ¶ 657.]

Testatrix devised a plantation to J. L. to be taken by him at a certain valuation—he, before taking possession, to execute bonds and a mortgage of the plantation to certain members of her family for certain proportional parts of the valuation; and if he should decline, then to E. R. at the same valuation and on the same terms; and if he, also, should decline, then to M. J. at the same valuation and on the same terms; and if M. J. should decline, then that the plantation be sold by her executors and the proceeds divided; but if the fund she had provided for the payment of her debts should prove insufficient, then that the residue of debts “be paid out of the proceeds of said plantation whether taken at the said valuation or sold as aforesaid.” J. L. took possession without executing the bonds and mortgage. It was afterwards ascertained that the whole value of the plantation would be required for the payment of debts, and thereupon J. L. took from the executor a conveyance of the plantation, and paid the valuation fixed by the testatrix to the executor, who disbursed it in payment of debts:—*Held*,

That the giving of the bonds and mortgage was not a condition precedent to the vesting of the title in J. L.

[Ed. Note.—Cited in *Shuman v. Heldman*, 63 S. C. 491, 41 S. E. 510.

For other cases, see *Wills*, Cent. Dig. § 1552; Dec. Dig. ¶ 657.]

[*Wills* ¶ 657.]

That J. L. occupied the position of a purchaser for valuable consideration discharged of the obligation to give the bonds and mortgage; and that he was not bound to see to the application of the purchase money.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1552; Dec. Dig. ¶ 657.]

[*Executors and Administrators* ¶ 147.]

Where an executor has authority to sell, a purchaser is not bound to see that he applies the proceeds to the debts in the order prescribed by law.

[Ed. Note.—Cited in *Hyatt v. McBurney*, 18 S. C. 215; *Jones v. Hudson*, 23 S. C. 500; *Campbell v. Virginia-Carolina Chemical Co.*, 68 S. C. 445, 47 S. E. 716.

For other cases, see *Executors and Administrators*, Cent. Dig. § 592; Dec. Dig. ¶ 147.]

Before Wardlaw, Ch., at Chambers, Charleston.

A sufficient statement of the facts will be found in the circuit decree, and in the opinion of the Court of Appeals. The Circuit decree is as follows:

Wardlaw, Ch. Mrs. Eliza Laurens died in 1842, leaving a will and several codicils, whereby after directing the principal part of

her estate to be kept together until her grandson, John Laurens, the plaintiff, should attain the age of twenty-one years, and her negro slaves (with the exception of a few

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that \*were specifically bequeathed) to be then sold and her debts paid out of the proceeds of sale, she devised her plantation on Cooper river, called Mepkin, to the plaintiff, to be taken by him at a certain valuation (\$37,000). But inasmuch as the value of this plantation greatly exceeded the plaintiff's distributive share, and the intention was not to give him a greater proportion of her estate, but only to ensure to him the refusal of the family seat, at a fair valuation, she directed that previous to his taking the said plantation he should execute bonds and a mortgage of the same to certain members of her family for certain proportional parts of the valuation. The testatrix further directed that in the event of the plaintiff dying or declining to accept the devise on the terms mentioned, her son, Edward R. Laurens, and her daughter, Harriet Ingraham, should successively have the refusal of the plantation on the same terms; and in the event of all of them declining, then the plantation should be sold by her executor, and the proceeds be similarly divided. And, lastly, it was provided that in case the fund designated for the payment of her debts, viz: the sales of the negroes not specifically bequeathed, should be insufficient to pay the full amount, the residue of debts should be “paid out of the proceeds of Mepkin, whether taken at the valuation or sold.”

Edward R. Laurens, the sole executor named in the will, proved the same. The plaintiff came of age in the latter part of 1845, and accepted the devise of Mepkin, and went into possession. The negroes were sold about the same time, but the proceeds of sale were insufficient for the payment of the debts, and the whole amount at which Mepkin was valued was required in addition. The plaintiff accordingly paid it to the executor, who disbursed it all in the payment of debts. Having thus paid the price of the plantation in full, the plaintiff did not execute the bonds and mortgage mentioned in the will. On November 25, 1851, the plaintiff agreed to sell the plantation to the defendant, Edward S. Lucas, for thirty thousand dollars. A written agreement was duly executed between them, and Mr. Lucas took possession on the

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day of \*1851, without any examination of the title. Upon that examination being made afterwards, he was advised that the title was liable to objections, and he refused to fulfil the agreement; and this bill was filed for a specific performance of the same. There are no disputed facts between the parties, and the cause was heard on the bill, and answer:

The defendant is satisfied with the chain

of title down to Mrs. Laurens; but he contends, in the first place, that the devise by her to the plaintiff depends on a condition, to wit: the giving bonds and mortgages to the parties mentioned in the will for proportional parts of the valuation of Mepkin, and that the condition is precedent, and consequently necessary to be performed before the title could vest. The words of the will are, that "previous to taking the plantation he shall execute bonds," &c. These terms do not necessarily import that the title shall not vest until this condition is performed, and the nature of the condition itself precludes such an interpretation: because the condition is that the devisee shall execute a mortgage—a thing which he could not do before the title had vested in him. Besides the devise is first to the plaintiff in direct terms, which, if the will had stopped there, would have been an absolute devise, so that the following condition annexed must be a subsequent, not a precedent one. *Peyton v. Bury*, 2 P. Wm. 627. In *Porter Shephard*, 6 T. R. 668, Lord Kenyon says, "Conditions are to be considered to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument, and technical words, if there be any such, should give way to the intention." Take the intention of the testatrix as our guide in this case; and it is manifest that she never designed that this devise should fail, because the performance of the condition attached to it became impossible. A prominent desire in her will evidently is that this grand-son should be the proprietor of the family seat, and her meaning was simply that Mepkin should be charged with certain legacies, and those charges be recognized by the devisee in the form of bonds and a mortgage, and not that the ceremony of exe-

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cuting those papers should be a prerequisite to the vesting of the title.

But the provisions of the fourth codicil render it unnecessary to consider the question of conditions precedent or subsequent; that codicil was executed in 1842, more than four years after the will, and probably after the testatrix had incurred new liabilities which made it likely that Mepkin would be needed in aid of the fund set apart for payment of her debts, and it expressly provides that, in that event, the same should be "paid out of the proceeds of Mepkin, whether taken at the said valuation, or sold as aforesaid." The entire proceeds of Mepkin, as we have seen, were required for the payment of her debts, and were accordingly paid by the plaintiff to the executor, and so applied by him. This payment to the executor was under the circumstances in accordance with the terms of the will, and it cannot be said that the testatrix intended the plaintiff to pay to the executor the entire value of the property, and give the bonds and mortgages spoken of besides. But it is further objected

that there are still outstanding specialty demands against the estate of Mrs. Laurens, which, having received no share or dividend of the assets, now constitute claims against Mepkin, in the hands of the plaintiff. The only demand which has been presented, it seems, is that of the heirs of Timothy Street, who are creditors of Edward R. Laurens, as Master in Equity, Mrs. Laurens having been one of his sureties for the first two of the four successive terms for which he was elected to this office, and they do not seek to subject Mepkin to their demand, but only the legacy left by Mrs. Laurens in the hands of the legatees. If the plaintiff, like those legatees, were a volunteer, there might be force in the objection; but he is not a volunteer, he must be regarded as a purchaser. It has not been decided yet whether Street's claim is good against the bonds of the first two terms; but whether or not, it was not presented before the estate had been closed after due notice to creditors, according to law, so that even the executor, if he were not himself an obligor on the bonds, could not be held

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liable in his own estate to these, or other like demands, and the plaintiff stands in a better position than the executor, inasmuch as he was not bound to see to the proper application of the money paid for Mepkin.

It is ordered and decreed that the agreement in the pleadings mentioned dated November 25, 1851, and filed with the bill, be specifically performed, and carried into execution. And upon the plaintiff executing and delivering to the defendant at the expense of the defendant, according to the said agreement and conditions of sale, a proper conveyance of said plantation called Mepkin, as heretofore tendered by him, it is ordered that the defendant pay to the plaintiff the amount of cash principal and interest and execute and deliver to the plaintiff the bond or bonds, and mortgages, and pay the commission of two and-a-half per centum on the amount of the purchase money, and do and perform the other acts and things required by the said agreement, according to the true intent and meaning thereof. Either of the parties to be at liberty to have a reference to the Master to determine the amount of cash to be paid, and the securities to be given, and the other things to be done by the defendant in case the said parties do not agree. Costs to be paid by the defendant.

The defendant appealed on the grounds:

1. Because the devise to the complainant could only take effect, even according to the terms of the will, after the payment of the debts of the testatrix; and was, besides, conditional upon his complying with the other directions of her will, and that whether precedent or subsequent such condition would operate as a lien or charge upon the estate, both in the hands of the complainant and all others claiming under him with notice.

2. Because the defendant cannot be bound



as a purchaser to look into the administration of the estate of Mrs. Laurens to ascertain that the money paid by complainant to the executor was applied in the proper course of administration.

3. Because it appears that there are still

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outstanding specialty obligations of the testatrix which would be entitled to be satisfied out of her real estate in preference to any debts that appear to have been paid by the executor.

4. Because under all the circumstances of the case the title is a doubtful title, and such as the Court will not compel a purchaser to take.

Dukes, for appellant.

The opinion of the Court was delivered by

DUNKIN, Ch. When John Laurens, in November, 1851, agreed to sell the Mepkin plantation to the defendant, Edward S. Lucas, he had been about six years in the possession of the plantation. He had paid thirty-seven thousand dollars for it to the executor of his mother, Mrs. Eliza Laurens. This sum is admitted to have been the full value of the premises, and seven thousand dollars more than the price stipulated to be paid by the defendant. Under these circumstances the agreement was made, for the specific performance of which these proceedings were instituted. The objections of the defendant are set forth in the grounds of appeal from the Chancellor's decree. Before advertng to them, it may be proper to state the general principle of this Court in carrying such agreements into execution. A purchaser cannot be compelled to take a doubtful title. But on this subject the Court acts on moral certainty, and a purchaser will not be permitted to object to a title on account of a bare possibility. This is illustrated by *Lyddall v. Weston*, 2 Atk. 19, where in the original grant from the Crown there was a reservation of tin, lead and all royal mines. Lord Hardwicke decreed a specific performance against the purchaser on the ground of the great improbability of the existence of such mines as well as the want of a right of entry. And in another case referred to by Mr. Sugden, p. 519, a man articed for the purchase of an estate with some valuable mines, which were under a common, and he objected to complete his purchase because others who had a right of common might bring actions against him for sinking shafts

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to work his mines. Lord Eldon decreed a specific performance, after showing the improbability of any obstruction from the commoners. The objections of the defendant seem to be first that the legal title was not in the plaintiff; and second, that if he had the legal title, it is so incumbered with charges or subject to claims, that the purchaser should not be compelled to accept it. The

title in Mrs. Laurens is not questioned, and the devise to the plaintiff is in direct terms. It is objected that the devise is after payment of debts. "Whatever doubts may once have existed," says Mr. Jarman, "whether these words rendered the devise contingent until the debts are paid, it is now well established that such a devise confers an immediate vested interest, the words of apparent postponement being considered only as creating a charge," 1 Jarm. 743. And *Barnardiston v. Carter*, 1 P. W. 505, not only sustains this position, but affirms that the receipt by the executor of funds sufficient to pay the debts, relieves the estate of the devisee from the charge. Then it is said that the execution of bonds to the other legatees was also a condition precedent to the vesting of the devise, or was, at least a charge binding on the estate in the hands of the devisee or others claiming under him with notice. The reasoning of the decree shews very satisfactorily that the character of this condition did not postpone the vesting of the estate. But suppose the plaintiff, in order to comply with the terms of the will, or because he was satisfied with the condition of the estate, had executed the bonds and mortgage as directed, and had thus created (if it were possible) a more perfect charge upon the estate than the terms of the devise created, and the plaintiff had been afterwards compelled to pay the full price of the estate to the creditors of the testatrix, can it be doubted that this Court would relieve against the bonds thus given to the legatees? The extreme improbability of any claim by the legatees arising out of this charge would in itself warrant the Court in regarding the objection as no obstacle to a decree for specific performance.

But this Court is also of opinion with the

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Chancellor, that the plaintiff is entitled to the position of a purchaser of the plantation for valuable consideration; and this view is, perhaps, more in accordance with the ultimate intentions of the testatrix, as well as the subsequent conduct of the parties.

The will of the testatrix was executed in August, 1838. The several codicils extend to November, 1842. Her wishes in regard to Mepkin, and the disposition of the stipulated value remained substantially the same, but the practicability of gratifying them had become doubtful. In the fourth codicil, executed 28 October, 1842, it is provided that, if her grand-son, John Laurens, "should be minded to accept the devise of Mepkin plantation" at the value fixed by the will, he should execute bonds for specific sums to Mrs. Ingraham and Mrs. Ramsay, daughters of testatrix, and to certain of her grandchildren. But if he should decline to take the plantation on these terms testatrix then directs that her son Edward R. Laurens "should have the refusal of the plantation"

at the same valuation, and, upon his acceptance, should execute certain bonds to the other legatees as therein specified; and, if he should decline, it is then directed that her daughter, Mrs. Ingraham, should have the refusal of the plantation at the same valuation, upon giving bonds as therein specified to the other legatees; and if Mrs. Ingraham should decline to take the plantation at this valuation and on these conditions, the testatrix directs that then "the said plantation shall be sold by her executor, at private or public sale, upon such condition for cash or credit as he may deem most advantageous." She then directs the disposition of the surplus of the sales, after the payment of her just debts and the legacies previously given; but by the next succeeding clause it is declared that if the fund before specifically provided for the payment of her debts and satisfaction of her legacies should prove insufficient, then that "the residue thereof should be paid out of the proceeds of Mepkin, whether taken at the said valuation or sold as aforesaid." Although the plaintiff had been let into possession of Mepkin, when he became of age, he had never executed bonds to the legatees, probably in consequence

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\*of the uncertain condition of the estate of the testatrix. But for some time prior to 24 April, 1851, it was well ascertained that the entire proceeds of Mepkin would be absorbed in the payment of the debts of the testatrix. On that day the executor of Mrs. Laurens executed to the plaintiff a conveyance in fee of the premises, acknowledging the receipt from him of the sum of thirty-seven thousand dollars; which consideration money the parties agreed was disbursed by the executor in the payment of the debts of the testatrix. This unquestionably constituted a sale of the plantation; and, if the executor had authority to sell, this deed operated as a complete transfer of the title of the testatrix. The proposition, sufficiently plain, may perhaps be illustrated by supposing that the plaintiff had paid nothing to the executor, and that the executor, finding the proceeds of Mepkin were demanded for the exigencies of the estate, had, on 24 April, 1851, sold the premises to a third person for thirty-seven thousand dollars, had executed to him the proper conveyance, and applied the purchase money to the payment of the testatrix' debts, what infirmity could be detected in the title of the purchaser? And why should not the plaintiff occupy this position? It has been rather faintly suggested that the executor had only authority to sell after the other parties had declined to take the plantation at the valuation and upon the conditions prescribed by the will. But no form of refusal is prescribed; and under the circumstances it may very reasonably be inferred from their silence and ac-

quiescence that they had declined so bootless a privilege. The only objection which seemed to be seriously urged was, that the testatrix, in her life time, had become one of the sureties of a public officer, and then it is suggested that in the administration of the fund by the executor he had not marshalled the assets according to law. During the life time of the testatrix no lien existed on her estate. By her will the executor was authorized to sell Mepkin plantation and make a valid title to the purchaser. It is difficult to maintain that the death of the testatrix, or the provisions of the Act of 1789, created any lien on the estate. An executor thus

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\*authorized has the same power as the testatrix. If Mrs. Laurens had been alive in April, 1851, her right to sell Mepkin for a valuable consideration and her capacity to make a perfect title are not questioned. She might have applied the proceeds to the payment of her debts, or in any other manner. The title of the purchaser would be in no manner dependent upon the mode in which she appropriated the funds. Unless an executor with authority to sell has the same power, no purchaser either of lands or negroes from an executor would be safe in his title until his administration had been closed and the regularity of his accounts judicially established.

This Court concurs with the Chancellor, that the purchaser from the executor was not bound to see to the proper application of the money paid for Mepkin; and they are also of opinion that the plaintiff stands in an equally favorable position with any third person who might have purchased from the executor.

It is ordered and decreed that the appeal be dismissed, and the decree of the Circuit Court affirmed.

JOHNSTON and WARDLAW, CC., concurred.

DARGAN, Ch., absent at the hearing.  
Appeal dismissed.

#### 6 Rich. Eq. \*227

\*THE SOUTH-CAROLINA MANUFACTURING COMPANY and Others v. THE BANK OF THE STATE OF SOUTH-CAROLINA, WADE HAMPTON and Others.

(Charleston. Jan. Term, 1854.)

[*Marshaling Assets and Securities* Ⓒ5.]

Money was loaned to a corporation on the bond and mortgage of the Company—the stockholders having, by contract, become, individually, sureties for the repayment of the loan: *Held*, that other creditors of the Company had no equity to compel the lender to exhaust his remedy against the sureties before resorting to the Company for payment.

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Cent. Dig. § 10; Dec. Dig. Ⓒ5.]



[Corporations  $\hookrightarrow$ 440.]

A bond and mortgage given for money loaned by the Nesbitt Manufacturing Company, held valid, under their charter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1775; Dec. Dig.  $\hookrightarrow$ 440.]

[Corporations  $\hookrightarrow$ 227.]

The solvent stockholders of the Nesbitt Manufacturing Company held not bound to make up for the benefit of creditors of the Company the deficiency of defaulting and insolvent subscribers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 882; Dec. Dig.  $\hookrightarrow$ 227.]

[Limitation of Actions  $\hookrightarrow$ 21.]

Instalments due to the Company by a defaulting stockholder, are barred by the statute of limitations after four years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 97; Dec. Dig.  $\hookrightarrow$ 21.]

[Limitation of Actions  $\hookrightarrow$ 174.]

Though a creditor of the Company may be subrogated to its rights against a defaulting stockholder, yet he will be barred by the statute of limitations whenever the Company would be.

[Ed. Note.—Cited in Terry v. Martin, 10 S. C. 267.]

For other cases, see Limitation of Actions, Cent. Dig. § 660; Dec. Dig.  $\hookrightarrow$ 174.]

Before Dunkin, Ch., at Charleston, February, 1853.

Dunkin, Ch. In December, 1836, the Nesbitt Manufacturing Company was incorporated, with a capital of three hundred thousand dollars to be made up of six hundred shares, of five hundred dollars each. This was to be paid as follows: one-third, whenever called in by the Board of Directors, during the year 1837; one-third of the balance, as called for by the Board of Directors, during the year 1838; one-third, as called for, during the year 1839; and the remaining third, as called for, during the year 1840. By the fourth clause of the charter, the stock of defaulting subscribers was declared to be forfeited to the Company, upon certain conditions, and with certain reservations, therein specified. The subscribers were Wilson Nesbitt, F. H. Elmore, Wade Hampton, William E. Martin, William Clarke, Thomas Cooper, B. J. Earle, Samuel M. Earle, Joseph N. Shelton, Moses Stroup, I. E. Nott, John G. Brown, B. T. Elmore, and P. M. Butler, for the shares affixed to their names, respectively, in the books of

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the Compa<sup>\*ny</sup>, and making, in the aggregate, the six hundred shares, of five hundred dollars each.

By the sixth clause, the Company was authorised to increase its capital to one million of dollars, for the purpose of carrying on its operations, either by enlarging the stock of the stockholders, opening subscriptions for new stock, selling new stock, or by borrowing money on the credit of the Company. Of the privilege of thus increasing the capital, it may be here remarked, the Company never availed themselves.

The seventh clause declares that, "for the

purpose of giving security for any loans made to said Company, either to commence its operations, or to increase its capital, the said Company may mortgage its charter, works, lands, and personal property, of every description;" and by the ninth clause, the Company is authorized, generally, "to sell, alien, transfer, convey and deliver any property, real or personal, which they may possess or acquire."

Three days after the passage of the Act, to wit, 24 December, 1836, the individual stockholders of the Company, reciting that the incorporated Company had it in contemplation to obtain, by loan, a sum of money not exceeding two hundred thousand dollars, to secure the payment whereof the said Company would execute its bond or bonds, or other obligations, with a mortgage or mortgages of its charter, stock, and estate, real and personal, or such part thereof as might be agreed on; and that the said stockholders had agreed to become, individually, securities for the repayment of said loans, they thereby constituted F. H. Elmore their attorney, to sign any contract for them to become sureties for such loan. And afterwards, to wit, on the 17th May, 1837, the Bank of the State of South Carolina, by an agreement with F. H. Elmore, reciting the premises, bound themselves, upon the condition that the Company would, when required, execute bonds with the aforesaid stockholders, as sureties, and a mortgage of the charter, &c., undertook to "advance and loan to said Company, as it might be required, and the means and ability of the Bank would allow, such

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sums of \*money, as might be required to enable said Company to complete their works for the manufacture of iron, and put the same in full operation."

Under this arrangement, large advances, on loans, were made by the Bank of the State. In 1840, they took a bond and mortgage from the Company; and in Oct. 1843, the President of the Company confessed a judgment to the Bank, on which execution was duly issued. In February, 1845, the Bank of the State instituted proceedings in this Court, in behalf of themselves, and such other creditors of the Nesbitt Manufacturing Company as should make themselves parties to the suit, against the said Company. Under a decretal order, the Master, in September, 1845, sold the whole estate, real and personal, of the Company, including the chartered rights and privileges. The amount realized, as appeared by a subsequent report, was (\$144,002.82 cents) one hundred and forty-four thousand and two dollars and eighty-two cents; and the Master reported that the amount due to the Bank of the State, and other creditors, who had established their demands under a published notice, was two hundred and seventy-three thousand and eighty-five dollars

and thirty-eight cents, (\$273,085.38;) that the amount due on the judgment and mortgages of the Bank of the State, and on mortgages to other creditors, would exhaust the assets, and leave nothing for the general creditors; and that a balance would still be due to the Bank of the State, of ten thousand four hundred and twenty-three dollars and forty-three cents (\$10,423.43.) The Master further reported, that of the subscribers to the capital stock, six had failed to pay up their subscriptions, and that the amount due by these parties was fifty-two thousand seven hundred and ninety-five dollars and twenty-eight cents (\$52,795.28;) that four of these parties were dead, two had removed from the State, and, he was informed, all were insolvent. The reports of the Master were confirmed by the Court, and the final order made 12 July, 1847.

The complainants, in the proceedings now pending, never made themselves parties to

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the suit instituted by the Bank of \*the State, although they had notice of the same. The issues between the plaintiffs and the Bank of the State have no connexion with the claims against the other defendants, and their defence depends on distinct principles. This bill was preferred on 22d February, 1848, and the complainants are unsatisfied creditors of the Nesbitt Manufacturing Company; some of their demands having been reduced to judgment, and others being on simple contracts. All the judgments are junior to that of the Bank of the State. In February, 1850, a special order of reference was made by Chancellor Dargan; and on 12 July, 1852, the Master's report was filed, in which he refers to the proceedings in the Bank of the State v. Nesbitt Manufacturing Company, and states that the assets have been distributed, in conformity with the decree. The case has been argued against the Bank of the State, as if the fund were still in the custody of the Court. On the part of the complainants, it is first insisted, that the Bank have two securities, to wit, the individual responsibility of the stockholders for the loans made, as well as the funds of the Company; and that they should first exhaust their remedy against the individuals, leaving the funds of the Company to those creditors, who have no other security. But it is manifest, from all the evidence, that the Company was the debtor of the Bank, primarily liable, and the security of the individuals was only collateral. The principle assumed by the complainants is sound and familiar, but is inapplicable to the case proved.

Then it is insisted, that the bond and mortgage given to the Bank are invalid. The charter of the Company, in reference to this subject, has been already recited. The agreement by the Bank to make the loans, was made in May, 1837; and they were made from time to time, until 1840, when the Com-

pany executed the mortgage, according to the original stipulation. It is not clear, that in 1840, any of the complainants were creditors of the Company. But this is not important. It appears to the Court, that the securities were executed and delivered, in conformity with the authority of the charter.

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\*Some of the property of the Company, sold by the Master in Sept. 1845, was not covered by any specific lien, as he then reported to the Court. But it was bound, by the execution of the Bank of the State; was recommended by the Master to be paid over; his report confirmed, and the fund paid over, in conformity with the decree, leaving the judgment and fi. fa. of the Bank unsatisfied. It is not perceived, that the general creditors have any equity to recall the payment so made. The Court can recognize, then, no ground upon which the complainants are entitled to implead the Bank of the State of South Carolina.

But the stress of the complainants' argument, was to establish the responsibility of the defendants, Wade Hampton and the legal representative of Franklin H. Elmore, deceased, for the deficiency of the defaulting subscribers, or stockholders. If the principles propounded are yet unsettled, it is important for the community, as well as for the parties to these proceedings, that they should be considered, and determined. Wade Hampton was a subscriber for fifty shares, or twenty-five thousand dollars, of the original capital, under the Act of Dec. 1836; and Franklin H. Elmore, for a like amount. Both paid their subscriptions in full. But six other subscribers, to the amount, in the aggregate, of fifty-two thousand seven hundred dollars, failed to pay their subscriptions. Five of the six are insolvent. It is insisted, that the other solvent stockholders are bound to make up this defalcation. The axiom is not called in question, that a corporation is the creature of the charter. The individuals, who subscribe to the stock, or become members of the corporation, incur no personal liability, unless as prescribed by the terms of the charter. "The charter," says Mr. Justice Story, "relieves them from personal liability, and substitutes the capital stock in its stead." *Wood v. Dummer*, 3 Mason, 311 [Fed. Cas. No. 17,944]. This exemption has created great jealousy in the minds of the community, and, at times, induced extreme reluctance, on the part of the Legislature, to create new corporations. This indisposition has gradually assumed

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the character of astute \*vigilance, in enlarging the security of the community, by various safeguards. But originally, the capital stock was the only fund to which creditors could resort. "Credit is universally given," says the author above cited, "to this fund, by the public, as the only means of payment." This



capital stock may exist, or be created, in various modes. Sometimes a number of individuals, engaged in a particular enterprise, may be in possession of the property, and desire, and obtain a charter of incorporation. Such was the Glen's Spring Company, and the Charleston New Theatre Company. But in the most ordinary applications for a charter of incorporation, the enterprise demands a larger capital than individuals would be disposed to embark, and is to be made up in such manner as the Legislature may prescribe. Such are Banks, Insurance Companies, &c. The capital is fixed, and the stock is divided into shares of a specified amount, in order that each subscriber may know the extent of his interest, as well as of his responsibility. The terms, and time of payment of the subscription, may be specially fixed by the Act, or may be committed to the persons appointed for that purpose. To ensure this in good faith, and to guard against any evasion, has always been an object of solicitude. Generally, forfeiture of stock has been made the penalty of a failure to pay every instalment; and frequently, the corporation is prohibited from going into operation until a certain amount of the capital stock (sometimes one-half) has been actually paid in gold or silver, or the current Bank notes of the State. But, in the absence of such prohibitory provision, to render each subscriber responsible for the payment of the whole amount of the capital stock, would not only engraft a new liability, but be fatal to the establishment of any such institutions. It is supposed that the argument has received some countenance from the decision in *Haslett v. Wotherspoon*, 1 Strob. Eq. 209. The ground of that judgment is stated at page 229. The Act of Incorporation declared, "and necessarily, (says the Chancellor,) on the authority of the persons applying for the charter, that its capital was then a pres-

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ent capital of \$60,000. And persons \*dealing with the corporation, and desiring to know what their means were, might well suppose that the whole sum had been paid in, and was in the hands of their treasurer. The fact that only \$37,000 had been subscribed, or paid in, was calculated to surprise, and operated as a fraud on the creditors, for which the corporation is responsible." It was held, that to make good this representation, all the persons who applied for, and accepted the charter, were responsible; and that in case of the insolvency of any, the deficiency should be made up by the others. Nearly all the defendants had already paid the amount, which they had originally agreed to subscribe to the Association, and the sum had been applied to the erection of buildings, &c. But they were all assessed again a fixed amount under the decree, and they were compelled, in any event, to make up the sum, which they had represented to

be "the present capital," at the time of incorporation. In this case, it is not suggested that the defendants made any representation, which would induce "persons dealing with the corporation, and desiring to know what their means were, to suppose that the whole sum of three hundred thousand dollars had been paid in, and was in the hands of their treasurer." On the contrary, it appears on the face of the enactment, that the capital was yet to be raised; and the Legislature, having regard to the public interest, as well as that of the corporators, prescribed the mode in which it should be accomplished.

*Hume v. The Winyah and Wando Canal Company*, *Carolina Law Journal*, p. 217, was also cited. I have neither the right, nor the disposition, to call in question, or in any manner impugn, the authority of that case, upon any point decided by it; but it appears to me to afford little sanction to the proposition here advanced. That Company was incorporated without any declared capital; but the parties entered into a resolution, that the fund for completing the objects of the incorporation "should be raised by assessments, to be made on the individual members, in proportion to the number of shares owned by each, according to the nature of their con-

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tracts, and the exigencies of the work." It was alleged, and by the demurrer admitted, that the defendant was \$1,000 in arrears to the corporation, on account of these assessments. It was held, that this constituted a fund, to which the complainant (a creditor) was entitled, in satisfaction of his demand. But it was not determined, or contended, that the defendant, W. Matthews, was liable for the sum assessed on his co-defendants, Mr. Poinsett, Gen. Hampton, or Col. Blanding, in the event of the defalcation on the part of either of them. The Court subrogated the creditor to the right of the corporation, under the resolution to enforce the assessments against the members. To this right, the complainants are here entitled. And this brings the Court to the consideration of the case of Dr. Thomas Cooper.

It appears from the Master's report, that Dr. Cooper was a subscriber for a certain number of shares in the stock, and that he had not paid his subscription. The Court has not been furnished with the evidence, on which the Master's report was founded. The instalments were payable in 1837, '38, '39, and '40. Dr. Cooper died in the Spring of 1839. His executor, Dr. De Leon, paid his debts, and gave bond for the surplus, \$3,600, to certain trustees. This bill was filed on the 22d February, 1848; and the case was argued upon the plea of the Statute of Limitations. The undertaking of Dr. Cooper, was a simple contract to pay five thousand dollars, by instalments; the last instalment falling due in 1840. It has been decided, in

recent cases, that for non-performance of this agreement, the corporation were entitled to maintain an action of assumpsit against a defaulting subscriber; and that the forfeiture of the stock, was only a supplementary remedy. In four years and nine months after the action accrued, certainly in October, 1845, the action of the Company would be barred, and their right gone. Are the creditors of the corporation in any better situation? It appears to the Court a misapprehension to suppose that, as between the creditors of a corporation and a defaulting subscriber, any trust exists. The fiduciary relation may be between the creditors and the corporation, but the contract of the sub-

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\*scriber to the stock is direct and single. No privity exists between him, as an individual, and any creditor of the corporation. He can only be reached by the creditor through the corporation; and this is the only equity of the creditor, to wit, to be subrogated, pro hac vice, to the rights of the corporation. If the rights of the corporation are lost, or their remedy barred, the creditor has no equity to revive them. The Statute of Limitations is not an act of amnesty. It probably proceeds on the presumption that the debt has been paid, but that, from lapse of time, the evidence of payment has been lost or destroyed. What should debar the representative of Dr. Cooper from the benefit of this presumption? What right of complaint against the representative of Dr. Cooper had the creditors, in February, 1848, which the corporation had not in 1840, and which was satisfied, or lost, in 1845?

It was suggested, that the proceedings of the Bank in 1845, had kept alive, or recognized, the liability of Dr. Cooper. But it is sufficient to reply, that the representative of Dr. Cooper was no party to those proceedings. The supplementary order of reference was merely for information, as a basis for making new parties; and the report of the Master effectually chilled all further action, or inquiry.

It may be, that the corporation were remiss in exacting payment from defaulting subscribers. But this is a matter between the stockholders and the directors, or between the corporation and the creditors. It has been already intimated, that the course of legislation, in this State, on the subject of corporations, at once indicates what is well understood to be the law, what are the evils, and in what manner the Legislature have endeavored to prevent those evils, while they still secured to the country the unquestionable advantages of such institutions. After passing several improvident Acts, by which a few irresponsible individuals were enabled to obtain credit, with no other claim to it than a charter of incorporation, the Legislature became justly alarmed at the consequences of their own imprudence,

and abruptly closed the door to all further

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applications. But this very salutary jealousy has been gradually tempered by a more liberal spirit. As early as 1801, stockholders in Banks, in case of the failure of such institutions, were declared liable for twice the amount of their subscription, or of the value of any stock, which they held within twelve months of the failure of the Bank. For several years immediately previous to 1838, many companies were incorporated for manufacturing, and similar purposes, which obtained a temporary credit, and then became insolvent. In 1841, it was declared that, "it should become part of the charter of every corporation, which should receive a grant of a charter, or any renewal, amendment, or modification thereof, (unless the Act should in express terms except it,) that every charter of incorporation granted, renewed, or modified as aforesaid, shall at all times remain subject to amendment, alteration or repeal, by the Legislative authority." In 1845, the Legislature incorporated several manufacturing companies, but under new and very stringent provisions. They were prohibited from going into operation until one-half the capital stock had been actually paid in: the members of the corporation were then declared liable, jointly and severally, for all debts and contracts made by such corporation, until the whole amount of the capital stock had been actually paid in. And again, if the total amount of the debts which the said corporations should at any time owe, exceeded the amount of the capital stock actually paid in, "the Directors under whose administration it should happen, are declared, jointly and severally, liable for the same in their natural capacities." All these precautions, are designed to protect the community from the danger of a fictitious credit. Having no original resource for the payment of their debts, but the capital of the ideal personage created by the charter, the payment of this is scrupulously secured, and then is superadded a limited individual responsibility, which would not otherwise exist. In the charter of the Nesbitt Manufacturing Company, no such individual liability is declared, and the remedy of the creditors is limited to the corporate assets.

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\*It is ordered and decreed that the bill be dismissed.

The complainants appealed on the grounds:

1. Because the debt contracted with the Bank primarily, was a debt of the individuals who negotiated with the Bank; and the Corporation should not be held liable, unless the individuals who contracted that debt were unable to pay.

2. Because the Bank, if a creditor of the corporation, was a creditor holding two classes of securities: (1) the obligations of the individuals who contracted the debt;



and (2) the assets of the corporation. And if the Bank elected to be paid from either of these securities, it was bound to preserve the other, as a security for those who had a legal claim only on the security which the Bank has exhausted.

3. Because the Bank cannot be held, against bona fide creditors, as a creditor of the corporation: for the loan which is assumed to have been made to the corporation, was not made under the circumstances which, in the charter, authorized the loan; and because it was a loan to individuals, who were then, and are still, indebted for their subscription to the capital of the Company.

4. Because the confession of judgment was unlawful, and should have been set aside.

5. Because the sum of \$8,000, reported by the Master, as assets of the corporation not bound by any specific lien, should have been applied to the payment of all the creditors of the corporation, and not appropriated to the benefit of the Bank of the State.

6. Because the capital of an Incorporated Company is the fund to which, alone, creditors can resort for the payment of debts: that the acceptance of the charter binds all stockholders for the payment of such capital: that in consideration of such liability, the stockholders are entitled to the benefit of all corporate privileges, including the exemption from being sued at law, or being made liable in this Court to make up more than any deficiency, in the capital of

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such Company. And in case of such deficiency, the solvent stockholders are liable to make good the same, for the benefit of the creditors of the Incorporated Company.

7. Because this principle applies, whether the capital required in the charter be described as present capital, or otherwise; and whether the charter specifies a division of the capital into shares, or not. The capital being a substitute for the personal liability of the stockholders, will always be required to be paid in for the benefit of creditors: and the arrangement of shares, or other division of the capital, being matters within the control of the stockholders, will not be held so to operate, that the capital, the only fund to which creditors can resort, shall be unpaid, while bona fide creditors are unsatisfied.

8. Because each stockholder, without the charter, is liable as a member of a joint stock Company. By the charter, that liability is reserved, and the capital substituted. And each stockholder, who, by the charter, protects himself from general liability, is bound for the performance of all acts provided for in the charter, and upon which the exemption is granted.

9. Because the plea of the Statute of limitations was no defence, and the decree, in sustaining the plea, is erroneous. That the

creditors of the Company have no remedy at law, but only in Equity, to compel contribution for the deficiency in the capital. And to hold that creditors, in the enforcement of this Equity, shall be affected by all matters which, in an action at law between the incorporated Company and its stockholders, may be pleaded, is to affirm the proposition, that, in this Court, creditors may be barred by lapse of time, before their right of action has accrued.

10. Because in the case of Thomas Cooper, it was in evidence that he had not paid any part of his subscription: that he had been reported as one who was bound, but could not pay: while the answer of his executor, in this case, admitted assets. And no other conclusion can be had, than that the report in the case, in which he was named as

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utterly insolvent, was erroneous, and had operated to lead this Court into the commission of a wrong and injury to the complainants.

11. Because the decree is in other respects erroneous, and should be reversed; and the complainants have the relief asked for in their bill.

Magrath, for appellants.

Petigru, Hayne, Torre, Martin, contra.

PER CURIAM. We concur in the judgment of the Chancellor: which is hereby affirmed. And it is ordered that the appeal be dismissed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurring.

DARGAN, Ch., absent at the hearing.

Appeal dismissed.

#### 6 Rich. Eq. \*240

\*ROBERT SHAW v. W. S. MONEFELDT and Others.

(Charleston. Jan. Term, 1854.)

[Wills  $\infty$  524.]

Testator directed the residue of his estate to be sold by his executors and the proceeds invested. The interest and profits he gave to his widow for life. He then directed that at her death the principal be divided, and he gave one moiety thereof to M. B., "if she shall be then living"—if not, to such of her children "as may be then living." The other moiety he directed to be subdivided into five equal parts—one part he gave to J. P., and the other four parts to four of his brothers, naming them; and in case M. B. should die before my wife and leave no children surviving at the death of my wife, or in case of the death of any other of my said residuary legatees before my said wife, or under age, the part or share of such so dying of the residue of my estate, shall go to the remaining sons of my father, to be equally divided between them, except his son John, who is hereby excluded from any part of my estate." M. B. died before testator's widow, leaving no children. Two of the four brothers named as legatees also

died before the widow, leaving no children, and one having attained full age died in her life time, leaving issue:

*Held*, that upon the death of M. B. her moiety went to the other sons of testator's father, except John; and that the son who alone survived the widow was not exclusively entitled.

[Ed. Note.—Cited in *Presley v. Davis*, 7 Rich. Eq. 109, 62 Am. Dec. 396; *Aaron v. Beck*, 9 Rich. Eq. 414.

For other cases, see *Wills*, Cent. Dig. § 1123; Dec. Dig. ¶524.]

[*Wills* ¶543.]

*Held*, further, that the interest of each of the four brothers named as legatees was defeasible only in the event of his dying before the widow and under age, in which event it went over to his other brothers, except John; and that the interest of each became indefeasible upon his attaining full age or surviving the widow.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1169; Dec. Dig. ¶543.]

Before Wardlaw, Ch., at Charleston, June, 1853.

Wardlaw, Ch. William D. Shaw, late of Charleston, made his last will and testament, bearing date December 31, 1817, whereby he constituted his wife Eliza, during widowhood, and his friends, Thomas Blackwood, Alexander Black and Timothy Street, his executors; and after some specific and pecuniary legacies, directed the residue of his estate to be sold and disposed of by such of his executors as should qualify and act, and the moneys arising from such sale, or from his choses in action, or otherwise from his estate, after the payment of his debts and legacies, to be invested by his said acting executors in public or bank stock, or other securities bearing interest, and at their discretion for the advantage of the parties interested, to be called in and re-invested, so as to produce the best annual income. The testator then gives all the dividends, inter-

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est and profits of \*said residue so invested to his wife Eliza for life, for her sole and separate use; and further declares his wishes concerning the disposition of his estate, as follows: "And it is my will that immediately after the death of my said wife, the principal sum or amount of the said public or bank stock, or moneys at interest, shall be divided into two equal moieties or half parts, and I give one of the said equal moieties or half parts thereof to my sister, Mary Ann Black, if she shall then be living; but if she shall be then dead, I give the same to such child or children of hers as may be then living, to be equally divided between or amongst them, if more than one, and to be paid to them, him or her, respectively, on their, his or her arrival to the age of twenty-one years; and the other of the said equal moieties or half parts, it is my will, shall be subdivided into five equal parts or shares and I give one of said fifth parts or shares to Martha Jane Palmer, sister of my wife, Eliza Shaw; one

other fifth part thereof to my brother, Robert Shaw; one other fifth part thereof to my brother, Franklin Shaw; one other fifth part thereof to my brother, Alexander Shaw; and the remaining fifth part thereof to my brother, Henry Shaw; and in case my sister, the aforesaid Mary Ann Black, should die before my wife, and leave no child or children surviving at the death of my said wife, or in case of the death of any other of my said residuary legatees before my said wife, or under age, the part or share of such so dying of the residue of my estate shall go to the remaining sons of my father, David Shaw, to be equally divided between or amongst them, except his son John, the fourth eldest now living, who is hereby excluded from any part of my estate."

This will was admitted to probate February 2, 1818, and at the same time Eliza Shaw, Alexander Black and Timothy Street, qualified as executors; of whom Black had the principal management. Street is dead, and the bill has been dismissed by consent as to his representatives, reserving the question of costs, until the sufficiency of Black's estate be tested. Some time after the death of the testator, his widow Eliza and Alexander Black intermarried, whereby her office

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as executrix terminated. \*She died in May, 1849, and her husband, Black, died in September, 1849, leaving a will, of which defendant, Monefeldt, is executor.

After the death of the testator Shaw, and before the death of his widow Eliza, testator's sister, Mary Ann Black, and his brothers, Franklin and Henry, departed this life without issue, but what was the order of their deaths, and whether they had attained full age or not, does not appear by the pleadings or evidence. In the same interval of time, testator's brother, Alexander, also died, at mature age, and leaving five children. The question submitted to my decision is as to the right of these children of Alexander to take any portion of the residue of testator's estate. The plaintiff claims that himself and Martha Jane Palmer are exclusively entitled to this residue, as the only residuary legatees who survived the widow of testator; whereas the children of Alexander insist that the legacies of the residuary legatees vested in right at the death of testator, although postponed in enjoyment, and liable to be divested in behalf of substituted legatees on future contingencies.

The law favors the vesting of estates, and words in a gift referring to the future are more readily interpreted to defer the enjoyment than the vesting of an estate. The will in the present case has the effect of converting the residue, which is the subject of controversy, into personal estate; and although there may be no great difference in principle upon the point of vesting between



real and personal estate, yet as to the latter estate, the terms of gift need not be so strong, and a trust is more easily created. It is argued for the plaintiff that no gift is made by the testator to the remaindermen until the death of his widow, and that the ultimate donees must fulfil the description of survivors at her death, or take nothing. The premises of this conclusion may be well disputed. The executors may be considered as trustees having the legal estate by immediate gift, in order to enable them to sell, invest, appropriate the income for life, and then divide the capital. If the executors had the legal estate as trustees, there is no room for

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controversy; for clearly \*a gift of residue to trustees to pay the income to a tenant for life, and at her death to divide the capital among remaindermen, vests an interest in the remaindermen at the death of testator. The condition is annexed to the time of payment, and not to the substance of the gift, and is in nature of debitum in presenti, solvendum in futuro. Some of the cases on this point seem to decide, that where interest or dividends alone are the subject of bequest until a particular time, and the principal is then for the first time given or distributed, the capital is not vested; but Mr. Jarman (vol. 1, 765, n. e.) justly remarks, that "it must not be too readily assumed, however, that any given case falls within the principle, as the Courts have evinced no great inclination to extend it; and, in truth, in some of the cases of this class, the difference of expression was very slight." If it be considered that there is in the present case an immediate gift to the executors as trustees of the whole estate, then words directing distribution at a future time among the remaindermen would not serve to postpone the vesting of the estate in them, which would occur without the superadded expressions. Granting that the immediate gift to the executors as trustees be doubtful, here the gift to the remaindermen is in the present tense. "I give one moiety, &c., I give one-fifth part," &c.; and the direction for distribution and payment in future does not fairly import postponement of vesting. The will, fairly interpreted, gives the residue to the executors, in trust to pay the income to the widow for life, and at her death to divide the capital among ascertained remaindermen, with certain provisions for substitution. But the terms of the gift to the remaindermen are not here as in some of the cases, those alone directing division and distribution at a future period. Our case of *Bunch v. Hurst*, 3 Des. 273 [5 Am. Dec. 551], may be advantageously consulted upon the general question of vested and contingent estates. In *Bankhead v. Carlisle*, 1 Hill, Eq. 357, testator, after devises to his children, gave to his wife during life or widowhood, the residue of his estate, and proceeded: "which said property I wish and devise at the mar-

riage or death of my beloved wife, to be

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equally \*divided among my children as above named, with one exception, &c." Gideon, one of the sons, survived testator, but died in the lifetime of the widow. It was held that Gideon's interest in remainder was vested and transmissible, that the direction to divide among the children was substantially a bequest to them, that Gideon having a present capacity at the death of the testator, to take whenever the possession should become vacant, had a vested interest. It is hardly necessary to remark, that the liability of an estate to be divested, upon the happening of some future contingency, does not hinder the original vesting; indeed, it is a circumstance in favor of the immediate vesting, that the testator has expressly given over the legacy to another, in the event of the legatee dying under certain circumstances. *Murkin v. Phillipson*, 3 Myl. and K. 257.

In *Packham v. Gregory*, 4 Hare, 396, a testator gave to trustees the residue of his estate, to be put out at interest, upon good security, and to pay the interest and proceeds thereof to his wife for life or widowhood; and from and after her decease or marriage, he directed his executors to pay and divide the whole of the money so directed to be put out at interest into and among all his nephews and nieces equally, except three who are named, within six months after they should become entitled thereto. One of the nephews survived the testator, but died without issue during the widowhood of testator's wife. V. C. Wigram held the representative of the nephew so dying to be entitled to his share. He argued that the words "pay and divide," on the death of a tenant for life, gave a vested interest, except where upon the whole instrument they served to designate persons who must answer a particular description at a future time, or not be otherwise entitled to take benefit from the gift; and that the direction to the trustees to pay and divide the fund within six months after the legatees should become entitled, merely allowed time for the discretion of the trustees and the convenience of the estate, and for those purposes only, and did not postpone the vesting; and that if upon the whole will it appears that the future gift is only postponed to let in

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some other interest, or as the Court has commonly expressed it, for the benefit of the estate, the interest is vested, notwithstanding the enjoyment be postponed. He remarks: "To avoid this construction, which treats the legacies as vested, the surviving legatees must contend for a construction which might be attended with the consequence, that if one legatee should die during the tenancy for life, leaving issue, that branch of the objects of testator's bounty would be excluded. I will not, without reason, adopt a construction which would or might be attend-

ed with such a consequence. The consequence of disinheriting issue is one ground on which the Court seeks, if it can, to avoid a construction attended with it." The reasoning of V. C. Wigram on the general doctrine appears more at large in *Leeming v. Sherratt*, 2 Hare, 14. In this latter case he cites and recognises the case of *Barnes v. Allen*, 1 Bro. C. C. 181, where testator gave the residue of estate to his wife for life, and afterwards to their children, and if she should die leaving no child at her death, he willed that his trustees should transfer the securities in which his estate should then be vested to his two brothers, and if either brother should die, to the survivor. Both brothers died in the lifetime of the wife of the testator; but it was determined that this substituted interest of the brothers was transmissible to their representatives, although there was no gift to them, except in the direction to transfer. These cases seem to justify me in holding that the interests of the remaindermen under this will are vested.

All the remaindermen, however, are not put by the testator in the same predicament concerning the substitution of legatees upon contingencies. One moiety of the residue is limited to Mary Ann Black if she should be living at the death of the widow, or if she should be then dead leaving children, to her children, and if she should be then dead without children, to the remaining sons of David Shaw (except John) to be equally divided between them. She died before the widow of testator, without leaving children. It was argued for plaintiff that remaining sons of testator meant his sons or son surviving his

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\*widow; but I think the term "remaining" is used in connection with the exclusion of John, and means only the other sons of David Shaw, besides John, who may be living at the death of Mary Ann Black. Admitting that the tendency of modern decisions in England and in this country is to restrict the term survivors to its natural and technical meaning, it may be well questioned whether the numerous cases quoted in argument, belonging to the class of *Cripps v. Wolcott*, 4 Mad., 11, have any application to the present case. The words remaining except one, naturally mean others besides the excluded individual; and no case requires us to give to the words the force of the term survivors, with reference to a remoter period of vesting. According to my construction, at the death of Mary Ann Black, one-half of the residue vested in the other sons of David Shaw, father of testator, except John, who is expressly excluded. I have already said that I am not informed by the pleadings and evidence which of the sons of testator's father were living at the death of Mary Ann Black, and the Master must inquire into this matter.

The other moiety of the residue is limited in fifth parts to five persons named, after

the death of the widow Eliza as life tenant, or in case of the death of any of them before said widow, *or* under age, then to the remaining sons, except John, of the father of testator. I have no difficulty, under our decisions in *Waller v. Ward*, 2 Speers, 786; *Scanlan v. Porter*, 1 Bail. 427; *Bostick v. Lawton*, 1 Speers, 258, in holding that *or* in this limitation must be construed *and*, and of course, that the estates otherwise vested in the remaindermen, as to the latter moiety, were divested only in case any of them died before the life tenant *and* under age. *Miles v. Dyer*, 5 Sim. 435, (7 E. C. C., 484,) is an instructive case, as well in relation to the vesting of estates as to the conversion of *or* into *and*.

The shares accruing to the other sons of David Shaw, upon the contingency of Mary Ann Black dying in the lifetime of the widow, without leaving children, and of any other residuary legatees dying under age in the

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lifetime of the widow, differing \*in this respect from the original shares bequeathed to them, are not liable to be divested upon any contingency, and must be distributed as their absolute estates. *Hill v. Hill*, 1 Strob. Eq. 6.

It is ordered and decreed that one of the Masters make the inquiries and take the accounts upon the principles stated in this opinion. At and since the hearing, various orders were passed in this case, and I leave the parties to apply at the foot of this decree for such others as may be necessary.

The complainant appealed on the grounds:

1. Because it is respectfully submitted the death of the widow of testator was the period of gift, division and payment, and there was no vesting before that event, and consequently no interests were transmissible to the representatives of those who did not survive her.

2. Because the legacy to Mary Ann Black did not vest, and there was, therefore, no such accrual of shares at her death to the remaindermen, as placed them beyond the contingencies contemplated by testator.

3. Because on intention, the testator did contemplate two contingencies in the provision for the limitation over, and therefore it is not a case where "or" should be construed "and."

4. Because the complainant, being the only son of David Shaw who survived the testator's widow, was entitled to the whole of his brother's estate, and it should have been so decreed.

Martin, for appellant.

Pressley, Spratt, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. This Court is content with the conclusion and general reasoning of the Chancellor.

As to the moiety of the residue given to Mary Ann Black: whether this legacy be



vested or contingent, the will expressly provides for the contingency, which has hap-

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pened, of her death \*before the tenant for life without leaving children surviving the tenant for life; and in that event this moiety is limited over, in equal shares, to the remaining sons of testator's father, except the fourth son, who is particularly excluded. The decree discusses the construction of the phrase "remaining sons," &c., in reference to this moiety only, adjudging that it means the other sons, except John, living at the death of Mary Ann Black; and leaves it to implication that the phrase has a parallel meaning, in the case of the death of one of the sons under the circumstances mentioned in the limitation over. To avoid misconception, it may be well to express this implication. If one of the four sons, to whom four-fifths of the other moiety were bequeathed in equal shares, died under age and in the lifetime of the widow, his share passed, by the limitation over, to the other sons of testator's father, except John, living at the death of such son. If any of these four sons attained full age or survived the widow, his share, originally vested and absolute, remains unimpaired by the limitation over.

It is ordered and decreed that the decree be affirmed and the appeal dismissed.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

#### 6 Rich. Eq. \*249

\*E. M. HUTSON v. W. S. TOWNSEND.

(Charleston. Jan. Term, 1854.)

[*Parent and Child* ⇐2.]

Bill by the maternal aunt against the father concerning the custody and control of an infant about thirteen years of age. The father resided out of the State, and the aunt had the possession of the infant. The commissioner ordered that the father be enjoined from any intermeddling with the infant, and from any measures to possess himself of his person until the further order of the Court. On motion of the father to dissolve the injunction, a Chancellor at Chambers ordered the aunt to deliver the custody of the infant to the father, he giving security for the forthcoming of the infant to abide the decree of the Court: on appeal *held*, that such order was within the discretion of the Chancellor.

[*Ed. Note.*—For other cases, see *Parent and Child*, Cent. Dig. §§ 4-32; Dec. Dig. ⇐2.]

[*Appeal and Error* ⇐87.]

Where the custody of an infant is the subject of suit, the Court is fully justified in making interim arrangements for his custody.

[*Ed. Note.*—For other cases, see *Appeal and Error*, Cent. Dig. § 559; Dec. Dig. ⇐87.]

[*Parent and Child* ⇐2.]

And where no strong objection is proved or stated, the father, where he has never abandoned his right to the custody of the infant, is

entitled, as natural custodian, to the possession of his person *pendente lite*.

[*Ed. Note.*—For other cases, see *Parent and Child*, Cent. Dig. § 13; Dec. Dig. ⇐2.]

Before Wardlaw, Ch., at Chambers, Beaufort, October, 1853.

Wardlaw, Ch. The contestation of the parties in this case is concerning the custody and control of Wm. H. G. Townsend, an infant of about thirteen years of age.

Maria, wife of defendant, and sister of plaintiff, died in June, 1840, soon after giving birth to said infant. The child was left with his grand-mother, Martha Hutson, and his aunts, the plaintiff and Mary C. and Anne B. Hutson; principally under the care and charge of the plaintiff: and the expenses of his nurture and education have been borne hitherto by these maternal relatives, or some of them, except that the hire of a nurse for one year was paid by defendant. The physical and moral needs of the child have been carefully and tenderly supplied; and the bill states, that the plaintiff and "her said sisters are in circumstances, and desire and intend, if permitted to do so, to complete his education, including a collegiate course, and a profession, if that should be his desire." Martha Hutson died in October, 1851, leaving a will, by which she bequeathed one-fifth of her personal estate, after payment of her debts, to her grand-son, W. H. G. Townsend, on his attaining twenty-

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one \*years, for his life, and on his death, to his issue; and upon his death without leaving issue then living, to her daughters, Esther, Mary, and Anne, with further limitations. The testatrix specially provides, that her said grand-son shall receive no portion of the income of said bequest until he attains twenty-one years of age, and that all of said income shall be enjoyed by her said three daughters, and the survivors and survivor of them, until that epoch; but that if all of them die before that event, her executors shall apply said income, from the death of the survivor until the grand-son be twenty-one years old, according to their discretion, for the education and support of said grand-son. By a codicil, dated October 15, 1849, said testatrix provided that if her said grand-son should die without leaving issue living at his death, or if such issue should all die in the lifetime of the said three daughters, the property given to the grand-son should then go to such of her said daughters as might then survive, with further limitations; and she further authorized her executors to mortgage the whole, or any part of the interest of her grand-son under her will, for the borrowing of such funds as might be necessary, and to be applied by said executors to defray the expenses of education of said grand-son, so long as he might be permitted to remain under the care and control of such of her said daughters as should con-

tinue unmarried; and to make sale of so much of the corpus of the property given to her grand-son, as might be necessary to satisfy the sum so borrowed; or if the executors preferred to advance the funds necessary for the education of the grand-son, while permitted to remain with the daughters as aforesaid, giving them like power to sell the corpus of the bequest for their reimbursement.

The defendant, at the time of his marriage with Maria Hutson, was a schoolmaster from the North, with small pecuniary means; after the death of his wife, he acquired the profession of a physician, and lived for some years in Georgia; afterwards he contracted a second marriage, with a widow having a son by a former marriage, and removed to Chattanooga, in Tennessee, where he pursued,

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unsuccessfully, the business of a merchant. He still resides there. The defendant denies, in his answer, that he is technically bankrupt or insolvent; but it is clear, from his own admissions and other evidence, that his affairs are embarrassed to insolvency.

A vague imputation is made in the bill, that the infant will be exposed to unwholesome moral influences in the family of his father; and the suggestion is thrown out, that the character and conduct of his stepson, prove the defendant to be unfit for the guardianship of his son W. H. G. A charge made so indefinitely, and unsupported by any proof, may be summarily dismissed.

Upon bill filed the Commissioner in Equity for Beaufort district ordered that defendant be enjoined from any intermeddling with the infant, and from any measures to possess himself of the person of the infant, until the further order of the Court. It seems the bill was filed, while the defendant was preparing to obtain possession of his child by process of habeas corpus in the law Court. The answer of the defendant insists strongly upon his rights as father, to the custody of his child, and the direction of his education; denying, or explaining the circumstances adverse to his rights at common law. In this state of things, application is made to me at Chambers, on the part of the defendant, to rescind the order of the Commissioner; and on the part of the plaintiff, to make some modification of the order. In general, the father is entitled to the custody of his child, even against the mother, and although it may require nourishment from the mother's breast; and this mainly results from his primary liability for the maintenance of his children. A Court of Equity, by virtue of its delegated power as *parens patriæ*, may remove the guardianship of children from a father, upon clear proof that he is of grossly immoral character, and voluntarily exposes his children to demoralizing influences. So, also, I suppose, this Court might interfere, to prevent delivery of a ward of the Court to a father, especially if he were about

to remove the ward beyond the jurisdiction of the Court, where such delivery would in-

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volve considerable pecuniary loss to the infant. Upon the pleadings, and the affidavits presented to me in this case, I am not satisfied that any thing appears to limit the father's right to the custody of his child, and I am restrained from granting the defendant's motion only by the consideration, that this might amount, under the circumstances, to a final determination of the case: whereas, it is possible, that at a full hearing, the plaintiff may entitle herself to some relief. I will provide some security for a fair and full trial.

It is obvious that the bill is defective in its frame. It does not make parties to the suit the infant, nor the sisters of the plaintiff, who seem to have equal right with herself. It contains no distinct averment of any fact leading to the conclusion, that the infant, under the care of the father, will be exposed to demoralizing influences. It contains no binding obligation, or promise, on the part of the plaintiff or her sisters, to add to the pecuniary means of the infant, if he be left under their care and nurture.

It is ordered, that the plaintiff deliver to the defendant the custody of the infant, W. H. G. Townsend, upon the defendant's executing a bond to the Commissioner with one good surety, in the penalty of one thousand dollars, conditioned to have the said infant forthcoming to abide the further order or decree of the Court; or his depositing five hundred dollars in cash with said Commissioner, to be held upon the same condition. It is further ordered, that the order of the Commissioner of April 7, 1853, be modified accordingly. It is further ordered, that the plaintiff have leave to amend her bill, as she may be advised.

The plaintiff appealed on the grounds:

1. Because, under the pleadings, no order could properly be made, to transfer the custody of the infant to the defendant. According to the practice of this Court, the injunction should have been retained or dissolved—though conditions could have been annexed, in either case.

2. Because the answer admits the infant

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was in good hands; and it is apparent, no injury would result from his remaining there until February, therefore the injunction should have been retained.

3. Because the security proposed is utterly inadequate to retain the jurisdiction.

4. Because the order considers (in part) the merits, on which no evidence was heard.

5. Because the complainant made no motion to modify, as stated in the order. Her motion was for injunction, (*de novo*;) if the Chancellor decided the Commissioner's order to be defective for form.



6. Because the order does not recognize the old and well settled equity rule, adopted recently even in the Law Court, that "it is the benefit and welfare of the infant to which the attention of the Court ought principally to be directed."

7. Because in an application for guardianship, the infant ought not to be a party, if under 14.

8. Because the order is in other respects contrary to law and equity.

Hutson, for appellant.

De Treville, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. The order of the Chancellor in this case, is upon a matter within his judicial discretion, and confessedly not the subject of appeal, unless he has violated the procedure of the Court in doing more than sustaining or dissolving the injunction granted by the Commissioner. The principal ground of appeal is, that the Chancellor directed the transfer of the custody of the infant pending the suit from the plaintiff, his aunt, to the defendant, his father. This is a mere provisional direction, not concluding the ultimate right of the parties, and guarded against such conclusion of right by security which the Chancellor, in his discretion, thought sufficient. It is the familiar practice of the Court to preserve by adequate securi-

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ty, the \*subject of litigation during a suit. Ellis v. Commander, 1 Strob. Eq. 188. And here where the custody of an infant is the subject of suit, the Court is fully justified in making interim arrangements for his custody. We desire to avoid, as the Chancellor manifestly avoided, any pre-judgment of the merits of the case; and this restrains us from full discussion. But it is proper to state, that when the order was made, the natural right of the father to the custody of his child did not appear to be infringed by misconduct on his part, or by consequential injury to the interests of the child. What is spoken of as a transfer of custody is simply restoring to the father until further order that practical control of his child, which for a time he had exercised vicariously, but without any abandonment of right. As the natural custodian, he was entitled to keep the subject pendente lite, where no very strong objection was proved, or even stated. We perceive no reason to be dissatisfied with this exercise of the Chancellor's discretion.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON and DUNKIN, CC., concurred.

DARGAN, Ch., absent at the hearing.

Appeal dismissed.

6 Rich. Eq. \*255

\*BENJAMIN H. WILSON v. ELEAZER WATERMAN and Others.

(Charleston. Jan. Term, 1854.)

[Equity ⇨419.]

The bill having been taken pro confesso, the defendant first moved for a continuance, and that motion being overruled, he then moved to set aside the order pro confesso and for leave to plead, answer or demur, which was granted on condition that the trial should not be retarded. He then put in a general demurrer and a plea, which were overruled, and a decree was pronounced against him on the merits. He appealed and moved for leave to answer: *Held*,

That the Chancellor had the right to require as a condition of setting aside the order pro confesso, that the case should not be retarded:

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 982; Dec. Dig. ⇨419.]

[Equity ⇨419.]

That, under the circumstances, his discretion was properly exercised.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 972-985; Dec. Dig. ⇨419.]

[Equity ⇨419.]

Where a party permits a bill to be taken pro confesso, he subjects himself to the discretionary power of the Court, and he should not be relieved from this condition without coming up to what the merits of the case and convenient practice require.

[Ed. Note.—Cited in Scott v. Davis, 9 Rich. Eq. 40.

For other cases, see Equity, Cent. Dig. §§ 972-985; Dec. Dig. ⇨419.]

[Equity ⇨217.]

A general demurrer to a bill which has been taken pro confesso, is unnecessary, as under such order the defendant may, without demurring, take advantage of any matter which would be good cause of demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 490; Dec. Dig. ⇨217.]

The Court sees no reason to recede from the judgment pronounced in the case of Walker v. Crosland, 3 Rich. Eq. 23.

[Judges ⇨36.]

Where the Ordinary has taken a void administration bond, and the administrator has removed beyond the limits of the State, a bill may be filed against the Ordinary to account before decree had against the administrator; and the recovery will not be limited to the amount of the bond.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 166; Dec. Dig. ⇨36.]

Before Dargan, Ch., at Georgetown, February, 1853.

This case will be sufficiently understood from the circuit decree, which is as follows:

Dargan, Ch. The will of Mathew Allen, late of Georgetown District, bears date 10th July, 1828. Not long after the execution of the will, (in 1834,) he died, leaving the same unrevoked, and in force. By the terms of this will, the testator devised and bequeathed one-third of his real and personal estate to his wife, Eliza Ann Allen; and the remaining two-thirds to his daughter, Mary A. Elizabeth Allen, at her marriage, or when she should attain the age of twenty-one years. There were contingent limitations,

by which the two-thirds of his estate given by the testator to his daughter, in the event of her dying under the age of 21 years, or unmarried, was to go over to other persons. But as she has both attained the age of 21 years, and has married, I need not cumber

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my statement with \*these provisions of the will. The testator appointed John R. Easterling and Thomas McConnell his executors; of whom, the latter alone qualified, and assumed upon himself the burden of executing the will. The land of which the testator died seized, was acquired after the publication of the will. The testator, therefore, died intestate as to his real estate, which devolved upon his wife and daughter, under the statute of distributions—his widow taking one-third thereof, and his daughter two-thirds. No question as to the real estate arises in these proceedings.

By virtue of a power given by the will, the executor, McConnell, made sale of all the testator's personal property; converting it into cash, bonds and choses in action. He paid off, as is alleged, the principal part, if not all the debts; and in the year of our Lord, 1837, departed this life, in the possession, as is charged in the bill, of a large amount of assets belonging to his testator's estate.

The bill further charges, that David Crossland having previously intermarried with the testator's widow, Eliza Ann Allen, some time in the year of our Lord 1839, made application to Eleazer Waterman, then, as now, ordinary of Georgetown District, for letters of administration with the will annexed of the said Mathew Allen; that administration was accordingly granted by the said Waterman to the said Crossland, upon his executing to the former an obligation purporting to be an administration bond, dated 22d March, 1839, in the penal sum of six thousand dollars, with Holden W. Lyles and Philip E. Crossland, as sureties thereto; and that thereupon the said Crossland obtained from the legal representatives of Thomas McConnell, a transfer of a large portion of the assets belonging to the estate of the said Mathew Allen, amounting to ten thousand seven hundred and seventeen dollars; which the plaintiff says will appear by the receipt of the said Crossland, a copy of which is filed with the bill as an exhibit, and marked B. The plaintiff further charges, that the said Crossland made no returns of his actings and doings as administrator with the will annexed of Mathew Allen; and instead

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of calling the legal representatives of Thomas McConnell to an account for the latter's mal-administration of his testator's estate, and himself in other respects not administering the estate according to law, the said Crossland converted to his own use the whole of the assets of the estate, that had come into his hands in the manner before

stated. The plaintiff further states, that the said Crossland, after committing this devastation, became insolvent, left the State of South Carolina and went to Florida, where he is now supposed to reside.

In August, A. D. 1847, the testator's daughter, Mary A. E. Allen, being still a minor, intermarried with one Hasford Walker. Prior to the solemnization of the said marriage, a deed of marriage settlement was executed by the said Walker, to which Mary A. E. Allen, his intended wife, was a party, as also was the plaintiff in this bill, (Benj. H. Wilson;) by which deed all "estates, and interests of Mary A. E. Allen in the estate of her father, the said Mathew Allen—and all the sums and amounts to which she may be entitled as aforesaid, were conveyed to the said plaintiff as trustee," upon certain trusts therein expressed.

Afterwards, a bill was filed in the Court of Equity for Marlborough District, by the said Walker and wife, (to which the said Benj. H. Wilson was also a party complainant,) against the said David Crossland, and the sureties to his administration bond, (the said Holden W. Lyles and Philip E. Crossland,) for an account of the administration by the said David Crossland of the estate of the said Mathew Allen, which had, or should have come into his hands. This cause came to a hearing at February Term, A. D. 1849. It appears that the Ordinary took from Crossland, whom he had appointed administrator with the will annexed of Mathew Allen, a bond after the form prescribed by the Act of 1789 in cases of intestacy, and not after the form, prescribed by the same Act, in cases of administration with the will annexed. The Court being of the opinion, that the bond in question was not taken in conformity with the provisions of the Act in such case made and provided; and that the

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defendants in that cause, the said Holden W. Lyles and Philip E. Crossland, sureties of said bond, were not liable under their obligation, for the alleged default of their principal, dismissed the bill. This decree on appeal was affirmed.(a)

In the month of September, A. D. 1851, and subsequent to the trial of the said cause, the said Hasford Walker died; leaving his widow, the said Mary A. E. Walker, and two children, the issue of the marriage, namely, Hasford Walker and Legrand Walker, surviving. By the terms of the marriage settlement, the estate therein conveyed remains vested in the plaintiff, (Benj. H. Wilson,) in trust for the use of the said Mary A. E. Walker for her life, and after her death for the use of her children, or such of them as shall survive her; and if none of her children or their issue shall survive her, then for the use of the said Mary A. E. Walker absolutely.

(a) Walker v. Crossland, 3 Rich. Eq. 23.



The plaintiff, Benjamin H. Wilson, as trustee, has filed this bill on behalf of his cestui que trusts. He charges, that "in consequence of the official default of the defendant, Waterman, in granting letters of administration with the will annexed of Mathew Allen, of his goods and chattels which had been left unadministered by Thomas McConnell his executor, to the said David Crossland, without first taking from him a bond with sufficient security, pursuant to the provisions of the statute in such case made and provided, the whole of the legacy bequeathed by the said testator to his daughter, (the plaintiff's cestui que trust,) has been completely wasted and dissipated by the said Crossland, and (the plaintiff) left without remedy for its recovery, except against the said Ordinary for such official default." He prays that an account may be taken of Crossland's administration of the estate of Mathew Allen; as well of such part thereof as came into his hands, as also such balances as he neglected to recover from the legal representatives of the executor McConnell; also, that an account may be taken of the legacy bequeathed by the last will of the said testator to his

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\*daughter; and that such legacy, with the interest due thereon, may be decreed to be paid by the defendant, Waterman, as Ordinary for Georgetown District, for his official default in neglecting to take a proper administration bond from the said David Crossland, for the faithful performance of his trust. He also prays for general relief, and for subpoena ad respondendum against David Crossland and Eliza Ann his wife, and against Eleazer Waterman. Against the two first named, who are resident without the limits of the State, and were made parties by publication, an order pro confesso has been obtained. The defendant, Waterman, having been served with process, has appeared, and he has pleaded, and also demurred.

Leaving out the formal parts, the plea is as follows: the defendant, Waterman, "for his plea sheweth, as to all the discovery and relief sought and prayed by the said complainant's said bill, he, the defendant doth plead, and for plea saith, that this defendant is not the executor, administrator, or the legal personal representative of the said Mathew Allen; and that no part of the assets of the said Mathew Allen, deceased, which, by law is applicable to pay the legacy sought by the complainant's bill to be accounted for, has come to the hands of this defendant, either as executor or administrator of the said Mathew Allen." The demurrer is a general demurrer.

In thus pleading, the defendant has violated one of the plainest rules of pleading. The plea and the demurrer both go to the whole bill. A defendant is not allowed to make out his defence in this way. If the

plea be good, there is no necessity for the demurrer. And if the demurrer be good, the plea is unnecessary. A defendant may plead and demur to different parts of the bill. But he cannot avail himself of both of these modes of defence as to the same matter. This rule is to be adhered to; for there is neither reason or authority for a departure from it.

It is obvious, too, from a mere glance at the plea, that it has no merit. In application to this bill it is utterly without meaning. It does not meet the case stated by the plaintiff.

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It simply declares that the defendant, Waterman, was not the executor or administrator of Mathew Allen, and that none of the assets of said Allen have come into his hands. The bill alleges no such fact; nor is it pretended that such a fact exists. How can it be supposed, that this plea meets the question of liability arising on the facts stated in the complainant's bill, which I have already narrated?

It will be proper for me here to make a brief explanation. When the case was called for trial, there was an order pro confesso against this defendant. He moved for a continuance, on grounds that were not deemed sufficient. The motion was refused. He then moved to set aside the order pro confesso, and for leave to plead, answer or demur. This was granted on the condition, that the trial should not be retarded. The plea and the demurrer were then filed. And the case came on to be tried.

The only serious question arising on this demurrer, is the objection to the jurisdiction of the Court. There is no doubt, but that where the want of jurisdiction is apparent on the face of the bill, it may be taken advantage of by demurrer. 1 Daniels Ch. Pl. and Pr. 607; Story Eq. Pl. § 472.

It may well be doubted, however, whether the defendant has not involved himself in difficulties that are insurmountable by his mode of pleading. There is certainly a proper time in the progress of a cause, when an objection to the jurisdiction should be taken, and after which, the objection would not lie. If the Court has no jurisdiction, the objection should be made in limine, and the cause arrested at once. Its natural place in the order or course of the defence is at the beginning. And this rule is not arbitrary, or technical merely; it is based upon the philosophy of pleading. The contrary would be unreasonable and inconsistent. Why should the Court, the Counsel, the parties, and the witnesses be occupied with an expensive, and perhaps protracted trial on the merits, when the Court has no jurisdiction, and when a plea to that effect on the threshold, would put a stop to all further inves-

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tigation in that Court? In 1 Daniels Pl. and Pr. 615, it is said, "If the objection on

the ground of jurisdiction is not taken in the proper time—that is, either by demurrer or plea, before the defendant enters into his defence at large, the Court having the general jurisdiction, will exercise it, unless in cases where no circumstances whatever can give the Court jurisdiction.”

In *Underhill v. Van-Cortland*, 2 Johns. Ch. 369, Chancellor Kent, in commenting upon an objection to the jurisdiction of the Court, remarks, “The reasons are probably of themselves sufficient; but at any rate, by answering in chief, instead of demurring, the defendants submitted their cause to the cognizance of the Court, and they come too late at the hearing of the merits to raise the objection. It would be an abuse of justice, if the defendants were to be permitted to protract a litigation to this extent, and with the expense that has attended this suit, and then at the hearing interpose with this preliminary objection.” *Ludlow v. Simond*, 2 Caines’ Cas. in Error, 40, 56.

But it may be said, that in this case, the defendant has not interposed his preliminary objection to the jurisdiction of the Court at the trial upon the merits; but that he has pleaded and demurred at the same time. But I have already shown this to be irregular. In *Clark v. Phelps and others*, 6 Johns. Ch. 214, the case was submitted upon the bill, and answer and demurrer, on the points presented by the demurrer. The Chancellor said, “that the answer and the demurrer, each went to the whole bill; and it is a settled rule in pleading, that a defendant cannot plead or answer, and demur to the same matter. The former will overrule the latter. It is inconsistent for a defendant to say he ought not to answer a bill, and yet to answer it fully. The rule appears in all the books that treat on the subject. (3 P. Wms. 80, 81, 2 Atk. 284, Cooper’s Treat. of Pl. 113, Beames Pl. 40.)” The demurrer was overruled, and the question of costs reserved.

Not perceiving how the defendant can be extricated from the labyrinth in which he has involved himself, I pass by these considerations arising upon the state of the plead-

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ing. I prefer \*to predicate my judgment upon higher and broader grounds, and will proceed to consider the case upon its real merits.

That the defendant, Waterman, is liable to the plaintiff upon the facts stated in the bill, does not admit of a serious question. To discuss the question of his liability, would be an idle waste of words and of time. He is charged with a default in the performance of a ministerial duty, which devolved upon him in his official character, as the Ordinary of Georgetown District, whereby the plaintiff has suffered loss. The official default charged in this bill has been already stated. The duty omitted, or performed in so negligent a manner as to be tantamount to omission, is so plainly inscribed upon the statute book, as

to be capable of comprehension by the most common understanding. Indeed, so plain was the duty—so unmistakable the chart by which he should have been governed, that it precludes the possibility of there having been any misapprehension, or error of the judgment. I do not mean to intimate that an error of judgment on the part of an officer in the performance of a ministerial duty would be available as a defence; what I mean to say is, that the conviction is forced upon me, that the official dereliction in this case is the result of sheer carelessness and oversight. In the judgment of the Court, the defendant Waterman is liable; and liable, too, to the extent of David Crossland’s devastavit, so far as the same have been attended with loss to the plaintiff.

The question as to the jurisdiction must now be considered. Has the plaintiff adequate remedy at law? Is Waterman liable in this Court? I will assume that the objection to the jurisdiction of this Court has been properly presented by the plea, or demurrer. And then the question recurs, has the Court power to take cognizance of the cause, and to afford the remedy sought for in the bill?

The 21st sec. of the Act of 1789, 5 Stat. 110; Pub. L. 494; 1 Brev. Dig. 334, 335, after prescribing the form of the administration bond in cases of intestacy, in conclusion, declares, “and if the Justices of the County

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Court who were present at \*the granting of letters of administration, or the Ordinary of the District as the case may be, shall fail to take bond and security as aforesaid, such Justices, or Ordinary, as the case may be, shall be liable to be sued for all damages arising from such neglect, by any person or persons interested in the estate.” A similar provision is not to be found in the preceding, or 20th sec. of the same Act, which relates to the bond to be given by the administrator in cases of administration with the will annexed. But it may be conceded, that the provision cited was intended to apply to both cases; or rather, that at Common Law, independent of any Legislative enactment, the principle embraced in this provision would prevail, and that any public officer would be liable to the party injured by any misfeasance, malfeasance, or nonfeasance in office. The defendant lays hold of the word “damages,” occurring in this clause of the Act of 1789, for the purpose of shewing, that the remedy given by the Act was intended to be by an action at law; such nomenclature being more harmonious with proceedings in that Court, than in equity. This would be a very narrow construction; but supposing it to be correct, it would only prove, that a Court of law had jurisdiction, but it would not have the least bearing upon the question, whether the Court of equity did not possess concurrent jurisdiction in all cases proper for its cognizance, on the great principles of its organization and modes of affording re-



lief. It would be a great misapprehension, however, to suppose that damages in no case can be had in this Court. Equity awards damages *eo nomine* in cases of waste. 2 Story Eq. Jur. 794. And trustees and all persons acting in a fiduciary capacity are responsible for the damages resulting from a breach of trust; the statement of the damages assuming in this Court the form of an account. In Courts of law torts may be sued on in actions *forma ex contractu* upon the implied assumption. And I see no reason why an Ordinary or any other public officer who has committed a default from which the party suing has suffered damages, may not have an account of such damages taken against him in this Court, by reason of the

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breach of his *public trust*: provided, the forms of proceeding in this Court, and its mode and measure of satisfaction, render its interposition necessary to the attainment of a more adequate remedy.

I think, that in a plain case, or perhaps in any case of this kind, an Ordinary might be sued at law in an action for damages arising from his neglect. In *Boggs v. Hamilton*, 2 Mill, 382, an action on the case was brought and maintained against an Ordinary for not taking an administration bond. But admitting that he might be sued upon the assumption, or an action be brought upon the bond, and the condition be submitted to a jury upon an issue of *quantum damnificatus*, it does not follow that the party injured, where an account was to be taken, might not come into this Court for a more perfect and adequate relief. And so, where any other feature of equity jurisprudence was involved in the case.

The measure of Waterman's liability, is the sum total of Crossland's devastations, in which is to be included any loss which resulted from his omission to call the representatives of the executor, Thomas McConnell, to an account and settlement. For the plaintiff charges in his bill, that Crossland negligently failed to have a settlement with McConnell's representatives, by which he says, that the estate sustained great loss. If this be true, (and it is in legal effect admitted to be so by the demurrer,) the plaintiff would be entitled to recover from Crossland the damages, or loss resulting from his neglect in not calling the representatives of his predecessor in the administration to account, as well as for the assets which came into his own hands and were wasted by him. All these liabilities would have been covered by his bond, if it had been good. And the bond being a nullity by the neglect of the Ordinary, all the same liabilities are thrown upon him. It is obvious, therefore, that to ascertain the amount of Waterman's liability to the plaintiff, it will be necessary to take an account, not only of Crossland's administration, but also of McConnell's. How is a jury to sit in judgment

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upon such a case, and do justice between the parties? Such a mode of trial would be as

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unfavorable to the defendant as it would be to the plaintiff—except so far as the former might succeed in enlisting the sympathies of the jury, and thus reduce the amount of their verdict. And certainly this is no argument for his being permitted to go there.

The very complicity of these proceedings would give the Court jurisdiction. Admitting the Court of law to have concurrent jurisdiction, the remedy there, from the mode of proceeding in that Court, would not be so adequate. This Court would be very cautious in putting a case like this out of the pale of its jurisdiction; for one precisely parallel in principles and general outline of facts might occur, but in which there might be such a complication of circumstances arising from a long course of administration, that it would require days, weeks and months of patient and laborious investigation by a Master, or Commissioner in Equity, in order to ascertain the extent of the Ordinary's liability; and in which a jury trial would be a ridiculous mockery. We frequently have such cases arising on administration accounts. And we are only to suppose in addition, the Ordinary to be liable for not taking a good administration bond, to make the case which I have depicted—a case by no means unlikely to occur.

Upon the most general principles applicable to the subject, it is said always, and nowhere denied, that in matters of account, equity has concurrent jurisdiction with Courts of law. In some cases of accounting, the jurisdiction of equity is exclusive, as in the accounts of executors, administrators, and trustees. In *Foster v. Willier*, 1 Paige 537, it is intimated that where to determine the liabilities of parties, it is necessary to require the accounts of several estates, (which is much the case before me,) the Court of Chancery alone has jurisdiction. In *Kerr v. Steamboat Company*, Chev. Eq. 194, Chancellor Harper, in delivering the judgment of the Court of Appeals, says, "though it may not be easy to define by a general rule, the class of cases in which a bill will lie for an account, yet I think there can be no doubt with respect to the present one. That an equitable jurisdiction exists in cases of

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complex and intricate accounts, \*between whatever parties, though an action might be maintained at law, and though no discovery be needed, the authorities have settled beyond question. Such is the conclusion of Justice Story. 1 Sto. Eq. 433, § 451. See also *Mit. Pl. 96*; *O'Connor v. Spaight*, 1 Scho. and Lef. 300. It is true in some cases, it is said, that there must be a series of mutual demands; not merely demands on one side, and payments on the other. Yet this is to be taken with some qualification, for in the case of the Corporation of *Carlisle v. Wil-*

sen, 13 Ves. 276, though the demands were all on one side, and all of them admitted to be of a legal nature, yet the bill was held to lie. The question always is, whether there is adequate remedy at law."

Judge Story, in the treatise quoted by Chancellor Harper in the above extract, traces the concurrent jurisdiction of Equity in matters of account to the inability of Courts of Law, in some instances, to give perfect relief; and this happens, as he says, "in all cases where a simple judgment for the plaintiff, or for the defendant, does not meet the full merits and exigencies of the case; but a variety of adjustments, limitations, and cross claims are to be introduced, and finally acted on, and a decree meeting all the circumstances of the particular case between the parties is indispensable to complete distributive justice." Lord Redesdale, in speaking upon this subject (Mitf. Pl. 96,) says, "that though accounts may be taken before auditors in a Court of Common Law, yet a Court of Equity, by its modes of proceeding, is enabled to investigate more effectually long and intricate accounts, and to compel payment of the balance, whichever way it turns." It would be difficult to imagine a case to which these remarks and authorities will apply with more propriety and force than the case in hand.

There is a class of cases which bears a strong analogy to this, and which supports the views I have taken as herein before expressed. In *Teague v. Dendy*, 2 McC. Eq. 209 [16 Am. Dec. 643], decided on the authority of *Glenn v. Conner*, Dec. T. 1824, Harper, Eq. 267, it was held that the remedy against the sureties on an administration bond was at law, and that they could

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\*not be joined as defendants, in a bill against the administrator for an account, though the administrator was insolvent. The practice at that day was to obtain a decree against the administrator, and then in an action on the administration bond against the sureties, to give the decree in evidence. If the doctrine of *Teague v. Dendy* still prevailed, it would not apply to this case against the Ordinary of Georgetown District. The administrator, Crossland, is without the limits of the State, and he is not personally amenable to our Courts. If he had left property within the jurisdiction that might be reached by an order of sequestration, or by some other proceeding in rem, a suit might have been brought against him. But there is no possible way in which Crossland could be made a party in the Courts of this State, so that a decree could be had against him, to be given in evidence against Waterman in a suit brought upon his official bond. And as an account of Crossland's administration is necessary, in order that a full and adequate measure of justice may be rendered to the plaintiff, there is no remedy but to take the account in this Court in the suit

against Waterman for his official default. In *Teague v. Dendy* and the other cases of that character, the argument was that there was no privity between the sureties and the parties injured by the devastavits of the administrator except the administration bond, which was said to be a legal, in contradistinction to an equitable obligation, and that consequently the sureties could not be made liable in Equity.

But the decision in *Teague v. Dendy*, proved to be unsatisfactory and inconvenient. It led to delay, to the increase of costs, circuity of action, and multiplicity of suits. It gave way and was yielded up in subsequent cases, under the force of these considerations. And a more searching examination, and more ample experience showed that the contrary rule was far more conducive to the safety, and the relief of the sureties themselves.

In *Riddlesperger v. Riddlesperger*, decided about Dec. 1824, cited McMullen, Eq. 490, it was decided that a bill would lie against an administrator, and his sureties for an ac-

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count, where the administrator had removed from and resided out of the limits of the State. In *Cole v. Cole*, cited in McMullen, Eq. 490, a bill was sustained against a guardian and his sureties, under the like circumstances. In *McBee v. Crocker*, McM. Eq. 485, it was decided broadly and without qualification, that the Court of Equity would entertain a bill against an administrator for an account, and against his sureties joined with him as defendants in the same action; thus overruling the case of *Teague v. Dendy*. To the same effect is the case of *Taylor v. Taylor*, 2 Rich. Eq. 123. It is to be remarked that much of the reasoning in these cases, in favor of the doctrine that the sureties to an administration bond might be joined as defendants in a bill against the administrator for an account, applies in favor of the liability of Waterman in this form of proceeding. *Gayden v. Gayden*, McMullen Eq. 435.

In the former case of this plaintiff v. David Crossland, and the sureties to his void administration bond, the bill was dismissed as to all the defendants, Crossland included. It is contended on the part of Waterman, that this decree concludes any liability to account on the part of the said Crossland. It is said that the decree for the dismissal of the bill generally, and without reservation, makes the matter *res adjudicata* as to him; that if he cannot be made to account, it can never be shown that he has committed any devastavits; and that consequently Waterman cannot be made liable for such devastavits. There is some subtlety in this objection, but admitting its full force, it is capable of an easy answer. The bill was filed against David Crossland, the administrator, and his sureties, Holden W. Lyles and Philip E. Crossland. David Crossland was without the limits of the State, and had no property within the jurisdiction which was sought to be



subjected. He was made a party by publication. When the bill was dismissed, as against Lyles and Philip E. Crossland, there remained no case against David Crossland, for he could not be made a party alone under such circumstances. The case could not go on against him. And it is precisely the

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same as if no bill had ever been filed. \*The plaintiff cannot be concluded by a case which he could, by no legal possibility, have prosecuted to judgment. In *Lesterjette, Ordinary, v. Ford* [1 McMul. 89, note], Decr. T. 1831, cited in *McMullen Eq. 490*, it was decided that a decree in Equity, rendered against a sole administrator defendant, who resided out of the State, and who had no property within it, and who had been made a party by publication of a rule, could not be given in evidence to charge his sureties in an action at law on the administration bond, (cited in *Buckner v. Archer*, 1 McMul. 85, 86. *Winstanley v. Savage*, 2 McC. Eq. 435.) The reason of the decision is perfectly sound. The decree in Equity was a nullity as against a person who was no party to the cause. And so, in this case, if the present plaintiff had been permitted to prosecute his suit against David Crossland, after he stood alone as a defendant upon the record under the circumstances which I have mentioned, and he had obtained a decree, it would have been void as against Crossland himself, and could not have been given in evidence against Waterman in this suit. Practically, as to the issues now in question, this case stands as if the other had not been instituted.

I regret that the worthy and conscientious Ordinary of Georgetown should be in so unpleasant a predicament. He has my sympathy. He is intelligent, and knows that his high character as an officer and a man, and his long and faithful official services can be of no avail as a defence in a case like this.

The judgment of the Court is, that the defendant, E. Waterman, in consequence of his official default in the premises, is liable to account to the plaintiff for all losses which he has sustained in consequence of the devastations of David Crossland as administrator with the will annexed of Mathew Allen, deceased, as well on account of the assets of said estate which came into the hands of the said David Crossland, and were wasted by him, as on account of any assets of said estate which he may have negligently failed to receive and collect from the legal representative of Thomas McConnell, the execu-

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tor of Mathew Allen, and the \*predecessor of said Crossland in the administration of Mathew Allen's estate.

It is further ordered and decreed that the Commissioner in Equity take an account of the assets of the said Mathew Allen, which have come into the hands of said David Crossland, and also an account of any assets

that should have been collected and received by the said Crossland from the representative of Thomas McConnell, and which the said Crossland omitted to collect and receive.

It is further ordered and decreed, that the said Waterman is liable to pay, and do pay to the plaintiff, to the same extent that the said Crossland would be liable.

It is further ordered and decreed, that the Commissioner, in stating the account, do allow all just and equitable discounts and credits.

It is further ordered and decreed, that when the net amount of the personal estate of the said Mathew Allen is ascertained in the manner herein directed, the said E. Waterman do pay to the plaintiff the two-third parts thereof, on account of the legacy of the said Mathew Allen to his daughter, the said Mary A. E. Walker, the *cestui que trust* of the said plaintiff.

The defendant appealed from the decree, and prayed that it may be so modified as to allow him to put in his answer to the complainant's bill, and he hoped that such prayer would be granted for the following, among other reasons:

1. That the complainants' claim is for negligence, imputed to the defendant in taking an improper bond from the administrator *de bonis non, cum test. an. of Mathew Allen*; and the right of action, therefore, depends essentially on proof of damage actually suffered by the complainant; and for that reason, it is essential to Mr. Waterman's defence that he should be allowed to show that no damage has occurred to the complainants; but this, by the present state of the pleadings, he is precluded from doing.

2. That the validity or effect of the admin-

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istration bond, \*which the defendant did take of David Crossland, is a preliminary legal question, which can only be tried in a Court of Law.

3. That the validity of that bond is an open question, which has not been decided, and can never be tested till proper measures have been taken to establish a default against the administrator, according to the terms of the bond by regularly citing him to account.

4. That there is nothing in the absence of David Crossland that prevents him from being cited to account, for, according to the best authorities, he is suable, as administrator, in the Courts of this State only; and on reason, as well as authority, he may be cited to account, as administrator, independent of the Act of 1784, respecting absent defendants.

5. And the defendant respectfully submits, that if from want of form in the administration bond, without any fraud or wilful default of the Ordinary, the complainants be put to inconvenience or loss, whether such loss be total or partial, the appropriate remedy is an action against the Ordinary on his offi-

cial bond; and that, on this ground, the bill should be dismissed.

6. That as the objection is not to the sufficiency of the sureties, nor to the amount of the penalty, but only to the want of form in the bond; and there is no fraud or collusion imputed to the Ordinary; he can be liable only to the extent that the sureties would have been liable, if the bond had been in due form; and that his responsibility could by no means be carried beyond the penalty of the bond.

Petigru, for appellant.

The opinion of the Court was delivered by

JOHNSTON, Ch. It appears that the bill had been taken pro confesso against the defendant, Waterman, and that, under these circumstances, he moved for a continuance of the cause until the next term. This motion was overruled. He then moved to set aside the order pro confesso, and for leave to plead answer or demurrer; which was grant-

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ed on condition that the \*trial should not be retarded. He then put in a general demurrer and a plea; and these being overruled, he now moves for leave to put in an answer.

The 36th rule of the Court, adopted the 10th of March, 1810,(b) declares that when a bill has been taken pro confesso, "the order therefor can be set aside only where the defendant shall apply for the same on the first day of the meeting of the Court, and shall have previously filed, or, on making such application shall produce a full and explicit answer or plea, with a brief for the Court,—and shall docket the cause for hearing at such Court,—and submit to any further conditions the Court may impose." And it further provides that if the answer, upon exceptions taken to it, "be adjudged insufficient, the bill shall be absolutely ordered to be taken pro confesso as to the points not satisfactorily answered,—unless otherwise ordered by the Court."

When a party has permitted a bill to be taken pro confesso, he has subjected himself to the discretionary power of the Court; and he should not be relieved from this condition in which he has voluntarily placed himself without coming up to what the merits of the case and convenient practice require.

The demurrer put in by Mr. Waterman was altogether unnecessary on his part. It gave him no defence which he was not equally entitled to under the order pro confesso. If the bill did not state a case entitling the plaintiff to a decree against him, he might have moved to dismiss it for want of equity appearing on its face. And the very rule under which he moved to set aside the order pro confesso which had passed against him, declares(c) that when a bill has been taken

pro confesso, the defendant "may take advantage of any matter which would have been good cause of demurrer," though not entitled to the benefit of matter which ought to be presented by plea or answer.

The demurrer interposed by the defendant in this case was therefore useless; and

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savoured of an attempt to stave off the \*case, and to secure by indirection the continuance which the Court had deliberately refused to grant.

The same may be said of the plea. It was plainly frivolous: and the Chancellor had a just right to assume, as he did, that its design was to pass the term and escape from putting in the answer, which should have been prepared and produced when the defendant came to ask to have the order pro confesso set aside.

We are of opinion that the Chancellor had a right to require as a condition of setting that order aside, that the case should not be retarded. We conceive that in seeing to it that that condition was obeyed, instead of being trifled with, he exhibited a sound exercise of discretion, and we cannot interfere with it, without breaking down rules essential to the practice of this Court.

On the remaining points argued on this appeal, the Court is of opinion that the decree must stand.

A deliberate judgment has been pronounced, from which the Court sees no reason to recede, that the bond taken by Mr. Waterman from Crossland, was not the bond which it was his official duty to have taken for securing the rights of Miss Allen, under the will of her father; that it was ineffectual either under the Statute or at Common Law for her benefit: and, if good, as a Common Law instrument, it was only so as a security to Waterman, the obligee, whose right to use it for his own indemnification was not abridged, but expressly left open to him, by the decree.

This decision was made upon an instrument handed by Mr. Waterman to the legatee as the security he had taken for the protection of her rights when he granted letters of administration to Crossland. After using every effort to render it effectual, she comes back to him with a decree that it was totally ineffectual as a security for her,—the only decree she could obtain:—and it would seem to be but just that he should now make it good to her.

It has been argued that Waterman should

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not be made an\*swerable until a decree has been obtained against Crossland. The cases referred to by the Chancellor are sufficient to shew that where the administrator is beyond the jurisdiction of the Court, so that no decree can be obtained against him, his sureties cannot avail themselves of that fact for exonerating themselves from accountability. The objection of the defendant, Waterman,

(b) 1 Des. 62.

(c) 1 Des. 63.



stands upon weaker grounds. In relation to the legatees of the testator, Crossland was improperly deputed by the Ordinary to administer the estate; inasmuch as he did not give the bond demanded by Statute as a prerequisite to his obtaining letters. As to the legatees he was no administrator, except so far as they might be willing to affirm his acts; and all his acts were wrongful. But as to the Ordinary, whose commission he held, he was administrator. The wrong of the Ordinary was in giving him power over the estate, when he should not have done so. He is rightfully responsible for all his acts, or omissions, under his own wrongful deputation.

It is no answer to this to say, as has been said in the argument, that this is to make Mr. Waterman answerable for damages. Independently of the obvious consideration that the act of Mr. Waterman constituted his deputy a trustee, and enabled him to act in a matter purely of account,—let us grant that the injury resulting to the plaintiff is a pure damage,—it is such a damage as can only be ascertained by account; and this is sufficient to bring Mr. Waterman into this Court, in order to fix the amount for which he is responsible.

Another objection to the decree, urged by counsel, was that Mr. Waterman should not be made responsible beyond the penalty for which he took the bond. It was argued that the process by which he fixed the amount for which security should be taken was judicial; and that his misdecision as to the value of the estate was protected by the forum in which he sat. Granting, for the sake of argument, that such a decision, in connection with a lawful bond, might have been entitled to the immunity claimed, does it follow that it should be extended to an unlawful bond?

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We know of no decision made by Mr. \*Waterman, only as we are to infer it from a piece of blank paper. From that we learn that Mr. Waterman determined to take an ineffectual security, and to limit, even that, to an insufficient amount—heaping injury upon injury. The plaintiffs have received no security; and what Mr. Waterman may have thought, in his own mind, respecting the extent to which this blank paper should go, is no adjudication. If the fixing a low penalty to a vicious bond would exonerate an Ordinary from liability beyond its amount; all that an Ordinary has to do, is to make the penalty as low as he pleases, and then take what bond he pleases; and then he is safe.

It is ordered that the appeal be dismissed.

WARDLAW, Ch., concurred.

DARGAN, Ch., absent at the hearing.  
Appeal dismissed.

## 6 Rich. Eq. 275

## FRANCES COX v. PETER COX.

(Charleston. Jan. Term, 1854.)

[Limitation of Actions  $\hookrightarrow$  99.]

Defendant purchased the land of plaintiff's ancestor, in October, 1842, at sheriff's sale, and received titles from the sheriff in October, 1843. In March, 1851, defendant brought trespass to try title against the plaintiff to recover possession of the land; and thereupon, plaintiff filed her bill for an injunction, and to have the sheriff's deed cancelled, alleging the purchase to have been fraudulent: *Held*, that plaintiff's bill was barred by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 479; Dec. Dig.  $\hookrightarrow$  99.]

Before Dargan, Ch., at Horry, February, 1853.

Except that the statute of limitations was interposed by the defendant in his answer by way of plea, everything necessary to a full understanding of this case appears in the circuit decree, which is as follows:

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\*Dargan, Ch. Harmon Cox, the deceased husband of the plaintiff, was the owner of a tract of land situate in Horry district, known as Cox's Ferry. It contained about 950 acres, and was worth 800 or 900 dollars. The ferry is said to have yielded an annual income of \$100.

Harmon Cox became embarrassed in his pecuniary circumstances; and there were executions against him. The sheriff levied upon the Cox's Ferry tract, and on the 3d of October, 1842, it was sold by the sheriff, and bid off for \$50 by the defendant, Peter Cox, Harmon's brother. Harmon Cox continued to live on the place till 1849, when he died, and his widow has lived on it from the day of his death up to the present time. Peter Cox received titles from the sheriff for the land on the 5th Oct., 1843. He at the same time received titles for another tract of Harmon's called Savannah Bluff, which he bid off at the same time. The latter tract is not in dispute. The facts relative to it have only been elicited on account of their supposed bearing upon the controversy relative to "Cox's Ferry."

In March, 1851, Peter Cox brought against the plaintiff in this cause an action of trespass to try the title of the Cox's Ferry tract, and the plaintiff has filed this bill for a perpetual injunction to restrain the said action at law; and to set aside and cancel the sheriff's deed, on certain grounds of Equity which she states in her bill; and for a partition of the said tract of land between herself and the defendant, they being the only heirs at law and distributees of Harmon Cox.

The plaintiff charges in her bill, that previous to the sale of the said land, there was a parol agreement between Peter Cox and Harmon, by which the former was to bid off the property for the benefit of the latter. She alleges that on the third day of "October

of that year, (1842) which was the sale day, the said plantation was offered for sale by the said sheriff, to satisfy a judgment and execution in favor of Charles J. Gore against the said Harmon Cox, in the presence of a considerable crowd, when Peter Cox, the brother of the said Harmon, pretending and stating that he was desirous of purchasing

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the said planta<sup>t</sup>ion for the benefit and accommodation of the said Harmon, and as a home for him and his family, which was then helpless, and he, the said Harmon, infirm, and that he desired no benefit to himself in said purchase; but on the contrary, as soon as the said Harmon refunded the purchase money that he should have the said plantation absolutely; all of which he had promised the said Harmon who was there ascending to the statement made by the said Peter, made, as he and all others believed, in good faith at the time; he, the said Peter, bid off the said plantation at the sum of fifty dollars, and it was knocked off to him at that sum, which your oratrix avers is less than one-tenth of the real value of the said plantation.

"And your oratrix charges, from what she has heard and believes of the said sale by the said sheriff, that it was purely on account of the objects expressed by the said Peter at the time, that he was enabled to bid off the said land at that sum; as many of the friends, as well as creditors of the said Harmon were present, interested in the said sale, and well aware of the embarrassments of the said Harmon, but who, as she has been informed and believes, desisted from competition on account of the avowed ostensible humane purposes of the said Peter Cox," &c.

To this bill the defendant pleaded the statute of frauds. At this stage there was an application made before Chancellor Dunkin for an injunction to stay the action of trespass to try the title. The case was heard on the bill and affidavits, and the plea.

The following order was made: "It is ordered that an injunction issue according to the prayer of the bill, until the hearing of the case, and the further order of the Court."

From this order an appeal was taken by the defendant. The Court of Appeals affirmed the order, and the appeal was dismissed. 5 Rich. Eq. 365.

The defendant had leave to file an answer, which he did on the 17 February, 1853. In his answer, "he admits that the Cox's Ferry tract was offered for sale at the time stated

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in com<sup>p</sup>lainant's bill, and that for the purpose of relieving his brother Harmon, this defendant purchased the said tract of land for the sum of fifty dollars, stating at the time that he would make titles to the same to the said Harmon, whenever he the said

Harmon should refund the purchase money, provided it was done in the lifetime of the said Harmon. And this defendant avers, that at no time during his life did the said Harmon pay, or offer to pay the purchase money aforesaid."

It will be perceived that the plaintiff and the defendant have given a very different version of the transaction.

The evidence on this part of the case is as follows: Josias G. Waller, who was a step son of Harmon Cox, says, "that he was present at the sale; it was on a Monday; there was a large crowd present; it was conducted as sheriff sales are usually conducted; there was no other bid than that of Peter Cox." He testified to no declarations of Peter Cox made at the sale, as to the terms on which he was to bid. But after the sale he heard Peter Cox say "that he had bid off the land for the benefit of his brother, and with the intention of befriending him. He wanted to help him. He said that Harmon was to have back the land when he paid him back his bid."

The affidavit of Benjamin E. Sessions was admitted as evidence. The affiant states, "that in a conversation between Harmon and Peter Cox in January, 1844, after the sale of Harmon Cox's land, Peter Cox stated that he had bought the land called Cox's Ferry, as well as another tract called Savannah Bluff, on sale day in October, 1842, for Harmon's benefit, and that he would recognize the sale made to the affiant by Harmon Cox of Savannah Bluff, at \$400. He asked Harmon to pay him when convenient, for what he had paid for Cox's Ferry, which he promised to do."

The Rev. James E. Belin said that in the Spring of 1844, from motives of friendship and compassion, he became Harmon Cox's agent, to examine into the state of his affairs and to settle and pay his debts. He made a memorandum from Harmon's statement of his liabilities, and the names of his credi-

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tors. The name of Peter Cox was among the creditors. It thus appeared that Harmon owed Peter two debts; one of \$50, the bid on the Ferry tract, and another debt, amounting to \$300 or more, which was in judgment.

Shortly after he had undertaken this agency, the witness met Peter Cox: he told him of his agency, and spoke to him about the bid of \$50 for the Cox's Ferry land. Witness said to him that the other creditors of Harmon were pressing, and asked whether he required immediate payment. The defendant said that what he had done, was done for his brother's accommodation, and that as soon as the money which he had paid for the land was refunded, he would make his brother titles for it; he agreed to wait for his money, but no time was fixed for its payment. The arrangement was, that he



was to be paid when the more pressing demands were satisfied. Before all the debts were paid, Harmon Cox died. The first money which witness tendered to Peter Cox, was the amount due on the judgment. He declined to receive it on the ground that his brother's death changed the whole aspect of affairs. He said that he was his brother's sole heir, and that the money which witness offered him was his own as his brother's sole heir. The witness paid it to the sheriff. The defendant forbid the sheriff to receive it. The witness supposed from this that he would not receive the bid of \$50 on the land, and did not then offer it; but about three years after Harmon's death, as near as he can recollect, the witness, acting, as he says, in behalf of the estate, offered Peter Cox the amount of his bid, \$50, with interest thereon, which was refused.

I have thus, with a good deal of minuteness, stated the evidence that bears upon the principal question in the case. It falls short of sustaining the allegations of the bill in a material particular. The bill states a case in which the defendant had damped and depressed the sale of the land by a public declaration made to the crowd at the time, that he was bidding off the land for the benefit of his brother Harmon, and that when the bid was refunded, the latter was to have his

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land re-conveyed to him. This statement, if true, would put the case on a parallel with *Kinard v. Hiers*, 3 Rich. Eq. 423 [55 Am. Dec. 643]. It was upon the aspect thus presented, that the Court of Appeals affirmed the order of Chancellor Dunkin granting the injunction. But when the defendant's answer came in denying the most material allegations of the bill, and still insisting upon the statute of frauds, and the plaintiff was required to make out her case by proof, she fell short of the mark, and failed in proving such facts as would exempt the contract from the operation of the statute. No witness has testified that Peter Cox, at the time of the sale, or before, made any declaration calculated to depress the price, or to prevent competition in the bidding. The proof of the contract or arrangement between the two brothers, arises from the subsequent declarations and admissions of Peter Cox, that he had bid off the land for the benefit and accommodation of his brother, and not that any declaration to this effect had been made at the time of the sale. So far as the witnesses have spoken, nothing was said by Peter Cox, or by any other person at the time of the sale, calculated to prevent competition. And it does not appear that any person was prevented from bidding. The case made by the evidence, is simply that the defendant has fraudulently refused to execute a parol trust. But a fraud of this character occurs in every instance where a party avails himself of the statute for the

purpose of evading the performance of a parol trust. To grant relief in a case like this, would be to repeal the statute. Something more is necessary, where there is a fraud beyond that of refusing to execute the parol trust, or to perform the parol contract. Where the contract or trust is obtained by fraud or misrepresentation, the Court will interfere, and not permit a statute which was intended for the prevention of fraud to become an instrument for its perpetration. Upon principles of high public policy, it has been settled that where a party by artful combination and representations, has stifled competition at a judicial sale, and has purchased the property at less than its value, he will not be suffered to retain his uncon-

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scientious advantage. The sale will be set aside at the instance of any person who has been aggrieved.

The refusal to perform a parol trust, however immoral and unconscientious such refusal may be, is not such a fraud as would authorize the Court to interfere. But where to this is superadded another fraud by which the party has been enabled to get the advantage, and to thrust himself into the position of a trustee under a void agreement, this Court will afford relief. Thus where a purchaser at a sheriff's sale, represents himself to the bystanders as bidding for the benefit of the debtor, inducing them, from motives of sympathy and compassion, not to compete in the bidding, and obtains the property at less than its value, he will not be suffered to appropriate to himself the benefit of his bargain. And this will be the result whether he was or was not authorized to make the declarations. If an agreement did actually exist, that the purchaser should buy for the benefit of the debtor (who, under these circumstances, is generally a facile victim) it would be a fraud as well as a great hardship, for the purchaser, suppressing all competition, to purchase the property at a nominal price, and then refuse to perform the contract. If no such arrangement existed, the fraud and falsehood would be still more aggravated. Neither case would be within the statute of frauds. (*Meador v. Jackson*, Mss. Col. May, 1847.) The Court would interfere, but not by affording a relief that would be in the face of the statute. The Court would not set up and enforce a parol trust, but would decree a vacation of the sale, and restore the parties to their former condition. But the case made by the plaintiff against the defendant, does not come within these principles. It is simply a case (as has already been explained) where the defendant refuses to perform a parol trust or agreement, which is void by the statute of frauds. That is not a fraud, in a legal sense, which the law itself allows. And there is in this case no other, or additional fraud by which this Court could take jurisdiction, as there was in *Kinard v. Hiers*; and as there would

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have been in *McDonald v. May*, 1 Rich. Eq. 95, but for the interposition of the statute of limitations.

But it is said that the admissions of the answer furnish evidence of the facts that are necessary to bring the case within the doctrine of *Kinard v. Hiers*, namely, a public declaration at the sale that the defendant was bidding for the benefit of his brother Harmon. The admissions of the answer in this respect, have been already fully quoted in a preceding page. It is admitted, that a statement was made at the sale, of the arrangement between the defendant and his brother; but it does not distinctly appear that it was a public declaration, nor to whom the statement was made. Be this as it may, the agreement set forth in the answer which the defendant admits to have been stated is very different in an important feature from that stated in the bill. The defendant admits that he did, in performance of a previous agreement, "bid off the land for the benefit and accommodation of his brother, and that he was to make titles to Harmon Cox whenever he, the said Harmon, should refund the purchase money, provided it was done in the lifetime of the said Harmon." He further says, "that at no time during his life did the said Harmon pay the purchase money aforesaid." Inasmuch as there is no proof contradicting the answer in this respect, (this admission being all the evidence afforded as to what passed at the time of the sale) and inasmuch as the plaintiff relies upon the admission to fix a liability upon the defendant, it is but fair to allow to the latter the benefit of his whole statement of the contract.

If the answer in this particular is true, and in this view of the case I must assume it to be true, the defendant has committed no fraud upon Harmon Cox, though competition at the sale was checked or prevented in consequence of the arrangement and the publicity that was given to it. The creditors of Harmon Cox (if there be any that are unsatisfied) might have some ground of complaint, but Harmon Cox himself could have none. He was not to have a re-conveyance

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of the property, unless it was redeemed in his lifetime. The defendant now holds on to his bargain in accordance with the very terms of the contract. He says that the purchase money was not paid, nor was there any offer to pay it during the life of Harmon. And there is no evidence that payment was made, or tendered until after his death.

The bill must be dismissed, and it is so ordered and decreed.

The complainant appealed, and now moved this Court to reverse the Circuit decree upon the grounds:

1. Because his Honor refused on the trial to allow defendant to insist upon the statute of frauds in his answer, as the same had

been previously overruled in the same cause, and at the same time sustained the defence on the plea of the same statute.

2. Because the answer of defendant, that he stated at the sale, he was bidding for the benefit of his brother, was calculated to stifle competition, and was such an act as should deprive him of all benefit from the sale, as he bid off the land far below its value.

3. Because the continued possession of Harmon Cox during his life, and his widow after his death, under the understanding that, upon paying the bid, he was to have the title, and the repeated promises and admissions of the defendant to that effect during the continuance of the possession, entitled the complainant to the relief prayed for.

Harlee, for appellant.  
Simonton, contra.

PER CURIAM. We are of opinion, that, without considering or approving any other ground, the plaintiff's right to a decree was barred by the statute of limitations, which began to run against the alleged fraud from the defendant's purchase; (see *Thrower v. Cureton*, 4 Strob. Eq. 155 [53 Am. Dec. 660], and *McDonald v. May*, 1 Rich. Eq., 91), and that the bill was rightly dismissed.

JOHNSTON, DUNKIN, DARGAN and  
WARDLAW, CC., concurring.  
Appeal dismissed.

6 Rich. Eq. \*284

\*D. H. HARBERS v. T. N. GADSDEN.

(Charleston. Jan. Term, 1854.)

[*Specific Performance* ⇨ 129.]

Where the vendor, in the agreement to sell, misdescribes the quality of the land, the vendee may insist upon a specific performance with proper abatement in the price.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 420; Dec. Dig. ⇨ 129.]

Before Wardlaw, Ch., at Charleston, June, 1853.

Everything necessary to a proper understanding of this case is contained in the circuit decree, which is as follows:

WARDLAW, Ch. Defendant being owner of a parcel of unimproved land in the upper wards of the City of Charleston, procured the same to be divided into building lots by the City Surveyor, and afterwards sold a large number of these lots at public auction, according to the representations thereof on the plat of said surveyor. At this sale plaintiff bid off for \$650, lot No. 112, at the corner of Spring and Chesnut streets, which was represented on the plat to consist of high land and marsh in nearly equal portions, whereas, in fact, it is all marsh land, and less valuable than it would have been if a large portion of it were high land.

Plaintiff, by this bill, seeks to compel the



defendant to specific performance of this contract of sale, with proper abatement in the price for defendant's misdescription of the lot. Defendant, in his answer, admits the contract and the representation, offers to convey the lot to the plaintiff for the price bid, or to rescind the contract—and insists that the plaintiff should be left to his remedy at law, and that this Court should not undertake to enforce a modified contract into which the parties never entered.

Where the vendor is incapable of making a complete title to all the property sold, or in the agreement to sell, has misdescribed it in important particulars, the Court will not hear from him the objection, that although he has part—he has not the whole estate as described and sold, but will compel him, if the purchaser so chooses, to execute so much of the contract as he is able, with abatement

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in the price. Story Eq. § 797; Mortlock *v.* Buller, 10 Ves. 315; Milligan *v.* Cooke, 16 Ves. 1; Thomas *v.* Dering, 1 Keen. 729. In Graham *v.* Oliver, cited in a note to this last case, Lord Langdale remarks, that this partial performance is somewhat incorrectly called a specific performance; and he says in the principal case in substance, that there are great difficulties in the exercise of the jurisdiction in cases which are not very clear and simple. The cypres execution of contracts given in these cases, is in fact the execution of new contracts which the parties did not enter into, in which there is no mutuality, and in which it is frequently difficult to ascertain the just price. It is more easy to compute a just compensation, where it is to be given for defect in the quantity or quality of the land sold, than where given for deficiency in the vendor's interest; where reversioners or others may be prejudiced by partial alienation.

In the present case, there can be no great difficulty in adjusting the proper abatement; and the general rule allowing option to the purchaser to have execution pro tanto must be followed.

It is ordered and decreed, that it be referred to one of the Masters to ascertain and report what abatement should be made from the price bid by the plaintiff on account of defendant's misdescription of the quality of the lot: and that upon plaintiff's paying and securing to be paid the balance of the purchase money according to the terms of the contract, defendant execute to plaintiff a conveyance in fee with general warranty of the lot in question. Let defendant pay the costs.

The defendant appealed, because, the plaintiff made no case which entitled him to the relief he asked, and which was decreed by the Court.

Magrath, for appelland.

— contra.

PER CURIAM. We concur in the decree, which is hereby affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, and WARDLAW, CC., concurring.

Appeal dismissed.

### 6 Rich. Eq. \*286

\*BENJAMIN F. HUNT *v.* ELIJAH P. COACHMAN and J. R. EASTERLING.

(Charleston. Jan. Term, 1854.)

[Judgment  $\hookrightarrow$  423.]

Judgments were obtained against B. H. at Fall Term, 1846, of the Common Pleas, upon an award dated January 16, 1845. By bill filed March 11, 1847, he sought to enjoin the judgments, charging that the arbitrators received hearsay evidence and committed other irregularities. The bill was dismissed on the circuit; and, on appeal, *held*, that it was properly dismissed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 801; Dec. Dig.  $\hookrightarrow$  423.]

[New Trial  $\hookrightarrow$  167.]

In a bill for a new trial the plaintiff must show, not only that injustice was done to him in the former trial before a tribunal of competent jurisdiction as to the subject of dispute, but that he was prevented by fraud, accident, or some other matter of peculiar equity cognizance, without any fault or negligence on the part of himself or his agents, from availing himself of his defence at law; and that his application to equity for relief has been prompt and timely.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 246-249; Dec. Dig.  $\hookrightarrow$  167.]

Before Wardlaw, Ch., at Charleston, June, 1853.

Wardlaw, Ch. By this bill, which was filed March 11, 1847, the plaintiff seeks to enjoin judgments at law against him obtained separately by the defendants, at Fall Term, 1846, for Georgetown, upon an award signed and sealed by George C. Munro, James G. Henning, and Benjamin King, bearing date January 16, 1845.

Coachman and Easterling shipped rough rice to Hunt's mill in New York, to be pounded, and sold, and complained of loss from negligence of Hunt's agents in preparing and selling the rice in due time; and the parties covenanted to submit the matter to the final arbitrament of Munro and Henning, with leave to the arbitrators, in the event of disagreement between them, to call in as a third arbitrator Benj. King or E. Waterman, with authority to the arbitrators "to examine all testimony furnished by either party, in such manner and at such time, as to them may seem fit and proper." Munro and Henning at first disagreed, but finally they and King awarded to Coachman \$145.94, and to Easterling \$133.92, to be paid by Hunt, and upon this award the judgments at law were rendered.

In this bill, the plaintiff, without charging corruption or partiality in the arbitrators, al-

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leges that they received hearsay evidence of a letter to his agent in New York, instructing prompt sale of the rice, and committed other irregularities in the trial. I am not satisfied upon the proof, that the arbitrators committed any gross error, but I shall not undertake to re-try the case upon its merits, or to discuss the testimony. In a bill like the present, substantially a bill for a new trial of a case heard and determined by the Court of Law, the plaintiff must show, not only that injustice was done to him in the former trial before a tribunal of competent jurisdiction as to the subject of dispute, but that he was prevented by fraud, accident, or some other matter of peculiar cognizance here, without any fault or negligence on the part of himself or his agents, from availing himself of his defence at law, and that he has made prompt and timely application to this Court for relief. Courts of Equity, equally with Courts of Law, exact diligence from suitors, and enforce the policy of suppressing multiplicity of suits, by giving effect to a former judgment on the same subject, between the same parties, by any Court having competent jurisdiction. Lord Redesdale justly says, in *Bateman v. Willoe*, 1 Sch. & Lef. 205, it is more important that an end should be put to litigation, than that justice should be done in every case; and the truth is, that owing to the inattention of parties, and several other causes, exact justice can very seldom be done; therefore the inattention of parties in a Court of Law, the mistake of his counsel or himself, or even supposed error in the Court, do not justify a Court of Equity in re-trying a case once heard by the Court of Law, as to any matter of claim or defence equally available in both Courts. *Res judicata*, as a plea in such case, applies not only to the matters actually heard and discussed, but to all questions of law or fact which might have been discussed and adjudicated in the former trial. *Maxwell v. Connor*, 1 Hill Eq. 22; *O'Keefe v. Rice*, Bail. Eq. 180.

All the grounds of objection to the award made by the bill in this case, were as good by way of defence in the Court of Law, as of relief in this Court. Indeed the defendant attempted to avail himself of them by spe-

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cial plea in the Court of Law, \*but by mispleading, or insufficiency of proof, he failed. In general, there is no substantial distinction between the Courts of Law and Equity, as to the grounds on which awards may be set aside in either. *Lingood v. Eade*, 2 Atk. 501; *R. v. Wheeler*, 3 Bur. 1257; *Russ. Arb.* 672; *Askew v. Kennedy*, 1 Bail. 46; *Shinnie v. Coil*, 1 Mc. Eq. 478. The plaintiff here alleges no ground such as fraud, or surprise, at the trial, which authorizes this Court to review the former judgment.

Besides, the application of the plaintiff to this Court was not made within the time required by the Act of 1791, nor within reasonable time. 7 Stat. 278; Story, Eq. § 895.

It is ordered and decreed that the bill be dismissed.

The defendant appealed on the grounds:

1. That it was clearly shewn by the affidavits of Munro and King that the award was made upon evidence admitted contrary to the agreement, and in violation of the legal rules of evidence.

2. Because the arbitrators, George C. Munro and Benjamin King, admit that their consent to the award was founded upon a misapprehension of the evidence, without which they would not have signed the award.

3. Because the defendant had no notice of the meeting of the arbitors, and no opportunity of cross-examination of witnesses, and producing evidence in reply, or to rebut the testimony upon which the award against him was given.

W. Whaley, for appellant.

Simonton, contra.

PER CURIAM. This Court concurs in the decree of the Chancellor, and it is ordered that his judgment be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurring.

DARGAN, Ch., absent.

Appeal dismissed.

### 6 Rich. Eq. \*289

\*S. R. M. HOLBROOK v. B. P. COLBURN and Others.

(Charleston. Jan. Term, 1854.)

[Judgment  $\Leftrightarrow$  675.]

W. M. gave five bonds to J. S., and at the same time gave him a certificate that the bonds were given for valuable consideration, and that he had no offsets or discounts against them. J. S. afterwards assigned two of the bonds to S. H., in discharge of a precedent debt—the agent of S. H. in taking the assignment placing some reliance upon the certificate. The five bonds were then put in suit by J. S. in his own name, and judgment was recovered at Law. W. M. then filed a bill in Equity against J. S. to be relieved from payment of the bonds on the ground of fraud, and after the death of W. M. a decree was rendered in favor of his executor, the bill having been revived. Pending the suits at Law and in Equity, no notice was given to W. M. or his executor of the assignment, although S. H. was informed of those suits, and through his agent watched their progress:—*Held*, that S. H. was estopped by the decree from afterwards pursuing the executor of W. M. for payment of the two assigned bonds.

[Ed. Note.—Cited in *Burkett v. Moses*, 11 Rich. 437; *Patterson v. Rabb*, 38 S. C. 148, 150, 17 S. E. 463, 19 L. R. A. 831.

For other cases, see Judgment, Cent. Dig. § 1191; Dec. Dig.  $\Leftrightarrow$  675.]



Before Wardlaw, Ch., at Charleston, June, 1853.

Wardlaw, Ch. If the plaintiff were formally party or privy to the suit in this Court of Matthews v. Colburn which resulted in a decree perpetually enjoining the judgment at law in the case of Colburn v. Matthews, he would be estopped from fresh clamor on the principle of *res judicata*; and if having notice of the suit in this court he forebore to interpose or give notice of any peculiar equity on his part, and acquiesced in the defence made by Colburn as his trustee or agent, although not formally party or privy, he may be in this Court within the scope of the same principle. In my view, the determination of these points is decisive of the case.

In May, 1842, H. A. DeSaussure, Esq., as agent of the plaintiff, who was a resident of Boston, Mass., received from J. S. Colburn in satisfaction of a debt from Colburn to plaintiff guaranteed by B. P. Colburn & Co., two of five bonds executed by Wm. Matthews to Colburn, Nov. 20, 1841, each conditioned for the payment of \$2,400 with interest from the date, payable annually. The moving consideration of these bonds was to compromise the debts of B. P. Colburn, son-in-law of obligor, to J. S. Colburn. On the day of executing these bonds, Mr. Matthews, by a separate instrument under his seal, acknowl-

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edged in general terms, and without mentioning any person or purpose, that the bonds were given for valuable consideration, and that he had no offsets or discounts against the same. At the time of the arrangement with plaintiff, all the five bonds were in the hands of Mr. DeSaussure as counsel of J. S. Colburn, assigned in blank by the obligee. Mr. D. then placed a private mark upon two of them, and wrote to plaintiff that he held these two subject to plaintiff's order: and Mr. D. afterwards retained all five of the bonds in his possession until a short time before the commencement of this suit, when, by direction, he delivered the two belonging to plaintiff to plaintiff's solicitor. On November 10, 1842, and December 21, 1842, plaintiff wrote to Mr. DeSaussure concerning interest and anticipated payment of his bonds; and on December 28, 1842, in reply, Mr. D. explicitly referred plaintiff for information to Mr. Colburn. No further communication was had between plaintiff and Mr. D. before plaintiff's letter of May 15, 1845, to which Mr. D., on 20 of same month, replied, explicitly informing him, that "the five bonds were put in suit against Mr. Matthews in the name of Mr. Colburn, to obviate multiplicity of suits for the same object; Mr. Matthews set up a defence against the payment of both principal and interest on the bonds, but his defence was not sustained, and a verdict on the five bonds was given for Mr. Colburn; Mr. Matthews has appealed, and his appeal will be heard

in January next." On February 21, 1846, Mr. D. again wrote to plaintiff that the Court of Appeals in Law had ordered a new trial in Colburn v. Matthews to be determined by the jury, probably in May Term ensuing; and again on September 11, 1846, that a second verdict had been obtained against Mr. Matthews, from which he had taken an appeal, to be heard in January following; and again on February 20, 1847, that the Court of Appeals had decided against Mr. Matthews. "Since that time, he has filed a bill in Chancery against Mr. James S. Colburn, and his son, Benjamin P. Colburn, charging fraud, &c.,—and when that new litigation is to end, time alone can decide. You may be as-

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sured you shall be promptly informed \*of any result favorable to your interest." And again on February 17, 1849, that the proceedings in the Equity suit had been revived in the name of the executor of Matthews, and that the pending appeal would be heard in the Court of Appeals in Equity, in the January following. The decree in Matthews v. Colburn was pronounced, after a hearing, in June, 1848, and was affirmed on appeal at the sitting of the Court of Appeals in January, 1850. In a letter of plaintiff to Mr. DeSaussure of September 5, 1846, he inquires, whether, allowing his two bonds to be included in the suit brought by Mr. Colburn might not be prejudicial to his peculiar claim of equity, as assignee upon assurance of the obligor that there were no offsets; and again in a letter of April 18, 1849, he says: "It has always appeared to me, that my bonds occupy a distinct and different ground from the other bonds given at the same time by Matthews, in consequence of his giving the assurance, &c." But until the date of the last letter, which was after the circuit decree in Matthews v. Colburn, the plaintiff took no measures to separate his interests from the common fate of the five bonds.

Our Act of 1789, (5 Stat. 330,) which authorises the assignee of a bond to bring debt or other legal action in his own name, does not restrict him to this course of pleading; and it has been repeatedly decided, that the assignment may be construed as a power of attorney to the assignee to use the name of the assignor as plaintiff in a suit upon the bond. When suit is brought in the name of the assignee, the Act reserves to the obligor all the defence to which he would have been entitled, if the action had been brought in the name of the obligee; and when suit is brought in the name of the obligee, the Court of Law will protect the rights of the assignee from any release or admission made by the assigning obligee after notice to the debtor of the assignment. There is, therefore, little advantage at Law, and there may be disadvantage on the score of costs, in bringing suit upon an assigned bond in the name of the assignee. It seems to me too clear for

discussion, that upon the evidence, Mr. Holbrook was really plaintiff in the Court of

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Law to the \*extent of two of the bonds, and as much liable to estoppels as if he had been nominal plaintiff. Indeed the plaintiff, by his pleading here, insists upon his interest in the judgment at Law, at least he mentions the judgment, and does not repudiate his proportional interest.

But the more difficult question remains, whether plaintiff is fairly concluded by the decree in this Court, in *Matthews v. Colburn*. The plaintiff was advised by his agent, Mr. DeSaussure, from time to time, of the progress of that suit, and yet did not interpose. It is not proved to my satisfaction, that either Mr. Matthews or his executor, had notice of the assignment to plaintiff before Chancellor Dunkin's decree enjoining the judgment at Law. Neither plaintiff nor Mr. DeSaussure demanded interest from Mr. Matthews or his executor, on the two bonds, or in any other form gave express notice to the debtor of the assignment. All five bonds in the suits in both Courts, appeared to be within the possession or control of J. S. Colburn and his counsel; and even Mr. Colburn's counsel were not made aware of plaintiff's interest. In his answer to the bill in this Court, J. S. Colburn claimed and treated all five bonds as his own; and in the suit at Law, the copies of the bonds filed with the declaration contained no assignment—and upon the originals the assignments are still in blank. The only countervailing evidence as to notice to Matthews of any interest of plaintiff in the bonds, is a covenant from J. S. Colburn to Matthews, bearing the same date with the bonds, November 20, 1841, that Colburn will not exact interest from Matthews on these two bonds while Colburn neglects to pay his debt to plaintiff. This paper was drawn by Mr. Jervey, of the firm of Memminger & Jervey, and the fee for drawing it was charged in the books to Mr. Matthews, yet paid by B. P. Colburn, and the instrument was executed in Mr. DeSaussure's office. Messrs. Memminger & Jervey were the counsel of B. P. Colburn and not of Mr. Matthews in all the negotiations concerning the arrangement of B. P. Colburn's indebtedness to J. S. Colburn, and Mr. DeSaussure was the counsel of J. S. Colburn. Mr. Mat-

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thews inter\*vened only to give his bonds for the relief of his son-in-law, B. P. Colburn, in consummation of the arrangements made by J. S. Colburn and B. P. Colburn. It is not made to appear that Mr. Matthews, by himself or authorised agent ever had control or knowledge of this covenant. It is argued, that it is so probable as to produce conviction, that B. P. Colburn, who certainly knew of this covenant, must have given notice of it to his father-in-law—but the force of this probability, in no aspect amounting to proof

of the fact, is much diminished by the consideration that Mr. Matthews does not appear at the time to have known the fact of J. S. Colburn's secret partnership in the firm of B. P. Colburn & Co., which was the ground of enjoining the collection of the bonds. The covenant at this trial is produced by plaintiff, and it must have been obtained from J. S. Colburn. I conclude that before decree no notice was given to Mr. Matthews or his representative of plaintiff's interest by assignment, or otherwise, in any of the bonds. In general, an assignee can take only such interest as his assignor may properly transfer, and is bound by all equities limiting the right of the assignor. Thus, a bond or other chose void by fraud or other annulling circumstances in equity, in the hands of the obligee, acquires no additional validity by transfer to a third person. But if the obligor, upon notice to him of an actual or intended transfer, conceals any equity in his behalf, or admits a greater liability than in fact he has incurred, his concealment or admission may conclude him, if acted upon by the assignee in taking an assignment. In England, notice to the debtor seems necessary to the completeness of the assignment; but in the United States, according to the weight of authority, it is not so sternly exacted. But in every administration of well regulated equity, where the assignee conceals his interest, and permits the assignor to remain in possession of the instrument of debt, and thus acquire delusive credit to the prejudice of innocent parties, he loses the advantage of priority in favor of such deluded parties. Notice however, is exacted for the protection of the debtor, and third persons dealing with him in transactions subse-

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quent to the \*assignment, and not for the disturbance of fixed pre-existing liabilities or equities. For authority for these principles, instead of citing numerous cases, I refer to the full discussion in *White & T. L. C. Am. Ed. pt. 2, vol. 2, 574 et seq.*, and to 3 C. E. C. C. 266, 277, 281. But a pre-existing equity in the debtor, discovered by him after assignment and before notice thereof, is not without the principle prior in tempore potior in jure. If, knowing his equity, he consents to waive it in behalf of an assignee, he is bound by the waiver—but general and loose assurances of having no equitable defences, if made ignorantly and before notice of a particular assignment, and without reference to transfer generally, are not to be pressed against him. The assurance of Mr. Matthews in this case, made at the time of executing the bonds, that he had no offsets against them, amounts to little more than the implication from the bonds themselves; but if acted upon by an innocent purchaser of the bonds within a reasonable time, who gave timely notice of his purchase, might serve to cut off existing equities of Mr. Matthews.



A general assurance of this sort has not as much force as a particular assurance to an individual about to deal in the matter; but still, if intended to give market value and transmissibility to the instruments of debt, must operate for a reasonable time against the person making the representation. Such an assurance, however, operates as an equitable estoppel for a reasonable time only, and it should not prevail in favor of a purchaser who permits the obligee for many years to hold himself out as owner without giving any notice of other title. In the present case, inasmuch as the plaintiff knew of the progress of the suit in Equity against one who had acted, and was acting as his agent and trustee, and refrained from setting up a separate claim until after decree in the suit, and after the time for presenting claims against Matthews' estate, fixed and published in *Lawton v. Hunt*, he must be regarded as substantially a privy of J. S. Colburn in *Matthews v. Colburn*. He permitted the Court and the debtor to believe that one acting as owner of all the bonds, was in fact, as his

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trustee or otherwise, owner of the whole, and having had the advantage of one adjudication, in which he had opportunity to present his claims, he has no title to vex doubly the representatives of his supposed debtor. *Nicholson v. Hooper*, 4 Myl. & Cr. 186; *Hammond v. Messenger*, 9 Sim. 327. The plaintiff, as cestui que trust of J. S. Colburn, is bound by acquiescence in the trustee's conduct of the defence in the suit in Equity.

It is ordered and decreed that the bill be dismissed.

The defendant appealed on the grounds:

1. Because the complainant, by accepting the assignment of the two bonds of the testator, William Matthews, in satisfaction of his notes, and on the faith of the certificate and waiver, was relieved from all after discovered equities, and Mr. Matthews was thereby precluded from setting up any such equities, especially when it is considered that the guarantee of B. P. Colburn & Co. was thereby extinguished, and an advantage gained to Mr. Matthews.

2. Because, whether the complainant is to be regarded as a party to the suit at Law on the bonds or not, in either case his rights cannot thereby be precluded, as the defence at Law was overruled, and the judgment affirmed.

3. Because it must be presumed from the relation of the parties, and the history of the transaction, and especially from the covenant given by J. S. Colburn to William Matthews, that the latter had notice of the assignment.

4. Because the want of notice could only enure to protect Mr. Matthews in any subsequent dealing with J. S. Colburn, and could not operate to divest the rights of the complainant acquired in consequence of his hav-

ing accepted the bonds on the faith of Mr. Matthews' certificate.

5. Because, the complainant cannot be affected by the decree in the cause of *Matthews v. Colburn*, inasmuch as he was neither a party or privy to the same; nor was the special case between himself and the complainant in that cause there considered or determined.

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\*6. Because, even if it had been proper for the complainant to give notice to Mr. Matthews, or to bring his rights specially before the Court in the last mentioned cause; yet, any apparent laches in this respect, is abundantly explained by his misapprehension as to the relation between himself and the professional gentleman, who, he fairly thought, was acting as his counsel, and should not operate to divest his rights, or defeat his claim in the present proceedings.

Dukes, for appellant.

McCrady, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. We concur in the reasoning of the Chancellor on the topics he has discussed, and in his conclusion. Usually where a decree can be safely rested upon particular grounds, it is advisable to avoid debate of other questions which may be more disputable; and such was the approved course pursued in this circuit decree. It has been strongly urged in the argument in this Court, that the plaintiff who is resident in a foreign jurisdiction, forbore to intervene as a party in *Matthews v. Colburn*, and to present a defence on his part distinct from that of the nominal defendant, from his mistake that his agent here was acting as his counsel; and that considerations affecting the character of counsel and the administration of justice in the State, invoke full and indulgent review of the plaintiff's claim. We yield to this appeal so far as to add something in corroboration of the decree, without meaning to disparage the sufficiency of the Chancellor's views. Certainly Mr. DeSaussure, on being examined as a witness in this case, disclaimed having been plaintiff's counsel in the previous proceedings; and it may be conceded argumentatively, (although we conclude nothing judicially on this point,) that the correspondence between him and the plaintiff may have misled the plaintiff into the belief that Mr. D. was acting as his counsel.

Did this mistake, if it existed, affect inju-

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riously any peculiar claim or equity of the plaintiff which might have been pleaded in the suit in this Court of *Matthews v. Colburn*? Before argument on this question, it is fit to re-state some of the facts.

November 20, 1841, William Matthews executed five bonds to James S. Colburn, each conditioned for the payment of \$2,400, and

interest from the date annually, respectively on November 20, of the years from 1842 to 1846, inclusive. On the same day, by a separate instrument under seal, after briefly describing the bonds, he made this statement: "I do hereby acknowledge that the aforesaid five bonds or obligations are given by me to James S. Colburn for valuable consideration, and that I have no offsets or discounts against the same." April 25, 1842, plaintiff wrote a letter to Mr. DeSaussure, enclosing two promissory notes made by J. S. Colburn to himself, dated October 1, 1836, each for \$2,500, with interest from date, at the rate of six per cent. per annum, payable quarterly, one due October 1, 1842, and the other October 1, 1844; stating that it had been agreed between Mr. Colburn and himself to exchange these notes for the two of said bonds of Mr. Matthews, payable in 1845 and 1846, with annual interest of seven per cent., waiving the difference of principal and interest, if Mr. D.'s opinion should concur with Mr. Colburn's, that Mr. Matthews' responsibility was unquestionable; further stating, that it was through Mr. Colburn's suggestion that the writer had solicited Mr. DeSaussure's aid in accomplishing the exchange; and authorising Mr. D. to complete the arrangement and hold the bonds subject to plaintiff's order. In his reply, under date of May 10, 1842, Mr. D. expressed a confident opinion of the pecuniary responsibility of Mr. Matthews; informed plaintiff that the exchange of securities had been consummated; and added: "Mr. Matthews has given a written certificate that the said bonds are bona fide due, and that he has no offsets thereto." It is probable that Mr. D. gave this version of the certificate from memory, without having the paper before him; for he does not pursue the precise terms, nor perhaps the legal effect of the certificate. He testifies in this cause, that he surrendered

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the notes and accepted the bonds \*on the faith of this certificate; and of course the fact is unquestionable. Yet it is also true, that before the exchange, he held as the counsel of J. S. Colburn, all the five bonds assigned in blank by the obligee; and that at the time of the exchange, he did no more concerning the bonds than to endorse the letter H, on the two payable in 1845 and 1846, as a mark that they were to be held subject to plaintiff's order. He retained the five bonds in his possession until the suit in Equity of *Matthews v. Colburn* was decided on circuit; producing them as they were needed for evidence in the course of litigation in both Courts, and re-taking them when they had been used for this purpose.

It thus appears, that plaintiff originally agreed with Mr. Colburn, without reference to the certificate now treated as so potent, to accept in discharge of the debt of the latter to him an assignment of two of the bonds

specified by date; if his agent, appointed on suggestion of his debtor, should be satisfied of the responsibility of the obligor. By the use of this term responsibility in his letter, I suppose from the context the plaintiff intended the sufficiency of the obligor's estate for his debts, and perhaps his punctuality in discharging them; and this is manifestly the construction adopted by his correspondent. At most, the phrase cannot be extended in meaning beyond the legal liability of the obligor on the bonds. So much of the certificate of the obligor as acknowledges that the bonds are given to the obligee on a valuable consideration, simply expresses what is the implication from the seals, and does not increase the force or validity of the obligations. That portion of the certificate which acknowledges that the obligor has no offsets or discounts against the bonds, might preclude him, under certain circumstances, from availing himself of a pre-existing creditor or counter claim, but adds nothing to his obligation on the specialties themselves. Offsets and discounts are legal terms of familiar and identical import, and applicable to the bonds as legal instruments. If these terms had been incorporated in the bonds themselves, they would have been equivalent to a phrase often introduced into bonds

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"without defalcation," and they cannot \*have a more extensive interpretation when employed in a separate instrument. The certificate can mean no more in favor of an assignee than of the obligee to whom it was delivered. This Court would relieve against a purpose to cheat by the employment of equivocal or legal terms, as against any other intentional fraud; but no such fraudulent purpose is imputed here. It is *res judicata* between the obligor and obligee, that the certificate does not exclude the obligor from defeating the collection of the bonds on the ground of mistake as to the liability of his son-in-law to the obligee, (to compromise which liability was the consideration of the bonds,)—a mistake arising from his ignorance of the secret partnership of the obligee in the firm of B. P. Colburn & Co. And we perceive no sound principle which entitles the plaintiff to different construction of the instrument or different measure of redress. The certificate was cotemporaneous with the bonds—it was faithful according to the state of Mr. Matthews' knowledge at the time—it was delivered to the obligee and for his use, without expressing any special purpose—it was not founded on any consideration additional to that of the bonds, proceeding from the obligee, the subsequent assignee or other person—it was not the original inducement to the plaintiff's agreement to accept assignment of the bonds, although influencing his agent in completing the agreement. Moreover the assignment was not purchased by money advanced, but was accepted in discharge of a precedent



debt of the obligee; no notice of the assignment was given to the obligor, and the assignee, informed of the progress of litigation in both Courts for seven years, suffered the obligee to be dealt with as real as well as ostensible proprietor. Under these circumstances, we regard the assignee as standing in no better position than the obligee; and that if his case, so far as it is distinct from that of the nominal defendant there, had been formally presented in *Matthews v. Colburn*, no different result in his behalf would have been attained.

The honest assignee of a bond is liable to be defeated of satisfaction by proof of fraud, mistake, or want of consideration

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\*affecting the obligation. If, however, the obligor, from fraud, negligence or folly, represent himself to be liable on the bond to one about to deal for assignment, (and perhaps the consequence may be the same as to any substituted purchaser who acts on the faith of the representation); or even if the obligor, with full knowledge of his defence, acquiesces in an assignment without disclosure of his defence; such representation or concealment will amount to an estoppel in pais upon the obligor from setting up his defence. It is indispensable to such estoppel, that the obligor should induce, promote or encourage the assignment, and that the assignment should be accepted in consequence of his representation or concealment. The general rule is that the assignee occupies no better position than the obligee; and the exception proceeds on the principle that the conduct of the obligor creates a new and independent contract between him and the assignee.

This (and no more) is the doctrine of the cases cited by the appellant. *McMillan v. Warner*, 16 Serg. & R. 21; *Carnes v. Field*, 2 Yeates, 543; *Ludwick v. Croll*, *Ib.* 465; *Davis v. Barr*, 9 Serg. & R. 141; *Davison v. Franklin*, 1 Barn. & Ad. 142; *Petrie v. Feeter*, 21 Wend. 172; 1 Penna. 478; 1 Washb. 296, 389. No case, however, has been cited, and I suppose none exists, deciding that where there is no fraudulent design, a vague assurance of a bond by the obligor at the time of execution, made to the obligee and for his use, without manifest purpose of promoting assignment, creates a new contract between the obligor and the assignee. Such is the present instance. The agent of the plaintiff took the assignment with some reliance on the certificate; but he was not instructed to look to such certificate, and he had no communication with the obligor at the time or afterwards concerning the assignment. We are not satisfied that plaintiff has any equity to disturb the decree in *Matthews v. Colburn*.

The Chancellor concluded upon the evidence that Mr. Matthews was ignorant of the

covenant of J. S. Colburn to William Matthews; and upon review of the proof, we ap-

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prove his conclusion. This instrument is important only in the question of notice of the assignment. Conceding the covenant was delivered to Mr. Matthews, it furnishes no intrinsic evidence of notice to him of an assignment which was made nearly six months afterwards, and which is not intimated therein as projected. To the concession that Mr. M. accepted this covenant, must be added the assumption that he surrendered it to the covenantor when the bonds were assigned to plaintiff, before the covenant has any significance in the cause. But this assumption is not supported by any express proof, is contrary to the answer of B. P. Colburn and to the probabilities of the case, and is hardly consistent with the testimony of Mr. Memminger and Mr. DeSaussure. It would be easy to conjecture motives in B. P. Colburn for desiring the execution of this covenant, and for not communicating it to the nominal covenantee; and it must be borne in mind, that all the arrangements of compromise between J. S. Colburn and B. P. Colburn were conducted by their counsel, and that Mr. Matthews, having no counsel, intervened only to give his bonds for the balance adjusted against his son-in-law. It is remarkable that the bonds, the certificate, the covenant, all bearing the same date, and the undated but probably cotemporaneous assignment in blank, are severally attested by different witnesses.

The bill in this case contained no prayer for relief against J. S. Colburn, who was made a party, and it was not intended in the circuit decree, nor is it now intended, to conclude the plaintiff, except on his case against the estate of Matthews.

It is ordered and decreed, that the circuit decree be affirmed, and the appeal be dismissed.

JOHNSTON and DUNKIN, CC., concurred.

DARGAN, Ch., absent at the hearing.  
Appeal dismissed.

## 6 Rich. Eq. \*302

\*JOHN BOYCE, Adm'r, v. W. W. BOYCE and Others.

(Charleston. Jan. Term, 1854.)

[Judgment ¶672.]

Where creditors are called in to establish their demands, and the Master's report upon the demands sets forth a mortgage as a valid lien upon the estate, and no exception is taken to the report, and it is confirmed, no creditor then before the Court can afterwards question the validity of the mortgage as a lien upon the estate.

[Ed. Note.—Cited in *Hutto v. Black*, 88 S. C. 6, 70 S. E. 420, 422.

For other cases, see Judgment, Cent. Dig. § 1186; Dec. Dig. ¶672.]

[*Mortgages* ⇨163.]

A mortgage executed and recorded in April, 1839, *held* to be entitled, under the Act of 1698, to priority over a mortgage executed in 1836, and recorded in June, 1840.

[Ed. Note.—Cited in *Warren v. Raymond*, 17 S. C. 200.]

For other cases, see *Mortgages*, Cent. Dig. § 371; Dec. Dig. ⇨163.]

[*Equity* ⇨410.]

Where a party has an opportunity, and does not except to the report, he cannot again bring the matter of the objection, either before the Master, or before the Court, on circuit, or on appeal.

[Ed. Note.—Cited in *Hand v. Savannah & C. R. Co.*, 17 S. C. 263; *Hubbard v. Camperdown Mills*, 26 S. C. 588, 2 S. E. 576; *Steen v. Mark*, 32 S. C. 291, 11 S. E. 93; *Bryce v. Massey*, 43 S. C. 388, 21 S. E. 320.]

For other cases, see *Equity*, Cent. Dig. §§ 905-919; Dec. Dig. ⇨410.]

[*Appeal and Error* ⇨362.]

Where a party appeals in a cause, he is concluded by the appeal decree from afterwards stirring any point not covered by his appeal.

[Ed. Note.—Cited in *Verdier v. Verdier*, 12 Rich. Eq. 143.]

For other cases, see *Appeal and Error*, Cent. Dig. § 3282; Dec. Dig. ⇨362.]

[*Mortgages* ⇨199.]

Where a fund arising from the rents and profits of mortgaged premises is to be applied to the debts of the deceased mortgagor, the mortgagees are entitled before the general creditors; and the oldest mortgage has the right to the first application of the fund.

[Ed. Note.—Cited in *Reeder & Davis v. Dargan*, 15 S. C. 179.]

For other cases, see *Mortgages*, Cent. Dig. § 520; Dec. Dig. ⇨199.]

[*Mortgages* ⇨243.]

One whose possession was tortious, and who bought in a junior mortgage to sanctify his possession, *held* bound to pay the rents and profits to the oldest mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 631; Dec. Dig. ⇨243.]

[*Account* ⇨7.]

One tortiously in possession *held* bound to account for the fair rentable income of the property, although it amounted to more than he actually received from the tenants and to interest upon the annual amount from the end of the year in which it become due.

[Ed. Note.—Cited in *Rabb v. Patterson*, 42 S. C. 537, 20 S. E. 540, 46 Am. St. Rep. 743.]

For other cases, see *Account*, Cent. Dig. § 20; Dec. Dig. ⇨7.]

Before Dunkin, Ch., at Charleston, February, 1853.

The case now came up upon the report of the Master under the order of reference made by his Honor, Chancellor Johnston, at March sittings, 1852, (vide 5 Rich. Eq. 267;) and was heard upon the following exceptions taken by Edwin P. Starr to the report:

1. Because the report of the Master sets up as a prior lien to the debts claimed by this defendant, a certain mortgage, executed by the administrator to the Bank of the State; which mortgage this defendant contends can only charge the share of the administrator as one of the heirs at law, after the payment of the debts of the intestate.

2. Because the mortgage of the intestate, duly executed to Jeannerett in his life time, although not recorded, is entitled to priority over the subsequent mortgage from one of the heirs at law to the Bank.

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\*3. Because the actual amount received for rents and profits by Mr. Starr, was proved before the Master, and this should have formed the true basis for his report, instead of the speculative and conjectural amounts which he has reported.

4. Because the Master ought not to have made annual rests in the account of rents.

5. Because the rents and profits ought to go into the hands of the administrator for the general benefit of the estate, and should not have been reported as belonging to the Bank of the State.

6. Because, if the receipts and profits are to be applied to the mortgage debts, then the defendant, as assignee of Jeannerett's mortgage, is entitled to the rents and profits of the lot covered by that mortgage.

7. Because the defendant, Starr, on the 24th June, 1844, was substituted to all the rights of the Master Gray, under the mortgage assigned to Jeannerett, and by Jeannerett assigned to Starr; and, that being in possession, under this assignment as mortgagee, he was authorized to take the rents and profits to his own use.

8. Because the subsequent report of testimony by the Master, shews that Starr did not take possession of the premises for one year after his purchase at sheriff's sale, and the report should be reformed by striking out the rents for that period.

Dunkin, Ch. Robert Boyce died intestate in October, 1838. His heirs at law were his sons, John Boyce and William W. Boyce, the former of whom became administrator of his estate 23d November, 1838. The personal estate was, comparatively, inconsiderable; his real estate was valuable: consisting of the premises at the corner of King and Society streets, called the Merchant's Hotel, and several lots on the opposite or south side of Society street. At the period of the intestate's death, his entire real estate was under mortgage to Ker Boyce for \$26,871, with interest from 1836; and one of the lots on the

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south side of Society street, was under mortgage to Mr. E. Jeannerett for \$1,000, with interest from 17th May, 1836—which latter mortgage was not placed on record until 25th June, 1840. These debts constituted at that time, the only liens on the estate, although other debts, by simple contract, existed to a considerable amount. The buildings on the lots on the south side of Society street, were destroyed by the great fire in the Spring of 1838, and at the period of the intestate's death, he was engaged in having them reconstructed. William W. Boyce



was a minor at his father's death; and in February, 1839, an application was made to this Court by John Boyce and Geo. B. Pearson, guardian of W. W. Boyce, to have the premises at the corner of King and Society-streets sold, and also for permission to be enabled to avail themselves of the benefit of the Fire Loan Act of Dec. 1838, in relation to the lots on the south side of Society-street, by executing a valid mortgage to the Bank of the State. On the 15th February, 1839, both these applications were granted by the decretal order of Chancellor Harper. In relation to the lots on the south side of Society-street, the order is as follows: "It is further ordered and decreed, that George B. Pearson, guardian as aforesaid, is hereby authorized, with the said John Boyce, to give such bond or bonds to the Bank of the State, as may be necessary to obtain loans from said Bank, under the Act for rebuilding the city of Charleston, upon such lots of land of the estate of the late Robert Boyce, as John Boyce and George B. Pearson, guardian as aforesaid, may think expedient to build upon; and that the said Geo. B. Pearson, guardian as aforesaid, may have power to mortgage said lot or lots of land with the said John Boyce, in conformity with the provisions of the aforesaid Act of Assembly, and the amendments thereto." On the 1st April, 1839, John Boyce and the guardian of W. W. Boyce, accordingly executed three bonds and a mortgage of the premises, on the south side of Society-street, on which loans were made to the amount of seventeen thousand dollars and upwards; of this loan, seven

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thousand seven hundred and eighty \*dollars (7,780) were paid to Ker Boyce, who, thereupon, entered satisfaction on his mortgage, (which included the real estate on both sides of the street,) and took a new mortgage from John Boyce and George B. Pearson, of the premises on the north side, thereby to enable the Bank to have the eldest lien on the premises at the south side.

On 2d July, 1840, John Boyce, as administrator of Robert Boyce, deceased, filed a bill for having the assets of the estate marshalled. The decree of Chancellor Wardlaw, in April, 1852, presents a succinct narrative of the proceedings had under that suit, to which, for the reasons therein set forth, he held the defendant, Edwin P. Starr, to have been a party. Among other things, it appears that on the 29th January, 1841, the Master submitted his report of creditors, who had established their claims under a previous decretal order. The report was accompanied with an exhibit, setting forth the several debts and the aggregate amount; of these debts, he stated that the bond to Ker Boyce, secured by the mortgage of the Merchants' Hotel, the fire-loan bond to the Bank of the State of South-Carolina, and the bond to James W. Gray. (Mrs. Jeannerett's.) secured by mortgage of the lot in Society-street, amounting to \$42,-

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529 21, were entitled to priority, and that it was not probable that the assets of the estate would meet them. "The Master concluded his report by a recommendation, that the estate of Robert Boyce be sold, and the proceeds distributed in payment of his creditors, according to their legal priorities. This report was confirmed by the Court, a sale ordered, and the Master directed to apply the proceeds thereof to the payment of the creditors in the said report specified, according to the legal priority of their several and respective liens and demands." This order is final and conclusive. The object of the proceeding now pending, is to carry into effect the decree then made against the parties in that suit. If the defendant, Edwin P. Starr, was dissatisfied with the report of the Master, made under a decretal order, which specially required him to inquire and report,

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"what liens, in \*whose favor, &c. now subsist, and are binding, &c., and in what order the creditors were entitled to be paid," and to notify creditors who claimed a lien, to prove their debts and liens—if he was dissatisfied with the report of 29th January, 1841, made under such order, he had the opportunity then to except to said report, and the decree of confirmation is just as conclusive upon him as if he had then filed the exceptions which he now submits, and they had been overruled. The exceptions in relation to the validity and priority of the mortgages to the Bank of the State, are therefore overruled.

By the Act of 1698, it is declared that the mortgage, &c., first recorded in the Register's Office in Charleston, shall be taken, deemed, adjudged, allowed of, and held, to be the first mortgage, &c., and be good, firm and substantial, in all Courts of Judicature within South-Carolina. (P. L. 3.) This law was particularly recognized and enforced in *Barnwell v. Porteus*, 2 Hill, Ch. 219. It was in strict accordance with this law, that the report of Jan. 1841, ranked the Fire Loan Bonds to the Bank of the State of South-Carolina, prior to the bond to James W. Gray (Jeannerett's.) Both were secured by mortgage of the lot in Society-street. The seventh clause of the Fire Loan Act, declares that the mortgage executed by the applicant shall be a charge upon the land, in favor of the said Bank and its assigns, from the date of the registry in the office of mesne conveyance, against all persons whomsoever; and all mortgages shall be recorded or lodged in the Register's Office for record by the applicants, before any money shall be paid by the Bank. The mortgage to the Bank of the State was recorded in April, 1839. No other incumbrance of the property was at that time on record, unsatisfied. The mortgage to James W. Gray was not placed on record until 25th June, 1840. The mortgage to the Bank of the State was then properly held and taken by the Court to be the first mortgage on the

lots on the south side of Society-street, and the Bank must be considered and declared to be entitled to all the rights and privileges

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of the first mortgagee. In the well considered case of *Matthews and Preston*, (M. S. Court of Appeals, Charleston, Jan., 1852.) (a) it was ruled that the first mortgagee, on account of the priority of his claim, has a right to the first application of the fund arising from the rents and profits of the estate. The fifth, sixth and seventh exceptions of the defendant are, therefore, overruled.

(a) In *MATTHEWS v. PRESTON*, the opinion delivered in the Court of Appeals is as follows:

[This case is also cited in *Laffan v. Kennedy*, 15 Rich. 260; *Reeder & Davis v. Dargan*, 15 S. C. 184; *Warren v. Raymond*, 17 S. C. 200; *Hardin v. Hardin*, 34 S. C. 77, 81, 12 S. E. 936, 27 Am. St. Rep. 786, as to accountability for rents of mortgaged premises.]

*DARGAN, Ch.* At Common Law, the mortgagee was, immediately after the execution of the mortgage deed, seized of an estate in fee, and the mortgagor was considered, in the language of some of the cases, his tenant at will—(*Powsley v. Blackman*, 2 Cro. 659). It would be a more proper expression to say, that the occupation of a mortgagor remaining in possession after the execution of the mortgage, was like that of a tenant at will: for in some respects they differed. The mortgagee was deemed the absolute legal owner: and had a right to enter, and could maintain a possessory action against the mortgagor, or any other person, except tenants who were in under leases anterior to the execution of the mortgage. (b) If there were covenants in the mortgage deed, by which the mortgagor was entitled to retain the possession, the Court of Equity would protect him in the enjoyment of such right, and would enjoin any action, or other proceeding instituted by the mortgagee for his ejectment.

Along with the legal estate, the mortgage conveyed to, and vested in the mortgagee all outstanding leases, or terms for years, attendant thereon. (c) As long as the mortgagee, by his own non-intervention, permitted the mortgagor to receive the rents and profits, his receipts were a legal discharge to the tenants. Nor was the mortgagor liable to account to the mortgagee for the rents and profits so received by him, except upon the ground of some special agreement. But the implied authority of the mortgagor to receive, and appropriate the rents and profits, might be terminated at the will of the mortgagee. He had only to notify the tenant of his mortgage, and demand the payment of the rent to himself, (both as to that which was in arrear, and that which was to accrue,) to render any subsequent payment to the mortgagor illegal. After such notice, the mortgagee might maintain his action at law for the rent, or he might resort to the more summary proceeding by distress, under the law of landlord and tenant.

The legal right which a mortgage gives to the mortgagee, to demand and receive the rents and profits as above described, appertain to the first mortgagee only, and depends upon his being considered at law the legal owner of the estate. It is obvious, that a second mortgagee can have no legal right to demand and receive rents and profits from the tenant, on the ground that the first mortgagee has the prior and the better right: and for the further reason, that the principle upon which the first mortgagee has the

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\*The remaining exceptions of the defendant relate to the amount of rents and profits reported by the Master, and the manner in which the account is stated. The property was sold by the city sheriff, under the execution of the defendant, E. P. Starr, or Starr and Howland, and purchased by E. P. Starr, who received a conveyance from

right to demand and receive the rents and profits, does not apply to the second. The latter has no legal estate vested in him. That is all in the

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first mortgagee. There remains only \*the equity of redemption. And the second mortgage can only be regarded at law, as an assignment of the right to redeem.

I have adverted to these principles of the Common Law in relation to the legal rights of mortgagors and mortgagees, for the purpose of drawing a distinction: and because it seemed to be supposed in the argument, that they should have a strict application in this case. In a Court of Equity, independent of the provisions of our Act of Assembly of 1791, the mortgagor is regarded as the owner of the land, even after forfeiture: and the mortgagee is only considered in the light of a creditor, having a lien upon the land created by the mortgage, and taking effect from the date thereof. (d) There is no principle, therefore, upon which a first mortgagee can stand in this Court, and claim an account of the rents and profits, which will not apply with equal force to the second or any subsequent mortgagee. Here they all stand upon the same footing as regards ownership in the land. None are considered as having rights founded upon legal title: but all are alike regarded as creditors simply, having liens upon the property, and having precedence in payment according to their priorities. The mortgagee in this Court, claiming an account of the rents and profits, must stand upon the general doctrine laid down by Coote (on Mortgages 342) that "although in equity the mortgagor remains the actual owner of the land until foreclosure, entitling him while in possession, to the receipt of the rents and profits without account, yet equity regarding the land with all its produce as a security for the mortgage debt, will restrict the right of ownership within those bounds, which may not operate to the detriment or injury of the mortgagee." This, as we have seen, is a principle, which, in this court, operates as well for the advantage of the second mortgagee as the first, with the exception, that the first mortgagee on account of the priority of his claim, has a right to the first application of the fund arising from the rents and profits of the estate. If the corpus of the estate is sufficient to satisfy the debt of the first mortgagee, thereby rendering him indifferent to an account for the rents and profits, the second mortgagee has a right to take his place: on the principle, that the land and its produce stand as a security for the payment of the mortgage debts, according to the order of their dates, and what is left by the first, the second is entitled to take. There is another familiar principle of Equity Jurisprudence, on which the second mortgagee may be indirectly let in to the benefit of the rents and profits: supposing him to have no particular equity in himself. If one incumbrancer has a lien, upon two funds, while a second, has a lien upon one of those same funds, the latter may compel the former in this Court, to resort to and exhaust the fund to which he has no claim: to the end, that both may be satisfied if practicable. Thus admitting that the second mortgagee has no right to claim an account of rents and profits: the first, under certain circumstances unques-

(b) *Powell on Mortg.* 207.

(c) *Moss v. Gallimore*, Doug. 279; *Burden v. Thayer*, 3 Mete. 79; 4 Kent, 165; *Aichrone v. Gomme*, 2 Bing. 54.

(d) 4 Kent, 158, et seq.



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the sheriff, on 5th July, 1842. \*The decrees of the Court heretofore pronounced, have declared that all those proceedings were in contempt of the Court, and that the defendant was a wrong-doer, and consequently responsible for rents and profits of the premises. In the last appeal decree, it is said to be "not unlikely that the irregular proceedings of the defendant, in the

tionably, has such a right even at law: and the resort to the rents and profits: that he should

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second may, in this Court, \*drive the first to resort to that fund for the exoneration of the corpus as far as it will go, for the benefit of the posterior in claim.

The general doctrine, that a mortgagee may come into this Court, for an account of the rents and profits, is not without precedent in this State. In the case of *Stoney v. Shultz*, 1 Hill, Eq. 465 [27 Am. Dec. 429], it was applied in favor of the first mortgagee, but upon principles that did not discriminate between the case of a first mortgagee, and that of a second.

The only thing requisite to entitle the second mortgagee to this relief, is, that he should file his bill, making the mortgagor, the first mortgagee, and the tenant, parties: that he should state the relations of the various parties to the mortgaged premises: that the mortgaged premises are insufficient for his security without a pray an injunction against the tenant paying the rents to the mortgagor: and that he should ask an account of the rents, and that they be applied according to the rights of the parties. When he has filed a bill framed after this manner, he has stated a case which, if supported by the proof, entitles him to relief.

I will not say, that the form of the complainants' bill is the best that might have been adopted. But it seems to me, that as against the defendant, *Emily Timbrook*, (and it is her branch of the case that I am first to discuss) the complainants' bill comes up, substantially to the above requirements.

The defendant, *Emily Timbrook*, admits that she was at the time of the filing of the bill, and for some time before, a tenant of the mortgaged premises under a lease from her co-defendant, *James Preston* (the mortgagor). She alleges, that she had regularly paid the rent to her landlord as it fell due. Not disputing her liability to account in this Court for the rent then unpaid, or which might thereafter accrue, she prays to be exonerated as to past payments. She does not deny the charges of the complainants' bill, that she had received formal notice as tenant of the premises in *Berresford-street*, that the said premises were mortgaged to the complainants: that the mortgagor was insolvent: that the mortgaged premises were an inadequate security: and that she should pay no more rent to her landlord, *James Preston*. As to the prayer of *Emily Timbrook*, to be exempt from liability in regard to the rents paid by her to her landlord, before she received the notice, it is to be remarked, that according to the principles which I have laid down in the preliminary discussion, she could in no event have been liable as to such payments. And in respect to the irregularity in the notice served upon her, which described the mortgaged premises as being "in *Princess-street*" instead of *Berresford-street*, it becomes entirely immaterial, as the decree from which this appeal has been taken, does not make her liable for any rent, except that which fell due, or was unpaid at the filing of the bill, and at the filing of her own answer. And surely, the bill, after she had filed her answer to it, may be regarded as a sufficient notice and demand.

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levy and sale of July, 1842, may \*have created obstacles in carrying into effect the decretal order of sale, made by this Court, which did not previously exist." The defendant was considered as a trespasser, and on that footing was his accountability adjudged. By violating the order of injunction in a suit to which he was himself a party, and procuring the sheriff's conveyance of

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\*The Master, at a subsequent stage of the case, held his references, attended by the solicitors of the parties. And, according to a very questionable usage of recent origin, and of quite too frequent occurrence, in reporting, upon the evidence, he proceeded to consider and determine judicially, all the questions of fact and law involved in the pleadings between the parties. The question of her liability to pay the rents into Court for the benefit of the mortgagees was decided against *Emily Timbrook*. In fact, I suppose, it was not at that time disputed. The Master's report did not fix the amount of rent due by her. But he recommended that the "rent due be paid into Court, to be distributed according to the rights of the respective mortgagees."

To this report, *Emily Timbrook* took no exceptions. The case came before Chancellor *Dun-kin*, at February T. 1847, on the report of the Master. The report was confirmed, and thus became a decree of the Court. In reference to the rents, the language of the decree is as follows: "It is further ordered and decreed, that the rents be paid into Court according to the recommendation of the Master." From this decree no appeal has been taken. And it was not until the Master submitted another report, stating the amount of the rent for which she was liable, that *Emily Timbrook* has started any controversy. Subsequently to the filing of her answer, she has paid rent, to the amount of \$800, to her landlord, the mortgagor. Of this sum, \$300 was paid after the Master's report was made up, and the cause had been heard by the Chancellor: and \$100 after the decree had been filed. Under these circumstances, it is the opinion of this Court, that her liability to pay the rent into Court for the benefit of the mortgagees, is not to her an open question, and that she is precluded from raising such a question now: first, by the Master's report to which she took no exceptions: and in the second place, by the Chancellor's decree from which she did not appeal. It is further the opinion of this Court, that if *Emily Timbrook* could now be permitted to raise such a question, it would be adjudged against her, on the facts of the case, and the principles of law hereinbefore stated.

The case of *John Preston*, the other appellant, in some points of view, stands upon a different footing. *James Preston* was seized of a lot and store on *East Bay-street*: these premises he mortgaged to *James B. Campbell* to secure a debt due to him: which debt and mortgage were assigned by *Campbell* to the defendant, *Willington*. He afterwards mortgaged the same premises to the complainants, to secure a large debt due to them by bond.

At a subsequent period, certain New York creditors of *James Preston*, recovered judgments against him in the United States Court. Upon these judgments executions were issued, and the Marshal levied on, and sold the equity of redemption of *James Preston* in the mortgaged premises situated upon *East Bay-street*. When I say the Marshal sold the equity of redemption, I speak as to the legal effect. The premises were sold subject to the prior lien of the mortgages, and the Marshal's deed could convey only the right or interest that remained

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the premises, he was enabled \*to hold himself out as the legal owner, throw a cloud on the title, and effectually embarrass any subsequent sale under the previous orders. The Master has fixed his liability for the rent, from the date of the defendant's conveyance, and he might have done so from the date of the levy, under the irregular execution. Then it is contended that he should

in the mortgagor: which was the equity of redemption.

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\*At this sale, John Preston was the purchaser for about \$700, and took the Marshal's title. John Preston was never in the possession of the lot on East Bay. After the conveyance, the mortgagor, James Preston (who was his brother) continued to occupy it as a store, as he had done before. The circumstances are, perhaps, sufficient to raise an inference, that James Preston held under, or by the consent of his brother, John Preston. Whether, if he did so hold, he was to pay any rent, or if he was to pay rent, any was actually paid, does not appear.

I have said in my preliminary remarks upon the law applicable to the case, that the mortgagor in possession, is not liable to the mortgagee on account of rents.<sup>(e)</sup> There is no case that goes so far; and the authorities establish a contrary doctrine. And I should have no difficulty in adopting the conclusion, that the purchaser of the equity of redemption in possession, occupies the same relations to the mortgagee, and upon the same principle, must be equally exempt. No tenancy in either case exists, or can be implied. In such a case, the rent, as an auxiliary fund to aid in the satisfaction of the debt, is beyond the reach of the mortgagee, though his security from the corpus of the estate may be inadequate. At least it is so, in the form of proceeding which has been adopted in this case. I will not undertake to say, that under the circumstances supposed, there might not be a remedy afforded in this Court upon a proper application. It perhaps might be attained, by an application to this Court with the proper averments, for the appointment of a receiver, to take charge of the estate, and to realise rents and profits for the benefit of the mortgagee. But this is foreign to the present inquiry.

If the mortgagor or the assignee of the equity of redemption have tenants in possession of the mortgaged premises, paying rent, such tenants may be brought into this Court, and be required to pay the accruing rents, or their rents in arrear, for the benefit of a mortgagee, whose security from the mortgaged premises is inadequate. But I am aware of no case, nor have I been able to find a single authority to support the proposition, that the mortgagor or the assignee of his equity of redemption is liable to account to the mortgagee for rents, in consequence of their own use and occupation of the mortgaged premises, or for rents actually received by them from their tenants before bill filed, or before notice.

Thus the case stood in reference to John Preston in the inception of these proceedings. I have no hesitation in saying, that he was not then liable. He was never in the actual occupation of the mortgaged premises. He was simply the purchaser of the equity of redemption, which he held by the possession of a third person, from whom, it does not appear, that he received, or by contract was entitled to receive, rent. Is he now to be discharged from liability? That is the question to which I will next address myself.

The complainants in their bill, claimed an ac-

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only be accountable \*for the rents actually received. But that it is not the rule applied to a trespasser. He did not levy upon the premises, or enter as an agent; on the contrary, he was warned at the sheriff's sale not to purchase in disregard of the existing decree. He occupies the ordinary position of a defendant in an action of trespass to try title, and is liable for mesne profits from the

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count for the rents against John Preston \*on account of his alleged possession of the mortgaged premises on East Bay-street. The defendant, (John Preston,) in his answer, admitted his possession, but did not raise the question as to his liability to account for the rents. The Master, in his report before alluded to, speaking of the rents, recommends the rents "to be paid into Court, to be distributed according to the rights of the respective mortgagees" and says, he assesses "the annual rent of the store occupied by James Preston at six hundred dollars." As the bill prayed for an account against John Preston for these very premises, the report of the Master can be construed as referring alone to the liability of John Preston, against whom the account for rent had been prayed. To this report, the defendant, John Preston, filed many exceptions: but he filed no exception questioning in any way his liability to account for the rent found against him by the Master, and by him recommended to be paid into Court for distribution among the mortgagees according to their respective rights. The Chancellor overruled all the exceptions of John Preston (none of which, as has been stated, related to the rent) and confirmed the report. In reference to the rents, the decree of the Chancellor is as follows: "it is further ordered and decreed, that the rents be paid into Court according to the recommendation of the Master." Thus it became a decree of the Court, that John Preston should pay into Court for the rent of the mortgaged premises on East Bay-street at the rate of \$600, per annum: to be distributed among the mortgagees according to their respective rights. From this decree no appeal has ever been taken.

The case being again before the Master, (in a very irregular way I think) he submits his final report, in which he undertakes to review his own previous finding, and the previous decree of the Court: and holds that John Preston is not liable for any rent whatever. To this report, the complainants filed exceptions, the great length, and argumentative form of which preclude their insertion in this opinion. As to the point now under consideration, it is sufficient to say, that the exceptions re-assert the liability of John Preston to pay the rent.

On this last report and the exceptions, the case came on for trial before the Chancellor at February, Term, 1850. He made a decree, in which he disposes of this question in the following manner: "But this question of his liability for rents, has been already adjudged against him. He filed exceptions to the Master's report of the 17th February, 1847. One of his exceptions was, that it was not a case for an account of rents and profits. His exception was considered and overruled. The report was confirmed and became the decree of the court." The Chancellor proceeds to say, "I cannot go behind the decree, to consider the questions of law ingeniously discussed by the defendant's solicitor. They are concluded by the decree."

The first circuit decree does seem to imply, that there were exceptions to the report as to the liability of the defendant, John Preston, for rents and profits. The Chancellor, speaking of the points in controversy, says, "although the

(e) Colman v. Duke of St. Abans, 3 Ves. 25; Ex parte Wilson, 2 Ves. and B. 252.



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\*time of his trespass by levying on the premises. If he had never received a dollar, it is irrelevant to the enquiry. The Master has come to the conclusion on the evidence submitted to him, that nine hundred dollars a year, from the 3d July, 1842, to 6th May, 1852, with interest calculated at yearly periods, would be a just and equitable charge

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exceptions are numerous, they \*involve substantially but two objections, to wit, that the bill was prematurely filed, and that it was not a case for an account of rents and profits.

As to the last, there seems to have been a misapprehension. For, on referring to the, original exceptions, which are now before me, it clearly appears, that no exceptions to the report were taken by the defendant, John Preston, as to his liability for rent. I take it to be one of the plainest rules of practice, that where a case is heard upon the Master's report, a party cannot question any part of the report, to which he has not filed exceptions. The rest of the report is admitted. It goes against him by default. The Chancellor will consider no question outside of the exceptions. Nor can an appeal be taken from a Chancellor's decree, confirming a report, or parts of a report, to which no exceptions have been taken.

But, suppose, that in this instance, the exceptions made on this appeal had been taken. The first circuit decree did, unquestionably, confirm the whole of the report. And the Chancellor who made the second circuit decree, in conformity to a rule founded upon both comity and policy, refused to consider as open questions all the matters adjudged in the decree of his predecessor. Certainly there was no error in this. Is there nothing to be considered as settled by a circuit decree? Is a party entitled to go back, and try over again, the matters therein adjudged, every time he has, or supposes he has, a new illumination? When can a cause in Equity be brought to a conclusion, if all the previous orders and decrees made in its progressive stages, are to be considered re-examinable, every time the case comes up on the circuit? The rule is, that all previous orders and decrees, except those that are administrative, are binding upon the Circuit Court, and are not open for consideration except by way of appeal. If then, this defendant had in fact filed exceptions to the Master's report as to the question of rent, (which it seems he did not,) his complaint should have been against the first circuit decree, and not against the last, which professed to carry out the first. But this appeal has not been taken from the first circuit decree, but from the last, in which there is no error. Nor was there any error in the first decree: in as much as it confirmed the Master's report, to which no exception was taken as to the point now controverted. The opinion of this Court is, that the defendant, John Preston, is concluded by the course which the case has taken.

The Master, under some supposed duty, imposed upon him by the first circuit decree, for the purpose of collecting the rent adjudged to be due by John Preston, proceeded to levy a warrant of distress upon a small stock of goods that were found in the store upon East Bay. The defendant, not admitting the right of the Master to distrain upon the goods, agreed to pay the estimated value of the goods, with the understanding, that the fund thence arising should abide the further order of the Court. The estimated value of the goods amounting to upwards of \$300 has been paid to the Master. In accounting for the rents, John Preston is entitled to credit for this sum. And the Master,

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for the premises during \*this period. For the reasons stated by the Court, this appears not to be a case for an account with annual rests. That principle is applied to trustees and others, acting in a fiduciary relation. The defendant was neither the agent nor the bailiff of the complainants. He held, avowedly, on his own account, and is responsible, as if in an action at law he had interposed the plea of not guilty, or liberum tenementum, or both. The Court has reviewed and considered the evidence reported; of all the witnesses examined, Mr. Whitney is the only one who can be regarded as differing with the judgment of the Master; and it is somewhat remarkable that this witness, in giving his testimony on the 27th Jan., 1852, says, that "the entire property would now rent at about seven hundred dollars a year—regards the full estimate of the value of the property to be seven thousand dollars." In three months after this testimony was delivered, to wit, on the 6th May, 1852, the premises were sold by the Master for seventeen thousand two hundred dollars in cash. And on the 21st June, 1852, the two purchasers at the Master's sale testified that they had rented out the premises to third persons for the aggregate annual rent of one thousand four hundred and sixty-five dollars.

If the Master had fixed the clear annual value at nine hundred dollars, there is much in the testimony to warrant such a conclusion. But he has allowed the defendant, for various disbursements during the interval, the sum of one thousand and sixteen dollars and twenty-three cents, (\$1,016 23,) making the clear annual value less than eight hundred dollars. The inference of the Master is then well sustained.

But as has been intimated, the Court is of opinion, that the defendant is not liable for

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interest, and that the statement must \*in that respect be reformed. This requires no further reference nor recommitment of the report. Charging the defendant with nine hundred dollars per annum, as recommended by the Master, from 5th July, 1842, to 6th May, 1852, the aggregate sum, without interest, is eight thousand eight hundred and fifty dollars, and deducting the account for repairs, taxes and commissions, as allowed by the Master, to wit, one thousand and sixteen dollars twenty-three cents, the balance due by the defendant for rents and profits on 6th May, 1852, amounted to the sum of seven

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in stating \*the accounts, will allow this credit. The Master will proceed to state the accounts in accordance with the circuit decrees.

It is ordered and decreed, that the circuit decree be affirmed, and that the appeal be dismissed.

JOHNSTON, DUNKIN, and WARDLAW, CC., concurred.

Appeal dismissed.

thousand eight hundred and thirty-three dollars and seventy-seven cents.

Much was said about the defendant's right to retain under Jeannerett's mortgage. But this has been already disposed of in what has been said. The Bank of the State, as first mortgagee, is entitled to be first satisfied from the proceeds of the sales, and the amount due for rents and profits. According to the statement of the debt to the Bank under the Fire Loan, as presented in the report by Mr. Tupper, 8th March, 1853, the above stated sources will be insufficient to satisfy that claim.

It is ordered and decreed, that the several exceptions to the Master's report, with the reservation of that in relation to the annual rests, be overruled, and that the defendant, Edwin P. Starr, pay into the hands of the Master, the above stated sum of seven thousand eight hundred and thirty-three dollars and seventy-seven cents, within thirty days after notice of this decree.

It is further ordered and decreed that, after deducting the costs accrued up to the time of filing the supplemental bill, 29th April, 1850, the Master pay over the surplus arising from the sales made by him, as well as from the amount thus directed to be paid to him, to the Bank of the State of South-Carolina, so far as the same may be necessary to satisfy the amount due to the Bank under the Fire Loan Mortgage, and that the Master report whether the same is sufficient to satisfy the said debt; and any special matter in relation thereto.

It is finally ordered and decreed, that the

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costs arising since the filing of the supplemental bill (except the costs of A. E. Carew, M. C. Mordecai and J. Cohen, who must pay their own costs) be paid by the defendant, E. P. Starr, and the Master inquire and report what would be a reasonable counsel fee to complainant's solicitors, in the supplemental bill, to be paid by the parties declared to be entitled to the fund, with liberty to said parties to except, &c.

The defendant, Edwin P. Starr, appealed from the circuit decree, and now moved this Court to reverse or modify the same, upon the following grounds:

1. Because neither the validity or priority of the mortgage of the heirs at law to the Bank of the State, was established by the former decree in the cause; nor were any of the questions arising upon the said mortgage considered, decided, or intended to be concluded.

2. Because it is competent now for this Court to consider and adjudge all the questions raised by the exceptions to the Master's report, and if well founded, they ought now to be sustained, notwithstanding the construction which is put in the decree upon the previous decrees.

3. Because the report of the Master sets

up as a prior lien to the debt claimed by this defendant, a certain mortgage, executed by the administrator to the Bank of the State; which mortgage this defendant contends can only charge the share of the administrator, as one of the heirs at law, after payment of the debts of the intestate.

4. Because the mortgage of the intestate, duly executed to Jeannerett, in his life time, although not recorded, is entitled to priority over the subsequent mortgage, from one of the heirs at law to the Bank.

5. Because the actual amount received for rents and profits by Mr. Starr, was proved before the Master, and this should have formed the true basis of his report, instead of the speculative and conjectural amounts which he reported.

6. Because the rents and profits ought to

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go into the hands of the administrator for the general benefit of the estate, and should not have been reported as belonging to the Bank of the State.

7. Because, if the rents and profits are to be applied to the mortgage debts, then this defendant, as assignee of Jeannerett's mortgage, is entitled to the rents and profits of the lot covered by that mortgage.

8. Because the defendant, Starr, on 24th June, 1844, was substituted to all the rights of the Master Gray, under the Mortgage assigned to Jeannerett, and by Jeannerett assigned to Starr; and, that being in possession under this assignment as mortgagee, he was authorized to take the rents and profits to his own use.

9. Because the subsequent report of testimony, by the Master, shows that Starr did not take possession of the premises for one year after his purchase at sheriff's sale, and the report should be reformed by striking out the rents for that period.

The plaintiff also appealed on the ground:

That so much of the decree of the Chancellor as reforms the report of the Master, in regard to interest allowed at yearly periods, on the arrears of rent with which the defendant, Starr, stands charged, should be modified so as to restore the charge of interest as set forth in the report.

Cunningham, Hayne, for plaintiff.

Memminger, for defendant, Starr.

The opinion of the Court was delivered by

JOHNSTON, Ch. No other defendant than E. P. Starr has excepted to the Commissioner's report, or appealed from the decree pronounced by the Chancellor upon it; and, therefore, this Court can take notice of no other defendant's case.

The first and second grounds of Mr. Starr's appeal present the question, whether the Chancellor was mistaken when he adjudged that the previous proceedings established the priority of the bank's mortgage over Mr.



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Starr as general creditor of Robt. \*Boyce and as assignee of Jeannerett's mortgage; and, if so, whether it is not competent for the Court, in this stage of the suit, to re-examine and re-adjudicate that matter.

If the proceedings, referred to, do establish the priority of the Bank's mortgage; and if, according to the practice of the Court, this point is not, now, open to re-examination, it will be unnecessary to consider the 3rd and 4th grounds of appeal, corresponding to the 1st and 2nd exceptions to the report.

If we examine the bill filed the 2d July, 1840, we shall find that it states minutely all the circumstances relating to the death of the intestate, his great indebtedness, the application to the Court for leave to mortgage a portion of the real estate to the Bank, for a loan, the purposes, beneficial to the estate and its creditors to which the loan had been applied, &c., and submits the estate, thus circumstanced, as a fund for creditors and claimants—who were accordingly called in, agreeably to the practice in this State, to present their demands and adjust the order in which they were to be satisfied.

It appears that many creditors came in and rendered their demands; but it is only material to notice that among them was Mr. Starr, claiming then as a general creditor, and that among the liens presented were the mortgages of Ker Boyce, the Bank, and Jeannerett, (since purchased by Starr.) See Mr. Laurens's report 29th Jan. 1841, and schedule attached.

This report, which gave the priority to the three mortgages, over all other claims, (without deciding the priority among the mortgages themselves) was confirmed. Indeed there was no exception taken to it. This certainly was enough to conclude Mr. Starr as to the demand he then held as general creditor. He did not except to the report; or if he had done so, the order of confirmation was an overruling of his exception.

Moreover, if I were now considering his third ground of appeal, I should hold that it was concluded by this order of confirmation. For let it be granted that a mortgage by the heirs, within the nine months following the intestate's death, during which his creditors are restrained from suing the admin-

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istrator, is not an incumbrance which can displace the creditor's right to be paid out of the land thus mortgaged: was not the report of the Commissioner, giving full effect to the mortgage over the intestate's creditors, subject to Mr. Starr's exception? and why did he not except?

But there is something in the order confirming this report, which goes still further. Mr. Starr, as I have said, was a party representing his demand as a general creditor, and was therefore concluded by his silence

from afterwards contesting either the legality or the priority of the Bank's mortgage. Upon the same principle, the then holder of Jeannerett's mortgage, also present, having acquiesced in the report setting forth the mortgage of the Bank as a lien on the real estate, was concluded from afterwards contesting its validity, or objecting that it was not a lien and among the preferable liens on that estate. I do not say, now, that he acquiesced in allowing it expressly a priority over his own mortgage. That is a distinct consideration. But the fact of its validity and of its general efficacy as a lien on the intestate's real estate, and the further fact that among all the claims it stood among the three foremost,—these points are certainly settled by the report and the order confirming it.

Then the enquiry presents itself, What is the order of legal priority established by law, between Jeannerett's mortgage and the mortgage of the Bank, both admitted to be valid, and both admitted to be liens on the real estate of Robert Boyce? What is it? Can there be any other answer than that given by the Statute of 1698—that that mortgage of the same property is to be preferred which is first registered?

There are, throughout the whole proceedings, numberless other evidences that this mortgage of the Bank was considered by every party, by the Masters and by the Court, as second only to Ker Boyce's mortgage, which was the oldest and first recorded. But as the exhibition of these evidences would involve the labour of selecting and bringing together many passages, and would protract my observations to a length that I would avoid, I content myself with what I have said.

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\*I turn, then, to the enquiry, whether the matters thus closed by the acquiescence of parties could be opened at any future stage of the proceedings, or can be now re-examined.

The observations of Spencer, J. in *Wilkes v. Rogers*, 6 Johns. R. 591, are very sound and instructive. "Exceptions," says he, "partake of the nature of special demurrers: and if reports are erroneous, the party must put his finger on the error. When he does so, the parts not excepted to are admitted to be correct; not only as it regards the principles, but as relates to the evidence on which they are founded. It is my opinion that the Court of Chancery cannot set aside a report upon exceptions not taken, and require further proof, where parties whose interests would excite them to make every possible objection, are satisfied."

We have numberless adjudications that where a party has had an opportunity to except, and has not excepted, he cannot again bring the matter of the objection either before the Master or before the Court, on cir-

cuit or on appeal. The principle is essential to the due and orderly administration of justice; and must have a place in every well constituted forum. If at law, a party pleads to special points, neglecting other points, he acquiesces in the pleading of his opponent, relating to these points which he does not contest; and so here, and everywhere.

We have other cases to the effect that if a party appeals he is concluded from considering points not covered by his appeal: and after the appellate judgment is delivered upon the points to which the appeal refers, he is not at liberty, afterwards, in any future proceeding in the cause, either on circuit or in the Appeal Court, to claim a consideration of the ground he has passed over and lost. See the opinion of Chancellor Harper in *Britton v. Johnson*, *Dud. Eq. 28*. A party who brings up a partial appeal, loses every ground of appeal then existing, which he neglects and leaves behind him; and cannot afterwards stir the objections thus lost by his supineness or acquiescence. When the decrees pronounced by my brother Wardlaw and myself were appealed from, every-

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thing behind them to which \*the appealing parties have objected should have been brought up with them; and if the party had not objected, and so had no ground for appeal then, he has no greater ground now.

It is lamentable that the decision of *Price v. Nesbitt*, so often quoted, was ever made. It has been a source of annoyance ever since it was pronounced. It seems that no amount of explanation or repudiation can prevent its being cited as authority. Seventeen years ago, enough was said in *Britton v. Johnson* to prevent any further recurrence to it. All other means failing, I am prepared to expressly overrule it.

But if we could re-examine the point touching the priority of the Bank's mortgage, what possible objection could be made to it? If the loan obtained by the heirs of Boyce upon this mortgage had been put in their own pockets, the creditors of Boyce might have complained of the incumbrance created by the heirs. But \$7,000 of the money went to the extinguishment of Ker Boyce's mortgage which is admitted to be the first lien on the estate. Surely the Bank is entitled to stand in his place, to that extent. The residue of the loan was expended in erecting buildings upon the premises in lieu of building consumed by the fire of April, 1838, in the lifetime of the intestate. It is not pretended that the sum thus expended did not add an equivalent value to the premises, when subsequently sold. Who then is entitled to the amount which the buildings thus erected added to the premises? Surely he who created the property out of his funds; and not creditors who are not prejudiced by it.

We come now to enquire whether the re-

port and decree are erroneous, upon the subject of rent.

The points are settled, by previous decisions in the case, that Starr was a party to the suit at the time of his purchase in 1842; and that his purchase was impeachable, and made in contempt: and his purchase was set aside. While in possession, he endeavored to fortify his right to retain the property thus obtained, by purchasing in Jeannerett's mortgage.

If in fact that mortgage had been the oldest and best, I should have hesitated to al-

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low him any advantages arising from its \*acquisition under the circumstances. But being not the best mortgage, the decision in *Matthews v. Preston* is conclusive, that the rents must go to the mortgage of the Bank, which is better.

To say, (as one of the grounds of appeal has it,) that as assignee of Jeannerett's mortgage, he was mortgagee in possession, and entitled, as such, to take the rents, is to forget that he was in possession as tortfeasor, and only got in this mortgage to sanctify his possession, and that the Court, in turning him out, declared his conduct tortious throughout, and that his possession was not the possession of a mortgagee.

One of the grounds of appeal insists that he did not get possession, nor obtain rent, until one year after his purchase, and should not have been charged the rent of that year. If the fact were as stated, the inference drawn from it does not follow. Nor does it follow that because he has returned all the rent he could get from his tenants, therefore he should not account for the fair rentable income of the property. The property was in the custody of the Court, and he by his interference to the prejudice of his co-parties to the suit, may have put it out of his power for a considerable time to procure an attornment from the tenants in possession; and it may be that he could not get the attornment from some of them without reducing their rent to a nominal sum. This is the complexion of the evidence. Shall he therefore be excused from answering for the rent that could have been obtained, but for this interference?

The Court is of opinion that, upon all points made by Mr. Starr, the decree must stand.

But upon the ground taken on the other side, we are of a different opinion. If rent had been received from regular tenants, it would have been charged, according to the familiar practice, with interest from the end of the year in which it was received. It is the opinion of the Court that it should have been so charged in this case. The Court might, in its discretion, go further, and, up-

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on the principle in *Schieffelin v. Stewart*, 1 Johns. Ch. 620, have charged him with annual or even semi-annual rests. A trustee,



or quasi trustee, who takes the trust property to himself, for his own advantage, may be thus treated. Mr. Starr took possession of property in this Court as a trust fund for the payment of creditors before the Court, he being one of them, and is entitled to little indulgence. But we are not disposed to press him too far. We adjudge him liable to pay simple interest on the rents of each year, from the end of the year; and excuse him from liability to have the interest compounded. If it is compounded in the report, that must be corrected.

It is ordered that the decree be modified by sustaining the plaintiff's exception, as just explained, and that in all other respects it be affirmed, and the appeal dismissed.

DUNKIN and WARDLAW, CC., concurred.  
Decree modified.

### 6 Rich. Eq. \*324

\*N. B. PROTHRO v. R. F. SMITH.

(Charleston. Jan. Term, 1854.)

[*Specific Performance* ⇨89.]

Where a vendee made claims under the contract to a right of way, &c., which were unfounded in its terms, he was *held*, under the circumstances, not to have forfeited his right to a specific performance of the contract according to its terms.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 227; Dec. Dig. ⇨89.]

[*Specific Performance* ⇨94.]

The rule that a party asking the specific performance of a contract, must show that he has performed all that on his part he is bound to perform, is not to be pushed in any case so as to work great injustice, and has feebler application to the case of a purchaser who merely has money to pay, where delay of payment may be usually compensated by interest, than to the case of a vendor.

[Ed. Note.—Cited in *Alexander v. Herndon*, 84 S. C. 186, 65 S. E. 1048.

For other cases, see *Specific Performance*, Cent. Dig. §§ 249-256; Dec. Dig. ⇨94.]

[*Specific Performance* ⇨105.]

Where no time is fixed for the performance of the contract, and a party who is in no default himself and who tenders a present performance of the stipulations on his side, gives notice of his intention to abandon it unless it be performed within a reasonable time, and the other party does not proceed promptly in the assertion of his rights after such notice, he will be held to have acquiesced in the notice and abandoned his right to a specific performance.

[Ed. Note.—Cited in *Lyles v. Kirkpatrick*, 9 S. C. 268; *Coney v. Timmons*, 16 S. C. 384; *McMillan v. McMillan*, 77 S. C. 513, 58 S. E. 431.

For other cases, see *Specific Performance*, Cent. Dig. §§ 325-341; Dec. Dig. ⇨105.]

[*Specific Performance* ⇨105.]

Vendor gave notice that unless the contract was completed by 25th January, he would consider it abandoned. A correspondence ensued between the solicitors of the parties in relation to the terms of the contract, which was closed on the 5th February, by vendor's insisting upon immediate performance. Vendee *held* to have

proceeded with reasonable promptitude, his bill having been filed on the 4th March.

[Ed. Note.—Cited in *Sams v. Fripp*, 10 Rich. Eq. 456.

For other cases, see *Specific Performance*, Cent. Dig. § 328; Dec. Dig. ⇨105.]

[*Specific Performance* ⇨97.]

That the vendor's title was encumbered by a mortgage, and that he made no offer to remove it or indemnify the vendee against it, *held* to furnish a reasonable excuse for the vendee's forbearance to pay the purchase money.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 288; Dec. Dig. ⇨97.]

[*Vendor and Purchaser* ⇨128.]

In the absence of countervailing stipulation or evidence, an agreement to sell implies an agreement to convey a good and unencumbered title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 234; Dec. Dig. ⇨128.]

[*Vendor and Purchaser* ⇨146.]

Though in England the rule is that the vendee shall prepare and tender the conveyance, with us, it seems, that it is the duty of the vendor to make and tender the conveyance, as well as to remove all encumbrances.

[Ed. Note.—Cited in *Cooper v. Rutland*, 99 S. C. 88, 82 S. E. 995.

For other cases, see *Vendor and Purchaser*, Cent. Dig. § 278; Dec. Dig. ⇨146.]

[*Vendor and Purchaser* ⇨97.]

Where a party seeks to abandon a contract containing mutual and dependent covenants or promises, he must shew performance of the stipulations on his side, equally with a party who invokes the aid of the Court to enforce a contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 161; Dec. Dig. ⇨97.]

Before Wardlaw, Ch., at Charleston, June, 1853.

On the 10th of July, 1850, Richard F. Smith purchased from Bishop Gadsden a low water-lot, for \$10,000, payable as follows: the interest semi-annually, the principal in five instalments—the first, on the 1st day of July, 1855, and the others on the 1st day of July, 1856, '57, '58 and '59; and to secure the purchase money, he mortgaged the premises, which mortgage is duly recorded.

After making considerable improvements

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on it, he let a part \*of the premises to his brother, B. F. Smith and N. B. Prothro, as partners under the name of Smith & Prothro, at a rent of \$1,000 per annum; and covenanted, among other things, to open a water communication with the premises, and to open and keep in order, a communication, by road or roads between the premises, which were entirely surrounded by his land, and the neighboring wharves, and to allow the lessees the privilege of shipping their lumber from his wharf, and of removing their buildings at the expiration of the lease.

On the 11th March, 1852, the lessees agreed to purchase of the lessor, all the lot from Washington street to the channel of Cooper river, including the premises demised to them, being a moiety of the purchase from

the Bishop, at \$7,500. The agreement was reduced to writing, and it was thereby stipulated that the existing lease should be cancelled, and the conditions of non-effect from that date, and that the purchase money should bear interest from 1st January, 1852, and that the payments of interest and principal should correspond in time with the payments of the purchase money, to Bishop Gadsden. And it was verbally understood that Smith & Prothro might use R. F. Smith's wharf for the present.

Instructions were given by the purchasers, and a conveyance drawn in conformity with this agreement; but before it was executed on the 2nd August, 1852, they dissolved their partnership, and signed certain articles of dissolution, by which they agreed that, in consideration of \$6,250, to be paid by Prothro, Smith would release to him all his interest in the partnership, except the money owing to the firm then due, and the planed lumber on hand; and that Prothro would pay the debts of the concern, and secure to Smith \$6,200 by a mortgage of half the lot, and execute the mortgage as soon as R. F. Smith should make a good title to the premises, or in case he could not make a good title, as soon as he would make a conveyance and fully indemnify Prothro against any defect. The agreement for this dissolution was made with the assent of R. F. Smith. B. F. Smith retired, and Prothro remained in full pos-

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\*session of the premises, and had permission to use the wharf as heretofore till the end of the year.

No steps were taken by him to complete his purchase till the 10th January, 1853, when R. F. Smith called upon him to pay the interest in arrear, and execute the bond and mortgage which would be ready for his signature, offering to execute a conveyance prepared by Prothro, whenever tendered with the money, giving time till the 25th of the same month to comply, and giving notice that if not complied with by that time, he would treat the contract as rescinded. Prothro answered on 24th of January, by his solicitor, that according to the agreement he was entitled to a right of way over the wharf of Smith; that the price of the purchase was only \$7,000; that the additional \$500 was for a wharf head, which had not been built, and that Smith had agreed to indemnify him against Bishop Gadsden's mortgage, and that he would comply on these terms and no other.

These terms were rejected by Smith, who persisted in his notice to repudiate the contract of sale unless Prothro would comply by the 25th January.

On the 7th of February, notice to remove his lumber from the wharf was given, and disregarded, and the use of the wharf maintained by force.

On the 26th February, 1853, R. F. Smith commenced an action of trespass to try title.

And on the 4th March, 1853, this bill was filed, claiming a conveyance of the premises, with the grant of a right of way; the reduction of the purchase money, and a guarantee against Bishop Gadsden's mortgage, not alleging want of notice of said mortgage at the time of purchase.

The case was heard on the 17th June, 1853.

W. H. Houston, examined for complainant, proved the cost of improvements made by Prothro, under \$500. The lot, without the mill, is worth 7 or \$8,000. Now accessible only by Smith's wharf. The value of the land depends on filling; and when filled, the owner will have no need of Smith's wharf for a way to his premises.

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\*L. T. Potter—Said that Smith & Prothro did an unsuccessful business. In 1852, the lot was worth 7 or \$8,000, and much more now.

E. Horlbeck—Thought the present value of the two lots, 15 or \$20,000.

For the defence, were produced Bishop Gadsden's title, and the writ of trespass to try title.

H. C. King.—Prothro called to give instructions for a deed for the lot from R. F. Smith to him. It was drawn according to his directions, and charged to him; no right of way mentioned.

Wardlaw, Ch. N. B. Prothro and Benjamin F. Smith formed a partnership with the style of Smith & Prothro, for the purchase, manufacture and sale of lumber and boards, and in furtherance of their business, leased a water lot, lately Bishop Gadsden's, from R. F. Smith, for ten years, at an annual rent of \$1,000, payable semi-annually on the 1st April and 1st October, upon stipulations which appear in the lease. The partners entered upon the premises leased, erected a steam mill for planing boards, and occupied the premises as lessees until March 11, 1852, when they contracted with R. F. Smith for the purchase absolutely of a parcel of land including the portion leased, on the following terms:—"I hereby agree to sell to Smith & Prothro a water lot on Washington street, 122 feet on said street, and running down the same width to the channel of Cooper river—the planing mill now on this lot being situated on the Southern line—for the sum of \$7,500, payable with interest, at the same time and in the same manner as my payments for the purchase of this property become due to Bishop Gadsden by my bond to him. The purchase to date from January 1, 1852. By the above sale, I reserve the right of making a street, parallel to Washington street, about forty feet wide, and nearly opposite to Marsh street, through the above named lot; my decision to be made at any time prior to March 1, 1861. The lease now existing between

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Smith & Prothro and myself \*to be cancelled, and the conditions of the same to be of non-



effect from the date thereof. Done in duplicate, this, 11th March, 1852. Charleston, S. C. R. F. Smith."

"We hereby agree to buy the above lot, on the terms and conditions stated by R. F. Smith, in his offer above.

Smith & Prothro.

Witness, R. C. Smith.

On August 2, 1852, Smith & Prothro agreed to dissolve their partnership, on terms which appear in a written memorandum thereof: of which it seems only necessary to mention for present purposes, that Prothro was to become owner of the water lot, mill and appurtenances.

R. F. Smith agreed to accept Prothro as purchaser of said lot, in place of Smith & Prothro, on the terms of the contract for sale to Smith & Prothro. Prothro has since occupied the premises, in the same business for which they were used by the firm.

In January and February, 1853, there was a correspondence between Messrs. Petigru & King, solicitors for R. F. Smith, and Mr. B. Whaley, solicitor of N. B. Prothro, concerning the agreement. On January 10, Messrs. P. & K. wrote to Prothro, calling his attention to the contract, and asking to hear from him, or to be referred to his solicitor. In this note they say: "As the payments stipulated to be made by Smith & Prothro have been neglected, and the whole subject has been transferred by your late partner to you with the consent of the seller, a compliance with the articles of agreement will embrace the payment of all arrears of interest and taxes, and the execution of a bond and mortgage. But we have it in charge to say, that Mr. Smith is ready to make a title as stipulated, and to request you to prepare such a title as you require, and pay the interest in arrear, and execute a proper bond and mortgage, which will be ready for your signature. In case of your declining to comply with this request, Mr. R. F. Smith will consider the contract at an end, and will expect to hear from you what your decision is by 25th instant: after which time, if not otherwise in-

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formed, \*he will regard the contract as abandoned by you: and if not promptly complied with, will treat the same as rescinded."

On January 24, the solicitor of Prothro replied: "Mr. Prothro not having in his possession an abstract of the title of the land bought by Mr. R. F. Smith from the late Bishop Gadsden, nor any plat relating thereto, and not having the written agreement or a copy thereof between R. F. Smith, and B. F. Smith and himself, cannot convey an idea of his rights more definitely than is herein set forth." He then proceeds to give Mr. P.'s version of the contract, in the course of which he insists on a right of way over the present bridge, or over the intermediate space between the mill and the bridge—that Smith agreed to extend the wharf-head from P.'s

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wharf-head to the edge of the canal on the Northern side of the lot, in consideration of which P. agreed to give Smith \$500, in addition to \$7,000, the price of the lot—and that Smith agreed to give P. a good title or indemnity against Bishop Gadsden's mortgage. He concludes: "Mr. P. instructs me to say, he is ready to complete the agreement according to the terms of the contract."

In a letter of January 29, Messrs. P. & K. furnish a copy of the agreement, and refer to it for explanation of Mr. Smith's views. They mention Mr. S.'s denial of any agreement for a right of way over his bridge or any part of his land, and of any agreement concerning the wharf head, and of the price of the lot being less than \$7,500. They conclude: "We beg to refer to our letter of 10th inst. to Mr. Prothro. He has not paid the purchase money, nor tendered a conveyance, in pursuance of the contract, but set up a different contract: from all which, Mr. Smith infers that he does not mean to comply with his purchase; and unless a tender is made of the money in arrear, and a draft deed in pursuance of the contract, Mr. Smith will be confirmed in that opinion and proceed accordingly. If the want of an abstract is all that is in the way of Mr. Prothro's compliance with his contract, a copy of that which has been seen by you will be submitted whenever demanded."

Mr. Whaley, in a letter of February 1,

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says in substance, that \*Mr. Prothro, while insisting that the writing did not contain a full expression of the agreement of the parties, would be content to take Mr. Smith's conveyance with warranty, and waive other indemnity, provided a right of way to his wharf be conceded: and if this be not agreeable to Mr. Smith, then, as a final proposal, Mr. Prothro proposes to submit all the matters in difference between Mr. Smith and himself to the decision of arbitrators.

Messrs. P. & K. closed the correspondence by a letter of February 5, stating that Mr. Smith adheres to his denial of the right of way, suggesting that if Mr. Prothro founds his claim on the terms of the lease, these were expressly abrogated by the contract for sale: and that Mr. S. declines the proposal for arbitration, regarding it as a mere offer to make a new bargain. "We repeat, that unless Mr. P. at once tenders a draft deed for Mr. S.'s signature, and pays up the interest in arrear on the purchase money, and refunds the taxes which Mr. S. has had to pay, he will consider that he has refused to comply with his purchase, and take measures accordingly."

On February 7, 1853, defendant gave written notice to plaintiff, having previously given verbal notice to the same effect, to remove his lumber from defendant's wharf within a reasonable time, and to place no more there at the risk of being treated as a trespasser:

further notifying plaintiff that the license which had been extended to him as an accommodation to use defendant's wharf (including the use of the bridge) until January 1, 1853, was now formally withdrawn. Prothro persisted in his use of the bridge, &c., and on February 26, Smith instituted an action of trespass to try title against him. On July 30, 1852, a draft of a conveyance of the water lot from R. F. Smith, to Smith & Prothro, was written by H. King, Esq., from instructions of Prothro, in the course of which nothing was said about a right of way. This paper was not executed, as in a day or two afterwards, Benj. F. Smith ceased to be a party of the contract.

The plaintiff, in his bill, filed March 4,

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1853, seeks that defendant may specifically perform said contract of sale, by making a good title to the premises, and indemnifying plaintiff against incumbrances: that the contract be reformed so as to give plaintiff a right of way over the bridge: and that the defendant be enjoined from prosecuting his action of trespass to try title.

The defendant, in his answer, insists that plaintiff has forfeited all benefit from the contract of sale, especially any right to a specific performance of it, by his acts of retaining possession of the lot without paying or securing the purchase money, or forcibly using defendant's bridge after the expiration of the license, and notice that it had been withdrawn, of refusing to comply with the agreement within a reasonable time after notice of defendant's purpose to consider it at an end, and of setting up unfounded claims of right of way over the other lands of defendant, and of indemnity against Bishop Gadsden's mortgage.

It appears by the evidence, that the improvements erected upon the lot which are fixtures, do not exceed in value \$500. It also appears, that the lot has considerably risen in market value since the agreement, from general appreciation of estate in the city, and not from circumstances peculiarly affecting this lot or its ownership.

The claim of plaintiff of a right of way over defendant's bridge, is clearly unsupported by the terms of the contract for sale, and no attempt was made to show that such right was omitted from the agreement by mistake. Plaintiff's counsel properly abandoned this claim at the hearing; but defendant urges that the persistence of plaintiff in this unfounded claim, in the correspondence between the solicitors and in the bill, and especially in the tortious use of the bridge, in such error of conduct on his part as excludes him from the extraordinary remedy of this Court of specific performance. The discretion of this Court in granting or refusing specific performance, is a judicial discretion governed by the principles and procedure of the tribunal. The plaintiff, in

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asserting this right of way, has \*committed error, but it is not in relation to the subject really included in the contract, and it is some palliation of his wrong, that the bridge being the only means of communication, was indispensable to the use of his mill, until he constructed a causeway for himself, which required some time after the sudden termination of his license to use the bridge. Besides, the defendant has selected the Court of Law for redress of his injuries in this particular, and he is not entitled to double redress. As a point of pleading, a party is not ousted from the relief to which he is entitled, because in his bill or preliminary proceedings, he may claim more than his equitable interests. It is quite clear that the plaintiff never meant to abandon the contract according to its terms, although he may have sought larger interests under it than could be justified by its proper construction.

In general, a party asking the specific performance of a contract, must show that he has performed all that on his part he is bound to perform; but this doctrine is not to be pushed in any case so as to work great injustice, and it has feebler application to the case of a purchaser who merely has money to pay, where delay of payment may be usually compensated by interest than to the case of a vendor. In this Court, time is not usually of the essence of the contract, although it may be made so by express stipulations of the parties in the contract itself, which is not the case here, or by the act of one of the parties fixing a reasonable time for the completion of the contract, and giving notice to the other party of intention to abandon the contract unless it be completed within the time fixed. When this latter course is pursued by a party who is in no default himself, and who tenders a present performance of the stipulations on his side, it will be prima facie a bar to demand for specific performance by the other party made after the time limited. If the other party do not proceed in the assertion of his rights promptly after such notice, he is considered as acquiescing in his notice, and abandoning his right to the equitable remedy. *Taylor v. Longworth*, 14 Pet. 175 [10 L. Ed. 405]; *Thompson v. Dulles*, (5 Rich. Eq. 370); *Seton v. Slade*, White and T. L. C. and notes En. and Am., vol. 2, part 2, 3.

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\*In the present case, the defendant has given notice of his purpose to abandon the contract, and the plaintiff has proceeded with reasonable promptitude, after such notice, to seek specific performance. The party seeking specific performance, forfeits the relief if he has been guilty of serious misconduct concerning the subject. It is imputed to the plaintiff here that he is in that category, because he has not paid nor offered to pay the money due on the purchase, and yet has re-



mained in possession of the lot. But a reasonable excuse for his forbearance to pay the money is afforded by the fact that defendant's title to the lot is encumbered by a mortgage to Bishop Gadsden, and that defendant has made no offer to remove the incumbrance, or to indemnify the plaintiff on account thereof. It is alleged in the answer, that plaintiff was well aware of defendant's mortgage at the time of the contract for sale, as the contract itself shows; yet the contract makes no mention of such mortgage, nor is the existence of a mortgage to be inferred from the mention of a bond. No proof outside of the agreement is offered of plaintiff's knowledge, at the time, of the existence of the mortgage, unless it may be inferred from the terms of the memorandum of dissolution of partnership between Smith and Prothro; and that, if it proves knowledge of the incumbrance, equally proves his determination to insist upon indemnity. The terms of that instrument on this point are: "upon R. F. Smith's executing a good title to the land agreed to be purchased formerly by Smith & Prothro, to N. B. Prothro, or in case a good title cannot be made, upon the said R. F. Smith's conveying the said land to said N. B. Prothro, and indemnifying him fully against any defect in the title thereto, and upon the said N. B. Prothro performing the said agreement on his part, the said R. F. Smith will release to the said N. B. Prothro, all his interest in the said Mill, &c."

It is probable from R. F. Smith's accepting Prothro as purchaser, in place of Smith & Prothro, that he was aware of this memorandum; but the fact is not absolutely proved. But in the absence of countervailing stipulation or evidence, defendant's agreement to sell implies an agreement to convey a good

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\*and unencumbered title. Again, defendant furnished to plaintiff no abstract of his title to the lot, and it is at least doubtful whether defendant was not bound to prepare and tender a conveyance before he had title to the purchase money. In England the rule is that the vendee shall prepare and tender the conveyance, but it has not been adopted generally in the United States: *Taylor v. Longworth*; *Dubignon v. Loud*, 5 Rich. 251. Where a purchaser enters into possession of land under agreement to purchase, and continues long afterwards in possession, he may be considered as waiving his right to investigate the title, and to have a tender of the conveyance; but the principle does not apply to this case where the purchaser was previously in possession under lease, and has not formally waived objection to the title. *Palmer v. Richardson*, 3 Strob. Eq. 16; *Smith v. Smith*, 1 Rich. Eq. 130. Where a party seeks to abandon a contract containing mutual and dependent covenants or promises, he must show performance of the stipulations on his side, equally with a party who invokes the aid of the Court to enforce a contract. *Kin-*

*loch v. Hamlin*, 2 Hill, Eq. 19 [27 Am. Dec. 441]. If an agreement to pay money at future dates, involves an agreement to give bond and mortgage, as the defendant, in the correspondence of his solicitors, insists; an agreement to sell with stronger reason, involves an agreement to make and tender conveyance, and to remove incumbrances. To refuse relief to the plaintiff altogether, would bring upon him great and irremediable loss, while all the injury that defendant has suffered in the matter of the contract is detention of his money which may be compensated by interest. The plaintiff would have acted more properly, if he had brought into Court with his bill, the money for which he is in arrear, but he may be sufficiently punished for this by making him pay costs. Vendors have been sometimes allowed further time after report of the Master upon title, to perfect their titles; and want of punctuality in purchasers should not be treated more harshly.

It is ordered and decreed that, upon plaintiff's paying into Court the money in arrear upon the contract of sale, the defendant execute to the plaintiff a conveyance for the lot

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described \*in the contract, and give the plaintiff indemnity against Bishop Gadsden's mortgage, by bond and sureties to be approved by one of the Masters, or remove said incumbrance, and that thereupon, plaintiff execute to the defendant bond with mortgage of the premises to secure the balance of the purchase money. It is further ordered that defendant be enjoined, until the further order of the Court, from prosecuting his suit at law for recovery of the lot aforesaid, with leave to him to prosecute said suit for recovery of damages from plaintiff for any trespass upon his bridge or other lands not embraced in said lot.

It is further ordered that the plaintiff pay the costs to the time of the hearing, and that the question as to the subsequent costs be reserved.

The defendant, R. F. Smith, appealed on the grounds:

1. That N. B. Prothro purchased with notice of Bishop Gadsden's mortgage, and is entitled to no other indemnity than the warranty of the vendor: that his pretensions to have an additional indemnity against that mortgage, and to have a right of way over Smith's wharf, and to have a wharf-head built for him, are fallacious. And his refusal to comply with his purchase unless these terms are conceded, is the same as a positive and wilful refusal.

2. That there is no equity for a purchaser, who, without cause, refuses to comply with his contract; and such a purchaser cannot have any more relief in this Court than at Law.

For these reasons, it was submitted, that the decree should be reversed, and the bill dismissed: but if not dismissed, then the ven-

dor prayed that the same may be modified, and that a day may be fixed for the complainant to pay the money, and to tender a conveyance at his own expense for the signature of the vendor; otherwise, to forfeit the benefit of the decree. And that the decree be altered as to the action at Law, which is an action of trespass to try title.

Petigru, for appellants.

B. J. Whaley, contra.

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\*The opinion of the Court was delivered by

WARDLAW, Ch. This Court is content with the general conclusion of the circuit decree.

The brief prepared by defendant's counsel, after reciting the substance of the stipulation in the agreement to dissolve the partnership of Smith & Prothro, that R. F. Smith should make a good title to the premises described in the contract of sale or fully indemnify Prothro against any defect of title, states that "the agreement for this dissolution was made with the assent of R. F. Smith." The defect of title thus intimated must be the incumbrance of Bishop Gadsden's mortgage. In the letter of plaintiff's solicitor, dated January 24, 1853, it is stated that "Smith agreed to give Prothro a good title, or to indemnify him against the incumbrance of Bishop Gadsden's mortgage;" in the reply this statement is not controverted, while other statements are stoutly denied. In the defendant's answer, too, he says, that he "was willing to remove the mortgage for the purchase money, if plaintiff would comply with his contract, which he has deliberately refused to do." We concur with the Chancellor that the plaintiff never intended deliberately to repudiate the contract according to its terms; although he claimed to have a wharf-head built for him, and a right of way over defendant's bridge, under cover of the contract and without foundation in its terms. He had the right to require, and he required,

with defendant's acquiescence, the removal of this incumbrance of Bishop Gadsden's mortgage or indemnity against it. It may be that he acquired knowledge of this incumbrance in the interval between the contract for sale on March 11, 1852, and the dissolution of the partnership of Smith & Prothro on August 2, 1852. But granting that he had notice of the mortgage at the time of sale, if then or afterwards it was agreed that he should be protected against this defect of title—and such agreement may be fairly deduced from the evidence and the admission of counsel—such notice does not impair his right or defendant's duty as to indemnity.

The plaintiff, by his misconduct, almost de-

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serves to be de\*prived of the extraordinary remedy of this Court, but our refusal to extend this remedy to him would work such injury as to amount to injustice.

The Chancellor, from inadvertence, fixed no time in the decretal order for the performance of the plaintiff's stipulations in their nature precedent to anything to be done by defendant. This defect must be supplied. In England, counsel usually attend to settle the minutes of the decree, when the Equity Judge announces his opinion. This precise course is impracticable under our procedure; but it would greatly aid the Court, if counsel at the hearing would prepare and submit projets of decretal orders suited to the contingent determination of the Chancellor.

It is ordered and decreed, that the decretal order in this case be so modified, that the plaintiff, within thirty days from the filing of this decree, pay into Court the moneys in arrear upon the contract of sale, and all sums paid by defendant for the State and City taxes since January 1, 1852; or that the bill be dismissed. In all other particulars the decree is affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, and DARGAN, CC., concurred.

Appeal dismissed.





# CASES IN EQUITY

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—MAY TERM, 1854.

CHANCELLORS PRESENT:

HON. JOB JOHNSTON,

“ BENJ. F. DUNKIN,

“ GEORGE W. DARGAN,

“ F. H. WARDLAW.

6 Rich. Eq. \*339

\*JONATHAN WRIGHT and Wife, and Others  
v. W. H. HERRON and Others.

(Columbia. May Term, 1854.)

[*Deeds* ⇐136; *Trusts* ⇐140.]

W. H. executed a deed by which he conveyed certain negroes to a trustee “for the use of myself and wife N. during our joint lives, and after my death for the use of my said wife, during her life; and after the death of my wife, for the use of my children which I have begot or may beget on the body of the said N. which may be living at her death,” &c. W. H. survived his wife N.: *Held*, that upon the death of N. the interest of W. H. in the negroes ceased, and they vested in the children absolutely.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 431; Dec. Dig. ⇐136; *Trusts*, Cent. Dig. § 187; Dec. Dig. ⇐140.]

Before Dunkin, Ch., at Darlington, February, 1854.

This suit was brought by the children of Nancy H. Herron, who died in 1848. The plaintiffs claimed from the defendant William H. Herron, a delivery to them, with an account of hire, of the slaves and their increase, included in a deed, executed by William H. Herron, which is as follows:

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\*State of South Carolina,  
Darlington District. }

Know all men by these presents, that I, William H. Herron, for and in consideration of the natural love and affection which I have towards my wife and children herein-after named; also for and in consideration of the sum of ten dollars by Newitt Delk, to me in hand paid at the delivery of these presents, have bargained, sold and delivered, and by these presents do bargain, sell and deliver to the said Newitt Delk, the following negroes: a girl named Ann, about fourteen

years of age; a negro boy named Belford, about twelve years of age; a negro boy named Charles, about eight years of age; a woman named Maria, about twenty-eight years old; a negro girl named Cherry, about eight years old; and a negro boy named Ralph, about three years old: to have and to hold all and singular, the said negroes and their increase to the said Newitt Delk and his heirs forever: In trust, nevertheless, that the said Newitt Delk shall hold the said negroes and their increase in trust for the use of myself and wife Nancy A. Herron, during our joint lives, and after my death, for the use of my said wife during her life; and after the death of my wife, for the use of my children which I have begot, or may beget on the body of the said Nancy H. Herron which may be living at her death, the issue of any deceased child being entitled to represent their parents in the division: also, for the use of any children of the said Nancy, which she may have on a second marriage. In witness whereof, I have hereunto set my hand and seal, this 2d January, A. D. 1837.

Wm. H. Herron, [L. S.]

Signed, sealed and delivered in the presence of—the concluding lines, commencing “also for the use of,” &c., interlined before signing.

Peter C. Coggeshall,  
John W. Lide.

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\*Dunkin, Ch. Whatever may have been the purposes of the grantor, or whatever his instructions to counsel, the Court, in this form of proceeding, can look at the deed of January, 1837, only as it stands, and give effect to it according to the legal construction of the terms used. Judging in this manner the slaves were to be held for the joint use of



Wm. H. Herron and Nancy his wife, during their joint lives: and upon the death of the wife, for her children absolutely.

Mrs. Herron died in 1848, and the plaintiffs are her children, and became thereupon entitled to the possession and enjoyment of the estate.

These slaves, or those from whom they descended, were originally the property of Newitt Delk, the father of Nancy Herron. By a deed dated March, 1830, he gave two of the slaves to his daughter in the terms therein stated. By another deed of March, 1833, he gave her another slave in the same terms—and by a deed of December, 1836, he gave her two slaves in different terms.

The defendant says he was advised that under these deeds he took an absolute estate, and that therefore, and "for the purpose of conciliating Newitt Delk," he executed the deed of January, 1837.

As to the deeds of 1830 and 1833, it might, with great reason, be maintained that the limitation over was valid, and in that view the plaintiffs are entitled under that limitation: but assuming that the limitation was invalid, as was clearly that of December, 1836, then the wife took an absolute estate, which vested in her husband by virtue of his marital right, and passed under his own deed of January, 1837.

In any view it appears to the Court that the plaintiffs are entitled to the slaves and their increase, and to an account of the hire since the death of Nancy Herron. It is ordered and decreed, that the slaves be delivered up and that a writ of partition issue to divide the same among the parties entitled, and that it be referred to the Commissioner to take an account of the hire and services of the slaves, and that he report thereon.

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\*The defendant appealed on the grounds:

1. Because by proper construction of the deed of January, 1837, the defendant, after the death of his wife, was entitled to a life interest in all of the negroes in which before January, 1837, he had an absolute estate.

2. Because no hire should be decreed in relation to any of the negroes.

Moses, Haynsworth, for appellant.

Dargan, contra.

PER CURIAM. We are of opinion that the Chancellor's construction of Herron's deed of January 2d, 1837, was correct: which obviates the necessity of looking into the three deeds of Newitt Delk. It is, therefore, ordered that the decree be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

### 6 Rich. Eq. \*343

\*MLURE, BRAWLEY & CO., and Others, v. B. F. WHEELER.

(Columbia. May Term, 1854.)

[*Mortgages* ⇨218.]

Where judgment is recovered on a note to secure the payment of which a mortgage of land had been given, the sheriff can sell under the *fi. fa.* no greater interest in the land than the equity of redemption.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 583; Dec. Dig. ⇨218.]

[*Mortgages* ⇨295.]

The purchase of the equity of redemption by the mortgagee extinguishes the mortgage debt, and the effect is the same whether the purchase be directly from the mortgagor, or from the sheriff under a *fi. fa.*

[Ed. Note.—Cited in *Allen v. Richardson*, 9 Rich. Eq. 56; *Edwards v. Sanders*, 6 S. C. 334; *Trimmier v. Vise*, 17 S. C. 500, 43 Am. Rep. 624; *Trumbo v. Cumming*, 20 S. C. 336; *Devereux v. Taft*, Id. 558; *Bleckley v. Brannan*, 26 S. C. 428, 429, 2 S. E. 319.

For other cases, see *Mortgages*, Cent. Dig. § 523; Dec. Dig. ⇨295.]

[*Mortgages* ⇨295.]

The mortgagee who had taken certain notes from the mortgagor as collateral security, purchased at Sheriff's sale the equity of redemption: *Held*, that he thereby extinguished the mortgage debt, and was bound to account for the notes.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 815, 817-831; Dec. Dig. ⇨295.]

Before Dunkin, Ch., at York, June, 1853.

This case will be sufficiently understood from the circuit decree, which is as follows:

Dunkin, Ch. This is a bill preferred by the judgment creditors of Elisha Jaggers, deceased. It seems that on 2d February, 1842, Jaggers purchased from the defendant a tract of land in York district, containing six hundred and forty acres, for three thousand three hundred dollars. The purchase money was to be paid in four successive annual instalments from March 1, 1842; for which Jaggers gave his four several promissory notes; and to secure the payment thereof, executed a mortgage of the premises. The first note of eight hundred and twenty-five dollars became due 1st March, 1843. At the time of the sale, the defendant had received from Jaggers a note on Thos. M'Lure for four hundred and sixty-one dollars, which was taken by him in part payment of the first note. On the 1st April, 1842, Jaggers also placed in defendant's hands, as collateral security for the performance of his contract, certain notes of Harvey Jaggers for nine hundred dollars, not then due, and three notes of George W. Bell for three hundred and seventy-five dollars, also not then at maturity.

On 11th March, 1843, the defendant took from Jaggers a confession of judgment for three hundred and sixty-one 31-100 dollars, being the balance due on the first note. He

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caused a levy \*to be made on a negro of

Jaggers's on 18th July following, which was sold, and the proceeds of sale, to wit, two hundred and fifty dollars, were applied in payment of the execution.

On 20th October, 1843, Jaggers died, intestate, leaving a widow and children. On 20th November, 1843, the defendant took out letters of administration on the estate, and on the 8th December, the personalty was sold by him for one hundred and eighty-two dollars twenty-five cents. Two days before this sale, the defendant caused his execution to be levied on the land. A sale was accordingly made by the sheriff on the 1st January, 1844, and the defendant became the purchaser at nine hundred dollars.

Many observations were submitted at the hearing as to the very prompt manner in which the defendant had enforced his demands against the estate of this intestate; and in the view which the defendant's counsel takes of the effect of the sheriff's sale, it might be necessary to enter into a very close inquiry of the amount then due to the defendant, and of other antecedent and accompanying circumstances. But in the judgment of the Court this inquiry may well be pre-terminated.

After the decisions in *Ex parte City Sheriff*, 1 M.C. 399, and *M'Clure v. Mounce*, 2 M.C. 423, it would seem superfluous to raise a question as to the effect of the sheriff's sale. It is precisely the same whether the mortgagee became the purchaser or a third person. The thing sold, that on which alone the sheriff had any authority to levy the execution, was the mortgagor's equity of redemption.

The proceeds of sale are payable not to the mortgagee, qua mortgagee, but to the eldest judgment creditor, or to the mortgagor himself after satisfaction of such judgments. In this case, it appears that the money was paid to the sheriff, the execution of defendant was satisfied, and about eight hundred and forty dollars, the surplus, was paid to the defendant. Some evidence was relied on to shew that the entire premises, and not merely the equity of redemption was sold.

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But the answer to \*this is anticipated by the judgment of the Court in *M'Clure v. Mounce*. Besides, whatever may have been the impression of the defendant, the price at which it was knocked down and on a credit sale, would lead to the conclusion that this impression was not very general.

As has been intimated, it makes no difference whether the mortgagee is the purchaser at sheriff's sale or a stranger; and this furnishes a solution to the only remaining inquiry. Purchasing the equity of redemption, a stranger would take the land subject to the obligation to discharge the incumbrance. That was the condition of the defendant on 1st January, 1844. It was ruled in *Schnell v. Schroder*, Bail. Eq. 334, (and the doctrine has been since repeatedly recognized) that a

purchase of the equity of redemption by the mortgagee extinguishes the mortgage debt; and that the effect was the same, whether the purchase was directly from the mortgagor or from the sheriff under an execution against him. Whatever amount remained unpaid on the mortgage debt on 1st January, 1844, was then extinguished and satisfied. The sum of nine hundred dollars, as well as all collateral securities, such as the notes of Harvey Jaggers and George W. Bell, as well as the sales of the personalty (which became due in September or October, 1844,) were assets in the hands of the defendant as administrator, and applicable to the payment of other creditors of the intestate. It is stated that Harvey Jaggers was insolvent; of course the defendant will be at liberty to make proof on this subject.

It is ordered and decreed, that the defendant account for his administration of the estate of Elisha Jaggers, deceased, upon the principles of this decree, and that it be referred to the Commissioner to state such account. It is further ordered and decreed, that the Commissioner cause to be published once a month, in York and Chester, a notice to the creditors of Elisha Jaggers, deceased, to establish their demands before him prior to the first day of April next, and that the Commissioner report thereon, as well as on the

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accounts of the administrator, and that \*he file his report at least three weeks prior to the next meeting of this Court for York district.

The defendant appealed on the grounds:

1. Because it is submitted that the purchase of the equity of redemption by the defendant, under the circumstances could not operate as an extinguishment of the mortgage debt.

2. Because it was held that nothing but the equity of redemption could be sold; when it is submitted that the defendant had the right, and did sell the whole interest in the land.

3. Because even if the purchase by the defendant amounted to an extinguishment of the mortgage debt, the defendant would only be liable for the balance of the sale after satisfying the execution under which the sale was made.

4. Because it is unnecessary to obtain an order of foreclosure when there is no intermediate judgment between the mortgage and the judgment on the mortgage debt.

5. Because the defendant had the right to the proceeds of the sale under the executor's Act.

6. Because if the purchase of the equity of redemption by the mortgagee extinguished the mortgage debt, the defendant was entitled to the proceeds of said sale—his being the oldest execution against the intestate.

7. Because the complainants, if entitled to any thing, were only entitled to redeem the land by paying up the mortgage debt, or to have the land re-sold for that purpose.



8. Because the defendant is not liable to account for the personal estate of Elisha Jaggers, the same having been applied to his judgment before the sale of the land.

9. Because all the complainants, except the minors, were barred by the statute of limitations.

10. Because if the purchase by the mortgagee did operate as a satisfaction of the mortgage debt, and he is bound to account for the purchase money, yet he ought not to account for the Bell & Jaggers notes.

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\*11. Because if the purchase operated as a satisfaction of the debt, the defendant would be entitled to the proceeds of sale.

Witherspoon, for appellant.  
Melton & Eaves, contra.

PER CURIAM. We do not differ from the Chancellor in this case. It is, therefore, ordered that the decree be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN, and  
WARDLAW, CC., concurring.  
Appeal dismissed.

## 6 Rich. Eq. 347

LUCRETIA JOHNSTON v. THOMAS J. LAMOTTE and Others.

(Columbia. May Term, 1854.)

[*Frauds, Statute of* ⚭78; *Pleading* ⚭369.]

Plaintiff's land, which she had mortgaged, was about to be sold under a decree for foreclosure. W. B. agreed, by parol, to buy it for the plaintiff, and re-convey it to her when reimbursed his outlay out of the rents. At the sale he succeeded in diminishing competition by representing that he was buying for the benefit of the plaintiff, and thus was enabled to purchase the land at a sacrifice. W. B. died, and this bill was filed against his executors and devisees for a re-conveyance of the land:—*Held*, That plaintiff could not enforce the agreement, as her bill prayed, the same being void by the statute of frauds.

[Ed. Note.—Cited in *Lamar v. Wright*, 31 S. C. 75, 9 S. E. 736.

For other cases, see *Frauds, Statute of*, Cent. Dig. § 134; Dec. Dig. ⚭78; *Pleading*, Cent. Dig. §§ 1199–1209; Dec. Dig. ⚭369.]

[*Pleading* ⚭369.]

But that she was entitled to relief on the score of fraud, her bill being also framed with that aspect.

[Ed. Note.—Cited in *Barrett v. Bath Paper Co.*, 13 S. C. 158; *Coney v. Timmons*, 16 S. C. 385, 386.

For other cases, see *Pleading*, Cent. Dig. §§ 1199–1209; Dec. Dig. ⚭369.]

[*Pleading* ⚭369.]

In such a case, if the bill aver a contract without more, the defendant may rely on the statute of frauds, and the bill must be dismissed. But plaintiff may aver a contract, and also charge fraud, in which case he may waive so much of the pleadings as relates to the contract, and proceed entirely upon the fraud. It is

better pleading, however, to file the bill upon the fraud alone.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1199–1209; Dec. Dig. ⚭369.]

Before Johnston, Ch., at Richland, June, 1853.

Johnston, Ch. This is a bill in which the plaintiff, Lucretia Johnston, seeks for the re-

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conveyance of real estate, pur \*chased by the late Wm. Beard, as her property; and for an account of rents and profits; and for general relief.

The plaintiff was the owner, for life, of the premises—being a house and lot in the town of Columbia, described in the bill, with remainder to certain of her relatives, and with a power to dispose of the premises, re-investing the proceeds to the same uses. It appears that she mortgaged the premises, in fee, to Loomis & Davis for the expenses of some buildings, or repairs, which they had put upon them at her instance; and that they obtained a decree of this Court for the sale of the premises, in satisfaction of their demand against her. This sale was made by the commissioner on the first Monday in August, 1849, and Wm. Beard became the purchaser, at the sum of four hundred dollars. He satisfied the debt to Loomis & Davis, with the interest and costs of the proceeding, amounting in the whole to about three hundred and fifty dollars, and obtained the receipt of the plaintiff for about fifty dollars, which he produced to the commissioner, who, thereupon, conveyed the premises to him in fee.

Wm. Beard, with the legal title in him, devised his whole estate, including these premises, to the defendants, LaMotte and Peckham, his executors, on certain trusts for his children; but, in the 12th clause of his will, directs that his executors, out of the rents of the house and lot purchased by him as stated, pay to the plaintiff forty-eight dollars per year, or four dollars per month, during her natural life. From certain receipts produced at the hearing, it also appears, that after his purchase, he was in the habit, while alive, of advancing her four dollars per month, to enable her to meet the rents of another house, to which, after the sale of this one, she resorted as a residence. Thus matters stood at his death. After his death, the plaintiff instituted this suit, by bill filed the 7th May, 1853, against his executors and devisees.

The plaintiff takes two grounds in the bill.

1st. That Beard purchased the premises un-

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der an agreement \*to reconvey them to her, when re-imbursed his outlay out of the rents.

2. That by representing that he was buying for her benefit, and requesting others not to bid against him, he accomplished his purchase at a sacrifice.

The devisees of Wm. Beard put in a merely formal answer, demanding proof, &c. The executors deny any knowledge of the alleged agreement, and aver their disbelief of its existence, and rely on the statute of frauds.

At the hearing, it appeared that there was no written agreement. The only proof was as follows:

Joshua Sowden had frequent conversations with Beard about the time of the sale by the commissioner. The morning before the sale, Beard told him he was going to buy the property for Lucretia, the plaintiff. After the crying of the sale began, he asked witness not to bid. He said, whenever she, plaintiff, paid him what he should be obliged to give for this property and repairs, he would reconvey. He was to put the premises in repair, and rent them; and was to allow her the rents he should receive, as so much paid by her. He also said that he wanted to get her out of the neighborhood. He owned property, in the neighborhood, which was depreciated by the kind of house she kept. Witness went to the sale with an intention to bid; conceived the fee of the premises was worth at least fifteen hundred dollars; and would have given more than Beard did for them, but desisted at his request.

Michael Winstead heard Beard tell Sowden that Loomis & Davis had a debt against Lucretia Johnston, and was going to sell her house. That his object in bidding was to break it up and that he was to hold it till he got back his bid, and to let her have a house elsewhere.

Edward J. Arthur was the Commissioner who sold the property under a decree. After the sale, Beard settled with Loomis & Davis by giving them his note for the amount of their demand, paid costs and commissions to

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witness, and procured \*from the plaintiff the following receipt, which he handed to witness:

"Loomis & Davis, }	
v. }	
Lucretia Johnston, }	
Bid for house and lot.....	\$400 00
Amount mortgage debt and interest .....	290 02
Costs and commissions.....	57 05—347 07
	\$52 93

Received of E. J. Arthur fifty-two dollars and ninety-three cents, being the surplus of sales of mortgaged property in above case, after paying mortgage debt, costs and commissions.

6th August, 1249.

her  
Lucretia X Johnston."  
mark

"Test, Walter Van Wert."

Mr. Arthur said he paid no money, nor did any pass into his hands beyond the costs, nor did he know whether Beard paid the plaintiff the sum she receipted for or not.

The body of the receipt is in Mr. Arthur's hand-writing; but all he recollects is, that it was handed in by Beard, as executed in discharge of so much on his bid; and he gave him titles.

Looking at so much of the plaintiff's bill as seeks to set up the alleged agreement, and to have it executed, I should feel bound to decree a specific performance, were I at liberty to admit this evidence for that purpose. For, although it does, at first view, appear to be somewhat inconsistent that Mr. Beard should have undertaken to give the plaintiff a right to regain the property, when his object in bidding for it was to get her out of his neighborhood; yet a close survey of the circumstances shows that there is no absolute inconsistency between that design and the agreement insisted on. He may have hoped that the rents of the premises pur-

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chased by him—when diminished by the yearly advance for the rent of the substituted residence of the plaintiff,—might not, during her life, catch up with the amount of his bid, and the expenses of his repairs, with interest upon both; and so she might never be able to call for a reconveyance. Be that as it may, the evidence, that notwithstanding his desire to banish the plaintiff from his vicinity, he did enter into a bargain such as is alleged, is too explicit to be disregarded. The answer of the executors is not a positive denial of the agreement, but a mere affirmation that they know nothing of it, and do not believe in its existence. Such an answer does not require two witnesses to contradict it. But if it did, we have two witnesses. And (besides) the circumstances relied on to support the answer and contradict these witnesses, have rather a contrary effect. The receipts taken by Beard for the money advanced for the rent of another place, are unmeaning, unless taken with a view to a further account and settlement between the parties. If he was under no obligation to advance this money, then the advance of it was either a pure gratuity—in which case there was no necessity for a receipt—or it constituted an ordinary debt—in which case a common note of hand, and not a receipt, would have been the appropriate security. Then look at the provision in the will. Unless there was some obligation on Beard's part, what induced him to appropriate four dollars per month, out of the rents of the purchased premises, for the benefit of the plaintiff?

But it is needless to examine the evidence further, with a view to execute the contract. The statute upon which the defendants rely, declares that parol evidence, however strong or clear, is not receivable for such a purpose; and that any contract, relating to lands, resting on parol, is simply null and void; and so stringent is the law, that many authorities hold that though a party admit a parol contract, he may, nevertheless, success-



fully plead the statute, and thus get rid of it. If the bill were, therefore, confined to the agreement alleged and its execution, I should be obliged to dismiss it.

It is fortunate for the plaintiff that her

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bill presents another aspect; I refer to that part of it which states the representations by which Mr. Beard extinguished competition, and was enabled to purchase at an undue rate.

The plaintiff's statement, that there was an agreement, does not preclude her from relying on these representations, and having the same advantage from them as if she had never made such averment. The well settled law is that the statements of a bill are not evidence against the plaintiff, but are to be regarded as the mere suggestions of counsel; and though the averment of the agreement were admitted in the answer to be true, it is still competent for the plaintiff to waive that point at the hearing, and proceed upon the other issues made by the pleadings. She may refuse to read so much of the answer as relates to the point she wishes to waive, and read such other parts of the answer as she chooses, and as may serve her purpose. And the defendant cannot read any part of it but such as is responsive to the bill, on points upon which the plaintiff continues to insist—in which case only is it evidence for him; or such parts as state independent facts for defence—in which case he must support the answer by proofs of his own. I proceed, therefore, to consider so much of the bill and the proofs as relate to Beard's representations at the sale. This part of the bill is not denied, or even noticed, in the answers, and is well supported by the witnesses.

From the testimony, it appears: 1. That the purchase was at an under value. It has been suggested in the answers, that the purchase was of the plaintiff's life estate, and not of the fee; and it has been argued that as the fee was proved to be worth 1,500 dollars, the life estate (usually estimated at, it was said, one-sixth) was not worth the four hundred dollars, bid by Mr. Beard; and therefore there was no sacrifice of the property. This estimate is erroneous. One-sixth is the value assigned to dower. But that is a life estate, in one-third only of the land. According to the same rate, the plaintiff's life estate in these premises, would have been \$750, or one-half the value of the fee.

But, if it were necessary, I think Beard

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must be held to have purchased the fee. It was the estate mortgaged which was sold, and not merely the right of the mortgagor in it; and as between the mortgagor and the purchaser under her conveyance, the purchaser cannot dispute the validity and extent of the conveyance under which he holds.(a)

(a) *Stoney v. Shultz*, 1 Hill, Eq. 465 [27 Am. Dec. 429.]

This is not a case of a sale in invitum by a sheriff. In such case the creditor sells the mere right of the debtor, be it much or little. I will not say whether there may or may not be cases of that sort, in which the purchaser may in some after proceedings take exception to the amplitude of the title acquired by him. It is not necessary to conclude anything on that point, because, as I have said, a sale under a decree for the foreclosure of a mortgage, stands, in my opinion, upon different grounds.

Although a sale of the latter description be made in invitum, yet the decree by which it is effected is founded altogether upon the mortgage, which is the mortgagor's conveyance, and therefore the title passes by a forensic circuitry, from the mortgagor to the purchaser. The whole proceeding is a mere act of conveyancing; and when the purchaser confronts the mortgagor, he confronts his own grantor, and cannot be allowed to dispute or abridge his title. This would be tolerably clear if this were an English mortgage, and the mortgagee had made a conveyance or assignment of his title. It may be said that Mrs. Johnston had only a life estate, and that though she had an express power to sell the fee, she had no power to mortgage it. That her assumption of a power to alienate the remainder for her own debt, was an abuse both of her implied trust, as life tenant and of her express power to sell. Granted. And her conveyance may be questioned by her cestui que trusts. They may impeach it, not only as against the trustee, but as against her alienee. But can the purchaser of the fee from the trustee, after taking a conveyance, aver, as against the trustee, that he did not purchase the fee. I am not saying he might not be heard if he came for a decision, and complaining

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against the grantor \*for fraud in attempting to palm off upon him a title which she did not possess: though after accepting a conveyance, he might encounter great difficulties. But what I mean to say, is, that where a trustee grantor is proceeding against his grantee, it is not competent for the latter to detract from the title he has received, on the ground that it arose from a breach of trust—when the cestui que trusts do not complain—may never complain; and may, in fact, have assented to the alienation: and, especially, when the decree sought is a restoration of the property to its original condition, thus curing the breach of trust, out of which the objection is raised.

2. The testimony shews that competition was diminished at the sale by Mr. Beard's representations that he was buying for the benefit of the plaintiff. Such representations (to the honor of our nature) being calculated, by their appeal to the generosity of the bystanders, to win them off from the free bidding to which their interests would otherwise impel them—a desire to produce that

effect is fairly attributable to him who makes them. But the design, in this instance, is not left to mere inference. It is in proof that Mr. Beard solicited one who intended to bid, and who would have gone to an amount beyond that in which the sale resulted, not to bid against him, and succeeded in his request.

Let it be admitted that the property brought its value or even more. Grant here that only the life estate was sold, and that Beard gave more for it than it was intrinsically worth; he did not give what it would have brought; and, viewing the point now under discussion apart from any agreement—which is the way I am bound to regard it—he was not justifiable in depriving her of the full amount that other persons, whether from error of taste, or of judgment, would have given. Contracts can be supported only when fairly made; and if means are used from which an inference of unfairness arises, they cannot stand, though the injury be slight. There is nothing in the statute of frauds to exclude evidence of the circumstances under which Mr. Beard made his purchase. It is a mis-

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take to suppose that \*the statute excludes all parol evidence relating to lands. It goes no further than to declare that all contracts or agreements relating to lands must be in writing. When these contracts are to be proved, parol must necessarily be received as to the execution and delivery of the instrument; and again, to shew the identity of the premises with those described in the instrument when the identity is doubtful. Other illustrations might be put. The statute is limited to the terms and nature of the contract. The question for consideration here has nothing to do with the agreement alleged to have been made between the plaintiff and Mr. Beard. It is neither whether such an agreement was made nor whether it should be executed. It relates simply to the means by which he acquired the title he holds. The inquiry is, were those means fair or unfair? which is neither more nor less than an inquiry whether he has a good title. Did he acquire his title by fraud? If he did, it is as liable to be set aside, as it would be in a case where no agreement had ever been mentioned or thought of. The inquiry whether the title acquired should be set aside for fraud, so far supersedes that with regard to the enforcement of the agreement, that the very application to set aside the title is an application to put it out of the power of the purchaser to perform. This is the doctrine of *McDonald v. May*, 1 Rich. Eq. 95; *Schmidt v. Gatewood*, 2 Rich. Eq. 177. In the latter case, it is said that where a purchaser at a forced sale effects his purchase by fraudulently destroying or reducing competition, it matters not whether there was a contract between him and the person whose land is sold or not. The brevity of the observation

has perhaps subjected it to some obscurity, and led to misapprehension (*b*). It is clear that if there be no agreement for the benefit of the debtor, the effect of such conduct is a fraud upon him, by diminishing the price of his property. If there was an agreement, cases may be imagined in which the conduct of the purchaser, attended with the same consequences, may be a fraud upon the agree-

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ment, and if so, a fraud upon the debtor. This is the meaning intended in the passage referred to, which was uttered with too little attention to precision.

It is entirely conceivable that a party, under the obligation of a contract to purchase a debtor's property for his benefit, may purchase it even at an under rate, and yet be liable to the imputation of no other fraud than a subsequent repudiation of the contract, and a refusal to carry it into effect; as, for instance, where the agreement is secret, and he is merely silent respecting it at the time of his purchase, and is guilty of no attempt to extinguish competition. Here the sale is fair, and indeed, his contract has only added one more to the number of competitors. The only fraud of which he can be guilty, is in changing his mind, after his purchase, and refusing to perform what he had undertaken. He may have been willing to perform it, but may be prevented by death, and his executors and heirs not being consulant of the agreement, may not feel at liberty to execute it. Such may well be the case in the present instance. In all such cases, the imputation of fraud has no other basis than a mere refusal to perform the contract. Such fraud, whether intentional or unintentional, depends, as is said in *Schmidt v. Gatewood*, 2 Rich. Eq. 175, entirely upon the question whether there was in fact an agreement to be performed; and the statute will not allow that preliminary fact to be established by parol. It is elsewhere said, (*c*) I think justly, that if fraud, consisting in the mere nonperformance of an agreement, or the injury resulting from nonperformance be sufficient to take the agreement out of the statute, every case of nonperformance is taken out of it, and the statute is a nullity. It seems to me inconclusive to answer this observation by replying that an unconscientious refusal to perform is such fraud, as should be held to displace the statute. The epithet unconscientious is applicable to every naked refusal to perform fair agreements. It adds, therefore, nothing to the fraud of mere repudiation, and if it be

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allowed to do so, and to \*take cases out of the statute, we are brought back to the original position, to wit: the holding a refusal to perform obviates the statute, must amount

(*b*) [*Kinard v. Hiers*] 3 Rich. Eq. 428 [55 Am. Dec. 643].

(*c*) 3 Rich. Eq. 430 [55 Am. Dec. 643].



to a virtual abrogation of the statute itself.

All my reflections on this subject have satisfied me that it can be presented to the Court in only one or another of the following ways:

1. The bill may aver a contract without more. In such case, if the defendant deny it, and plead the statute, or, at the hearing, objects to parol proof, or if he admit the contract and plead the statute—the contract cannot be established by parol; the bill must be dismissed.

2. The bill may aver a contract, and may also charge and set out circumstances of fraud. In such case as I have said—whether the defendant admit or deny the contract, it is competent for the plaintiff to waive such portions of the pleadings as relate to it, and proceed entirely upon the fraud.

3. The plaintiff may file his bill upon the fraud alone, which is certainly the better method of pleading. In this case, the defendant has no resource but to deny the fraud and leave the issue to depend upon the proofs, unless he choose to set up the contract by way of exonerating himself from the fraud charged against him; in which case he must perform the contract.

Such, I conceive, to be a summary of the law on this subject; and I have taken some pains to set it forth with as much explicitness as I can, because I am of opinion some of the cases have been misconceived.

To conclude. The plaintiff in this case expresses in her bill the desire that the executors be allowed the amount expended by Mr. Beard and themselves, in the purchase and repairs, and in payments made to herself. This is just, because I suppose there would be no litigation if Beard were alive. I apprehend the executors defend this suit only because they suppose it to be their duty. It is ordered, that, as a preparation for a final decree, the commissioner take an ac-

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count of the purchase money \*expended in the purchase, repairs and payments to the plaintiff, and all other just charges on the part of Beard's estate, and of the rents received by Beard and his executors, and all the just charges on that side of the account, and that he report the account with such balance as may be due on either side. Let the costs of the defendants be paid out of Beard's estate. The plaintiff to pay her own costs.

The defendants appealed from so much of the decree as grants relief, and orders a reference preparatory to relief, and now moved this Court to reverse the same, on the grounds:

1. Because the complainant, having stated and proved no more than a case proper for specific performance, (if the agreement had been reduced to writing, or in part performed,) the Court ought not to grant relief in contravention of the statute of frauds: still

less should relief be granted by carrying the alleged agreement fully and particularly into execution, which is the relief prayed for in the bill and indicated by the decree.

2. Because no fraud was alleged or proved other than not complying with the alleged agreement, or declarations and acts pursuant to that agreement.

3. Because the complainant had a plain and adequate remedy at law.

Failing in this motion, then they moved so to modify the decree and the order of reference as to reserve the question, whether the relief to be granted shall not be confined to awarding to the complainant the difference, if any, between \$400, the amount paid by Beard, and the value of the premises at the time of the sale; or the difference between that bid and the amount which Sowden or Winstead, being responsible, would have given: and also to reserve the question, whether, even if the premises be ordered to be reconveyed to the complainant, the testator's estate is liable for rents and profits.

Tradwell, Bellinger, for appellants.

Talley, contra.

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\*PER CURIAM. We are not able to discover any ground upon which the appeal should be sustained. It is, therefore, ordered that the appeal be dismissed, and the decree affirmed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CO., concurring.

Appeal dismissed.

## 6 Rich. Eq. 359

A. P. and L. T. BROWN v. ISAAC A. WOOD. SAME v. WILLIAM ASHLEY.

(Columbia. May Term, 1854.)

[Costs  $\curvearrowright$  73.]

A decree for the specific delivery of slaves, and an account for their hire, without any order as to the costs, entitles the plaintiff to costs under the 33 Rule of Court.

[Ed. Note.—Cited in *Bratton v. Massey*, 18 S. C. 560.

For other cases, see Costs, Cent. Dig. § 305; Dec. Dig.  $\curvearrowright$  73.]

Before Dargan, Ch., at Barnwell, February, 1854.

These were bills for the specific delivery of slaves. By the decree of Wardlaw, Ch., at February Sittings, 1853, the defendants were ordered to deliver up the slaves, and account for their hire; and on appeal, the decree was affirmed. (Vide ante p. 155.) The Commissioner reported the sums due by the defendants, respectively, for hire, and no exception was taken to the report. His Honor confirmed the report, and ordered each party to pay his own costs. From this order, the plaintiffs appealed on the ground, that the

question as to costs was settled, in effect, by the circuit decree of Wardlaw, Ch., and the affirmation of the same by the Court of Appeals.

Owens, for appellants.  
Aldrich, Bellinger, contra.

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\*The opinion of the Court was delivered by

DUNKIN, Ch. Since *Muse v. Peay*, Dud. Eq. 236, it has been well settled that, when no direction is given with respect to costs, they shall follow the event of the suit. This is the construction given to the 33 rule of Court. 1 Des. Rep. 62. See *Higginbottom v. Peyton*, 4 Rich. Eq. 314.

The plaintiffs filed their bill for the specific delivery of slaves, and their right was contested by the defendants. The bill was sustained by the Circuit Court, the right of the plaintiffs affirmed, and the defendants decreed to deliver up the slaves and account for their hire, without any order as to the costs. On appeal from this decree, the judgment was affirmed. This entitled the plaintiffs to costs, under the rule stated. The account for hire was merely incidental. If a bill had been filed to foreclose a mortgage given to secure a bond, and the validity of either had been contested, and a decree passed for the plaintiff, this would entitle him to costs, although a reference to the Commissioner might have been directed to calculate the interest on the bond.

It is ordered and decreed, that so much of the decretal order as directs each party to pay their own costs, be set aside; and that the plaintiffs have leave to enforce their decree for the amount thereof, together with their costs.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Decretal order set aside.

6 Rich. Eq. \*361

\*ELLEN McGUIRE and Others v. JAMES JEFFERYS and Others.

(Columbia. May Term, 1854.)

[*Specific Performance* ⚡55.]

Before payment in full of the purchase money and execution of titles under a contract to purchase land, a prosecution for retailing was commenced against the purchaser, and it was then agreed between him and the vendor, that the vendor would protect the purchaser's property, and, in the event of a conviction, would make titles to his wife and children. The purchaser was convicted, and the balance of the purchase money was paid: *Held*, that the wife and children could not maintain a bill to enforce the contract to make titles to them, the same having been concocted in fraud.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 176; Dec. Dig. ⚡55.]

Before Dunkin, Ch., at York, June, 1853.

Dunkin, Ch. It is alleged that, in 1841,

John McKoy, deceased, agreed to sell to John McGuire a tract of land on the Catawba river for eight hundred dollars; that two hundred and fifty dollars were paid down, and in March, 1844, the balance due was levied and satisfied, under an execution of McKoy against McGuire. It is further alleged, that, in 1843, a prosecution for retailing spirituous liquors was instituted against McGuire; that McKoy was to protect his property by means of a confession of judgment in case of conviction, and, in that event, that he would execute titles for the land to the complainants, who are the wife and children of McGuire.

McGuire and his family were in possession of the premises, or a part of them. But it appears that he had from time to time given notes to McKoy for rent due therefrom. McKoy died in June, 1851; and on the 13th January, 1851, when John McKoy was ill and supposed to be on his dying bed, McGuire executed to him a note purporting to be for the rent of the premises for the current year.

After the death of McKoy, and after the expiration of the year 1851, the defendant as his executor, sold the premises and when possession was required resort was had to a magistrate and freeholders, who ordered restitution.

This bill was then filed by the wife and children of John McGuire for a specific performance. John McGuire himself seems to be no party to the proceedings, although he alone has sworn to the bill.

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\*There are many very serious obstacles in the way of a decree for the plaintiffs. The alleged original agreement was for a conveyance to John McGuire. Three or four years afterwards it is said McKoy agreed to make a deed to McGuire's wife and children, if McGuire should be convicted. It does not appear from the pleadings what became of the prosecution, although the evidence shows that a conviction took place, and that an execution issued for the fine imposed. But so far as the Court can perceive, the agreement was concocted in fraud, and no party could claim the aid of this Court to enforce the performance of it. If McGuire had not been convicted, then it would seem that he alone was entitled to enforce the contract, and as has been said, he is no party to these proceedings. But if McGuire, or his family were entitled to a conveyance in March, 1844, why did he or they suffer seven years to elapse, and McKoy to descend to his grave, without any demand for title, and in the meantime, McGuire acknowledging by his rent notes that he held as his tenant? It may be, as is suggested in the bill, that this was to cover the property from his creditors. There is much in the evidence to induce the conclusion that McKoy was paid for the land, and if McGuire had asked for a specific performance, it may be that the evidence is



strong enough to entitle him to the aid of the Court. But the basis of this proceeding is an alleged agreement to convey to McGuire's wife and children, in order to defeat his creditors. In such case, this Court can only leave the parties to their legal remedies, if any they have.

It is ordered and decreed, that the bill be dismissed, but without costs.

The complainants appealed on the grounds:

1. Because it was held that the agreement was concocted in fraud, and that the complainants are therefore not entitled to the aid of this Court, whereas it is submitted that the complainants were no parties to the fraud, if any, and are therefore entitled to specific performance.

2. Because his Honor erred in supposing

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that the contract \*was, that if McGuire was convicted in the State case, that then the titles were to be made to the complainants; if not to John McGuire. Whereas, it is submitted that the contract of McKoy was to make title to the complainants, unconditionally.

Clawson, for appellants.  
Williams, contra.

PER CURIAM. We concur in the decree; and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and  
WARDLAW, CC., concurring.  
Appeal dismissed.

#### 6 Rich. Eq. \*364

\*R. F. SIMPSON v. W. D. WATTS and W. R. FARLEY, Admr's.

(Columbia. May Term, 1854.)

[Equity ⇨455.]

Application for leave to file a bill of review, or bill in the nature of a bill of review, refused.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1111; Dec. Dig. ⇨455.]

[Equity ⇨454.]

A bill of review, or bill in the nature of a bill of review, cannot be filed without the previous leave of the Court.

[Ed. Note.—Cited in *Durant v. Philpot*, 16 S. C. 126; *Ex parte Carolina National Bank*, 56 S. C. 20, 33 S. E. 781; *New York Life Ins. Co. v. Mobley*, 90 S. C. 560, 73 S. E. 1032.

For other cases, see Equity, Cent. Dig. § 1110; Dec. Dig. ⇨454.]

[Equity ⇨447.]

To obtain such leave, the applicant must satisfy the Court, by his affidavit or otherwise, that new matter, which might probably have occasioned a different determination, has been newly discovered by him, which could not be produced for use when the decree was made.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1092; Dec. Dig. ⇨447.]

[Equity ⇨447.]

It must be shown that the new matter is so material that it would entitle the petitioner to a decree, or at least would raise a question of such difficulty as to make a determination in his favor very probable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1093; Dec. Dig. ⇨447.]

[Equity ⇨447.]

It is not enough that the new matter came to the knowledge of the party after the fit time for use of it, but he must show that he could not have acquired knowledge of the fact, in time for effective use, by the exercise of reasonable diligence.

[Ed. Note.—Cited in *Ex parte Dunovant*, 16 S. C. 302.

For other cases, see Equity, Cent. Dig. § 1094; Dec. Dig. ⇨447.]

Before Dargan, Ch., at Laurens, June, 1853.

This case will be understood from the opinion delivered in the Court of Appeals.

Irby, Sullivan, for appellant.

Young, Perry, Bobo, Henderson, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. This is an appeal from the refusal of Chancellor Dargan to grant leave to the plaintiff to file a bill of review, or a bill in the nature of a bill of review, of a decree of Chancellor Johnston, in 1851.

The original bill was filed in 1842, by the plaintiff, against William F. Downs, Sarah Downs and others, to set aside for fraud a decree obtained by Sarah Downs, against William F. Downs in 1839, for \$15,317.10. The defendants answered, denying the fraud, and died before the hearing, viz: Sarah Downs, April 24, 1844, and William F. Downs, Sept. 11, 1847; and the bill was revived against their representatives. The claim of the plaintiff, as creditor of William F. Downs, by judgment at the filing of the bill, was overpaid on October 23, 1847, and his other unsatisfied claims as assignee of the

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subsequent \*judgments of the Commercial Bank, and of himself as partner in the factory of Simpson & Downs, amount to \$6,376.51, with interest from July 1, 1852. The whole fund, subject to distribution among the creditors of Wm. F. Downs, is \$4,541.80, with interest from July 1, 1852.

The decree of Sarah Downs against William F. Downs, was founded on a claim that he had received the rents and profits of certain lands and negroes devised to her for life, with remainder to him. In his answer to her bill, he admitted his liability; and the amount of his indebtedness was ascertained and reported by the Commissioner, on the testimony of two respectable witnesses.

This decree was assailed by the plaintiff, on various grounds, such as, that defendant was not technically trustee of his mother, that the relation between them and their conduct to each other implied gift of the

profits on her part, and that the amount of the account was so enormous as to demonstrate fraud. All of these grounds were overruled by the decree of 1851.

The application for review of Chancellor Johnston's decree proceeds entirely on the ground that William F. Downs was charged in the Commissioner's report, which was the basis of the decree in *Sarah Downs v. William F. Downs*, with rent for more land than was included within the premises devised to Sarah Downs for life.

The affidavit of the plaintiff alleges, that William F. Downs was charged with rent on 200 cultivated acres of land devised to Sarah Downs for life, whereas the whole arable land of the plantation did not exceed one-half of this sum of acres, and that of the portion in actual cultivation, for which rent was charged, 16 acres belonged to William F. Downs himself; and that plaintiff, until after the decree, supposed that the whole arable land belonged to the parcel of land devised to Sarah Downs for life, and discovered the contrary by coming into possession of certain conveyances to William F. Downs, from the distributees of Lydall and Mildred Allen in 1818, 1827, and 1837. I infer from the names of these grantors, al-

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though the fact is not definitely stated in the Commissioner's report, that these grantors were the daughter Mildred, with her husband Lydall and children, of the testator Jonathan Downs.

The plaintiff appeals from the decree dismissing his petition, on the ground that his affidavit set forth newly discovered evidence, material, important, and not cumulative, which he could not have produced before the decree of 1851, by any possible diligence.

A bill of review, or a bill in the nature of a bill of review, cannot be filed without the previous leave of the Court. To obtain such leave, the applicant must satisfy the Court, by his affidavit or otherwise, that new matter, which might probably have occasioned a different determination, has been newly discovered by him, which could not be produced for use when the decree was made. 3 Dan. C. P. 1688; Mitf. 94. It must be shown that the new matter is so material, that it would entitle the petitioner to a decree, or at least would raise a question of such difficulty as to make a determination in his favor very probable. Dan. C. P. 1734; Story Eq. Pl. 414; Ord v. Noel, 6 Madd. 127. It is not enough that the new matter came to the knowledge of the party after the fit time for use of it, but he must shew that he could not have acquired knowledge of the fact in time for effective use by the exercise of reasonable diligence. Lord Eldon, in *Young v. Keighty*, 16 Ves. 350, says, the question always is not what the petitioner knew, but what, using reasonable diligence, he might have known.

On the present application, the plaintiff fails in several particulars.

In the first place, he does not exhibit new matter which would probably produce a reversal of the decree of 1851. All of the important elements of fraud in the decree of *Sarah Downs v. Wm. F. Downs* were considered and overruled in the decree of 1851. The whole effect of his additional testimony is to show that the decree of *Sarah Downs v. W. F. Downs* is for too large an amount: but unless the excessive sum of rents on arable lands, allowed in this decree, would serve to reduce the sum recovered about

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three-fourths, or to annul it altogether \*on the ground of express fraud, the plaintiff could not be profited by his alleged new matter. It is conceded that the plaintiff could not reach the assets in controversy by simple abatement of the judgment for rents allowed to Sarah Downs for lands not belonging to her for life; and relief to the plaintiff must depend on setting aside the judgment altogether. But after the principal grounds of express and annulling fraud have been overruled, it would be too strong an exercise of discretion to hold that the decree should be void for the whole, because part of the aggregate was disputable. It is not suggested, nor is there room for supposing, that the witnesses examined before the Commissioner to fix the value of the rent, were suborned to perjury by Sarah or William Downs, or that their over estimate of the land in cultivation proceeded from other motive than honest mistake. It may be true, that if William F. Downs, knowing the extent of his mother's land, and of his own, permitted the witnesses to testify in mistake of the extent of the respective tracts of his mother and himself, his silence, when he should have spoken, might have constituted fraud on his part. But there is no proof of any complicity in any supposed fraud of Sarah Downs and the witnesses. The portion of land in cultivation, probably supposed to belong to Sarah Downs' estate, which in fact belonged to Wm. F. Downs, is only sixteen acres, by estimate, and it lay so near the boundary between these proprietors, that all parties, including Wm. F. Downs, might have been honestly mistaken as to the inclusion of this portion in one or the other of the tracts. If the witnesses were honestly mistaken in their estimate of the land in cultivation, and not misled by suggestion or concealment on the part of William F. Downs, the decree of Sarah against William Downs might be liable to abatement, but surely not to entire vacation. We do not perceive that the new matter suggested by the petitioner would have probably produced a determination that the decree of 1839 was absolutely fraudulent and utterly void; and for the reasons suggested, mere



abatement of the sum recovered would not profit the petitioner.

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\*Again: the additional matter suggested by the petitioner can hardly be considered as newly discovered. The subject of controversy in the suit was in this particular the excessive allowance of rents. It was admitted on the trial that William F. Downs owned land adjoining the portion devised to his mother for her life. The tract devised to the mother was specified by the number of acres in the will of Jonathan Downs. The interest of the plaintiff required him to ascertain the limits of the tracts devised to Sarah Downs, but he had no concern in the limits or mode of acquisition of William F. Downs' land, except as this contiguous tract defined the lands of Sarah Downs. It made no difference to him whether William F. Downs acquired his own land by purchase or descent, except as the mode or instrument of acquisition might limit the extent of the mother's lands; and it is an abuse of speech to say that petitioner newly discovered the extent of Mrs. Downs' lands, because he more accurately ascertained the extent of Mr. Downs' lands. It does not appear, although the attention of plaintiff's counsel was directed to the point on the trial, as is apparent from the admission in evidence of the contiguity of the tracts, that the plaintiff made any effort by survey or otherwise to settle the boundaries of the tracts known to be adjoining of Sarah and Wm. F. Downs. The discovery of the conveyances to Wm. F. Downs in this case is not of equal importance to the recuperation of the bill of sale of the vendor in *Hinson v. Pickett*, 2 Hill, Eq. 351, where review on this account was refused. In *Ex parte Vandersmissen*, 5 Rich. Eq. 519 [60 Am. Dec. 102], a bill of review was allowed where the evidence might have been produced at the original trial, if the counsel had been very astute and diligent; but there the new evidence was in a foreign language, it was decisive of the case, and the apparent negligence of counsel was excused by the change of their members. The case itself may be liable to some criticism. It at least admonishes us of the difficulty of laying down inflexible rules as to re-hearings and bills of review.

I have, to a great extent, anticipated the

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strongest objection \*to review in this case, that the petitioner has not shown the exercise of due diligence in procuring the new testimony. The evidence alleged to be newly discovered is of a fact directly in issue in the former trial—is in its nature merely cumulative of the actual evidence then used, and it might easily have been then brought to light by proper diligence. No attempt was made at or before the trial to obtain from

the heirs or representatives of Jonathan, Sarah or William F. Downs the deeds or plats exhibiting the titles of the respective parties. The same witnesses who now give testimony of error in the estimates of the cultivated lands, were examined on the original trial on the part of the plaintiff, and might then have been constrained by searching examination to give all the information which they now in some sort volunteer.

We are of opinion that the petition of plaintiff was properly refused under the circumstances of this case.

It is therefore ordered and decreed that the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Appeal dismissed.

### 6 Rich. Eq. \*370

\*THE HEIRS OF DAVID MORTON v. THOMPSON and Another, Executors.

(Columbia. May Term, 1854.)

[Wills  $\hookrightarrow$  859.]

Three separate clauses by which testator bequeathed to three different legatees—to each one-third of his estate, *held* to be residuary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2184; Dec. Dig.  $\hookrightarrow$  859.]

[Slaves  $\hookrightarrow$  22; Wills  $\hookrightarrow$  849.]

Testator directed that his two slaves, W. and M., have their freedom by paying their appraised value, and that they be allowed three years to pay it in; that his negro woman A. 'be free by getting a guardian,' and that her child D. 'go with her, in like manner.'—*Held*, that this was an open and undisguised attempt at emancipation, contrary to the Act of 1820, and not coming within the Act of 1841; and that the slaves passed to the residuary legatees.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 95; Dec. Dig.  $\hookrightarrow$  22; Wills, Cent. Dig. § 2165; Dec. Dig.  $\hookrightarrow$  849.]

Before Dargan, Ch., at Greenville, July, 1853.

Dargan, Ch. This case comes before me on an appeal from the Ordinary. There is some irregularity in the form in which the case has been brought up; but, as the appellants have taken no exception as to the form of the proceeding, I do not deem it incumbent on me to notice it.

The whole litigation turns upon the construction of David Morton's will. The testator, after giving some directions for the sepulture of his body, and making provision for the payment of his debts, declares as follows:

"Firstly. At my death, I desire that my land, and stock, and crop, household and kitchen furniture, be sold as soon after my death as my executors may think best, and the proceeds applied as is directed herein-after.

"Secondly. I desire that my negro property be appraised by disinterested persons, and

that there be as many appraisers as the law directs; and I want Matilda and her children to be appraised together; and if any of the other girls should have any child or children before that time, that they be appraised in like manner.

"Thirdly. My two boys Wilson and Madison to have their freedom by paying the appraisement, and that my executors give them three years to pay it in.

"Fourthly. My negro woman Amy, I desire that she be free by getting a guardian.

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I do this for her kindness towards me \*during the affliction that it has pleased God to afflict me with; and that her youngest child, David, go with her in like manner; and that no inventory be taken on the above two.

"Fifthly. I bequeath to Fairview Church one-third of my estate, after all my expenses are paid, to be used by said Church—to be managed to the best advantage for said Church.

"Sixthly. I bequeath to the Domestic Missionary Society one-third of my estate after my expenses are paid.

"Seventhly. I bequeath to the Foreign Missionary Society one-third of my estate, after all my expenses are paid; and I direct my executors to pay over to the South-Carolina Presbytery the two last items above named, so soon as it can be done after it comes into their hands."

The testator then nominated Alexander Thompson and Jesse H. Stone the executors of his will.

The executors having been advised that the provisions of the will for the emancipation of Wilson and Madison, and of Matilda and her child David, were illegal and void, have sold the said negroes, together with the rest of the real and personal estate. They have accounted before the Ordinary for their administration. No question arises on their accounts. The Ordinary, on auditing the same, decreed a distribution to be made of the net residue into three equal parts: one-third to Fairview Church, one-third to the Domestic Missionary Society, one-third to the Foreign Missionary Society—the two last portions to be paid to the South-Carolina Presbytery, according to the directions of the will.

The heirs-at-law and distributees of the testator, who have made themselves parties to the proceedings in a manner somewhat informal, have appealed from this decree, which was, in fact, ex parte, they not being parties in the proceedings. The second and third grounds of appeal are the only ones that were discussed on the hearing, and it will only be necessary for me to notice them. The two grounds are substantially the same, and may be resolved into one. They are as follows:

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"Because the next of kin of the said David Morton are entitled to the negroes which

the said David Morton attempted to emancipate in his will.

"Because the said emancipation being void by the laws of this State, and the said negroes not being otherwise disposed of in and by the said will, the proceeds of the said negroes belong to the next of kin of the said David Morton, and should not be decreed away from them."

Though there is no general residuary clause in this will, it is obvious that the three last clauses are residuary in their character. If the testator had given his estate to one person, such person would have been the general and residuary legatee. The effect is the same where the testator has given the whole, as in this case, to different legatees, in fractional portions, the sum of which constitutes the entire estate.

The appellants ground their claim principally upon the provisions of the Act of 1841. If the case comes within the operation of either of the first three clauses of that Act, their proposition would be undeniable. In order to a proper understanding of this subject, I must be allowed to submit a brief review of the action of our Legislature upon the subject of negro emancipation.

A free African population is a curse to any country, slaveholding or non-slaveholding; and the evil is exactly proportionate to the number of such population. This race, however conducive they may be in a state of slavery, to the advance of civilization, (by the results of their valuable labors,) in a state of freedom, and in the midst of a civilized community, are a dead weight to the progress of improvement. With few exceptions they become drones and lazaroni—consumers, without being producers. Uninfluenced by the higher incentives of human action, and governed mainly by the instincts of animal nature, they make no provision for the morrow, and look only to the wants of the passing hour. As an inevitable result, they become pilferers and marauders, and corrupters of the slaves. Our early colonial legislation bears the impress of these great truths in the repeated enactments dis-

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couraging and restricting \*the emancipation of slaves. It will not subvert any present purpose I have in view to refer more particularly to that period of our legislative history.

The first legislation on this subject that I will notice, is the Act of 1800. That Act, after reciting the evils and abuses resulting from too great a facility in the emancipation of slaves, inhibited emancipation, except by the deed of the owner, executed under the supervision of public authority, after certain forms prescribed by the Act. It was necessary that there should be a judicial examination by a magistrate and five freeholders, who were required, after hearing the evidence, to decide whether the slave proposed to be emancipated was of good character and capable of earning his or her livelihood, &c.



If the result of the investigation was favorable, they gave a certificate to that effect. The owner then executed a deed of emancipation, and the slave became free. It was further declared, that any slave emancipated contrary to the provisions of this Act, became liable to seizure by any person who thought proper to exercise the right, and a good legal title vested in the captor. This part of the Act of 1800 is still of force.

Thus stood the law till 1820, when an Act was passed, "That no slave shall hereafter be emancipated but by the Act of the Legislature." This Act rendered every private emancipation a nullity. If, after the attempted emancipation, the slave remained in the possession and under the control of the owner, his right of property was not divested or in any way affected. If he sent the slave adrift, or abandoned the possession, such slave was subject to manucaption, under the provisions of the Act of 1800.

In this state of the law, there were not wanting attempts at evasions. Some of these attempts were successful. I am constrained to say, (and I say it with all proper deference,) that, in my opinion, the Judiciary did not seem to realize the stern, but wise and necessary policy of the State, embodied in the Act of 1820. That Act rendered private emancipation impossible. If not done by Legislative authority, it was simply a nullity. Should not all attempts at evasions of the

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law have been held \*ineffectual and void? Was not a provision, by deed, or by will, that a slave should be held in nominal servitude, against the plain meaning and intent of the Act?

In *Carmille v. Carmille*, (2 McM. 454,) John Carmille, for a nominal consideration, conveyed to Pringle and Chartrand certain negroes, of which he was the owner, in the trust and confidence that they should be held only in nominal servitude. By the terms of the deed, the slaves and their issue were to be permitted "to seek out and procure employment, and to work for their own support and maintenance." And, further, they were "to receive and take, for their own use and benefit, all such moneys as they may obtain for their labors or otherwise, after paying to the trustees the sum of one dollar per annum, and no more." By a second deed of the same date, John Carmille conveyed to the same trustees two other negroes, in trust, to apply their labor to the use of Henrietta and her children, (the slaves mentioned in the deed above referred to,) until her youngest child shall come to the age of 21 years, and then the said two slaves were to be sold, and the proceeds were to be equally divided between Henrietta and her children, share and share alike.

This case came before Chancellor Dunkin, in Charleston, June Term, 1839. The Chancellor considered the case as "an undisguised attempt to evade the law of the State forbid-

ding emancipation," and it was ordered and decreed, that the slaves in question be delivered up by Pringle and Chartrand, to be administered as a part of the estate of John Carmille. An appeal was taken; on hearing of which, there was a difference of opinion among the Chancellors, and the case was referred to the Court of Errors. The case was finally heard at February Term, 1842. It was held that the deeds were valid, and vested a legal title in the trustees; that the condition was void, and the negroes remained slaves; and that if the trustees should give them the proceeds of their labor, it would not be unlawful. It was further held, that the second deed, which conveyed two slaves for the use

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of Henrietta and her chil\*dren, was valid. It is impossible to deny that this decision afforded a precedent, and a form by which the Act of 1820 might be practically annulled and the policy of the State baffled. Upon the authority of this case was decided *McLeish v. Burch*, (February, 1849,) 3 Strob. Eq., 225, being a case arising under a will which took effect before 1841. The cases are very similar in every respect.

The case of *Carmille v. Carmille*, and other cases occurring about the same time, gave rise to the Act of 1841. This Act was intended to remedy the deficiency of the Act of 1820, in carrying out the policy of the State, and to provide for cases, which, according to judicial construction, were not embraced in any previous legislation. From the very necessity for this legislation, from the phraseology of the Act of 1841, and the two decisions which I have cited, it may be assumed, that cases may arise under the Act of 1820, which do not come under the provisions of the Act of 1841, and vice versa. The cases arising under the two Acts may be classified as follows: While the Act of 1820 defeats and renders null any open and undisguised attempt at emancipation by the act of the owner, the Act of 1841 renders null and void any indirect attempt to accomplish that purpose, by secret trusts, and other means of evasion, which according to the decision of the Court, was not reached by the Act of 1820.

Thus, the three first provisions of the Act of 1841 apply only to cases where emancipation is attempted to be effected by indirection. It contains four sections. The first renders void "any bequest, deed of trust, or conveyance, intended to take effect after the death of the owner, whereby the removal of any slave or slaves without the limits of the State, is secured, or intended with a view to the emancipation of such slave or slaves."

The second section renders void "any gift of any slave or slaves hereafter made, by deed or otherwise, accompanied by a trust, secret or expressed, that the donee shall remove such slave from the limits of the State, with the purpose of emancipation."

The third section renders void "any be-

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quest, gift or conveyance of any slave or slaves, accompanied with a trust, or confidence, either secret or expressed, that such slave or slaves shall be held in nominal servitude only."

The fourth section provides that "every devise or bequest to a slave or slaves, or to any person, upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void."

Under the provisions of this Act, the slaves which the owner attempts illegally to manumit, or directs to be held in nominal servitude, shall go to the distributees or next of kin of the owner. And it is contended that this Act must qualify the construction of David Morton's will, and conceding, what cannot be denied, that lapsed and void legacies fall into the residuum, and pass under the residuary clause, the Act of 1841 provides a different disposition in cases coming within its provisions, supersedes the residuary legatee, and declares in favor of the distributees or next of kin. The proposition, as thus stated, commands my unqualified assent, and it is not difficult to assign reasons why the Legislature should have so provided. But, in my judgment, the case arising under David Morton's will does not fall under any of the provisions of the Act of 1841, but under the Act of 1820. The will does not direct or contain any trust to the effect, that the slaves in question shall be removed from the limits of the State, with a view to their emancipation. Nor is there any trust or confidence, secret or expressed, that the said slaves shall be held to nominal servitude only. And it is only in such cases that the law declares that the distributees or next of kin shall take. In all other instances they are left to take, or not to take, according to the general law of the land, for the distribution of intestates' estates, and the general principles for the construction of wills.

The case before me is an open, barefaced infraction of the Act of 1820, not falling within either of the specific provisions of the Act of 1841, and, in my judgment, must be decided as if it had occurred before the last mentioned Act was passed. And if it had so occurred, beyond all doubt, as a void legacy, or as no legacy at all, the slaves in question

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would have passed \*under the provisions of this will which are residuary in their character.

The 4th section of the Act of 1841 declares any devise or bequest to, or in trust for, a slave, void, without saying how such void devise or bequest should be disposed of. The absence, in this clause, of the provisions in favor of the distributees and next of kin, which occur in the three preceding clauses, evinces, on the part of the Legislature, an in-

tention that a different rule should prevail. In a case arising under the 4th section, the void bequest would go to the distributees or pass under the residuary clause of the will, (if such a clause existed,) under the general principles of law applicable to the subject, outside of the provisions of the Act of 1841. Otherwise, there would be no meaning in the marked and studied difference of the phraseology. This, I think, lends some confirmation to the view, that the Legislature did not intend to alter the Act of 1820 in this particular—I mean, as to the parties who would be entitled to take the slaves emancipated by law contrary to the provisions of that Act.

The opinion of the Court is, that this appeal must be dismissed. And it is so ordered and decreed.

The plaintiffs appealed on the grounds:

1. Because the said decree is contrary to the true intent and meaning of the provisions of an Act of the General Assembly of this State, passed the seventeenth day of December, one thousand eight hundred and forty-one, and entitled, "An Act to prevent the emancipation of slaves, and for other purposes."

2. Because the said decree is otherwise contrary to Law and equity.

Young, for appellants.

PER CURIAM. We concur in the decree of the Chancellor; and it is ordered, that the same be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

6 Rich. Eq. \*378

\*THOMAS PETIGRU v. THOMAS FERGUSON.

(Columbia. May Term, 1854.)

[Domicile ⚡5; Executors and Administrators ⚡10.]

Where a minor had resided several years before his death with his step-mother in Abbeville, held, that he had such a residence in Abbeville as authorised the Ordinary of that district to grant administration of his estate, although his original domicile was in Edgefield where his father lived and died, and where his guardian was domiciled.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 32; Dec. Dig. ⚡5; Executors and Administrators, Cent. Dig. § 23; Dec. Dig. ⚡10.]

[Executors and Administrators ⚡23, 29.]

A first grant of administration is conclusive of the right to the administration, until the grant be vacated or annulled by a direct proceeding for that purpose. It cannot be impeached collaterally; and a second grant is null until the first is vacated.

[Ed. Note.—Cited in Ex parte Crafts, 28 S. C. 284, 5 S. E. 718; Ex parte White, 38 S. C.



46, 16 S. E. 286; *Hartley v. Glover*, 56 S. C. 74, 33 S. E. 796; *In re Estate of Mears*, 75 S. C. 486, 56 S. E. 7.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 129, 178; Dec. Dig. ☞ 23, 29.]

[*Guardian and Ward* ☞ 146.]

Bill by the administrator of an infant against the former guardian of the infant, who was also guardian of his brother and sole distributee, for an account of the infant's estate. The bill contained an averment of debts, and there was, at the hearing, a prima facie shewing of their existence: *Held*, that the bill was well brought, for an infant, though he have a guardian, may owe debts for which he is liable; and the regular way to ascertain whether debts exist against an intestate is through the channel of an administration.

[Ed. Note.—Cited in *Read v. Read*, 8 Rich. Eq. 153; *Markley v. Singletary*, 11 Rich. Eq. 403; *Strickland v. Bridges*, 21 S. C. 25.

For other cases, see *Guardian and Ward*, Cent. Dig. § 490; Dec. Dig. ☞ 146.]

[This case is also cited in *In re Mears' Estate*, 75 S. C. 482, 56 S. E. 7, and distinguished therefrom.]

Before Wardlaw, Ch., at Edgefield, June, 1853.

Wardlaw, Ch. Brantly Tompkins died in Abbeville district, in September, 1850, when he lacked a few months of being twenty-one years of age. His father, surviving his mother, died in 1836, in Edgefield district, where he always resided and was domiciled. Soon after the death of the father, the defendant was appointed by the Court of Equity for Edgefield the guardian of Brantly and his younger brother Furman; and the defendant from the date of his appointment until the present time has had his residence and domicile in the latter district. For some years after the death of his father, Brantly abided in Edgefield district, not at the home of his guardian, but with the consent of the guardian, at first with the grand parents of the ward, and afterwards at other places selected by the guardian principally with reference to convenient schools for the ward. In December, 1846, Brantly Tompkins, with consent of the guardian, went to live with his step-mother in Abbeville district, and thenceforth for the rest of his life he was an inmate of her house, except that in 1848, for two or three months he was a pupil at the Greenwood School in Abbeville district, and

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in \*1850, was absent for about five months on a visit to relations in Mississippi. In 1847, he superintended his step-mother's farm. In 1849, he rented and cultivated a small parcel of land, bought two horses to work it, had some horses shod, and ploughs made at plaintiff's blacksmith shop; and in that and the following year made other contracts as one apparently mature in size and forisfamiliar, but, as an intelligent witness described him, "gawky and unformed in manners." The defendant, who resided about six miles from Brantly's step-mother, although in a different district, paid for the board of his

ward at the step-mother's, and for such other of the ward's contracts as seemed to him as guardian to be reasonable.

Brantly Tompkins was possessed at his death of some small articles found in Abbeville, and of a slave and about \$2,000 in money in the hands of defendant. He died intestate, and his brother Furman, defendant's ward, is the sole distributee of his estate. After ward's death, defendant was advised, that his ward's estate might be settled without the expense of administration.

On October 6, 1851, the Ordinary of Abbeville district granted to the plaintiff, administration of the goods, chattels and credits of said intestate; and on October 21, 1851, the Ordinary of Edgefield made a similar grant to the defendant, after notice to the Ordinary of Edgefield, and to defendant of the prior grant to plaintiff.

Plaintiff, by this bill, calls upon defendant to account for the estate of intestate in defendant's possession. Defendant in his answer insists, that inasmuch as intestate's domicile at his death was in Edgefield, the Ordinary of Abbeville had no jurisdiction or authority concerning the administration of intestate's estate, and consequently, that the grant of administration to the plaintiff is extra-judicial and void.

The first question, is whether domicile of an intestate in his district, is necessary to give an Ordinary jurisdiction to grant administration of the estate of an intestate who resided and died in his district. By 10 Sec. of the Ordinary's Act of 1839, (11 Stat. 41,) "Wills shall be proved before the Ordinary of the

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\*district where the testator resided, or he having no place of residence within the State, in the district where the greater part of his estate may be;" and by 3 Sec. of same Act (Ib. 39) "in case any person die intestate, the Ordinary of the district where the will of such person, had he left a will, would have been proved, shall grant administration of the goods" &c., of the intestate. Residence and domicile are not synonymous words, although the former, as the larger term, generally includes the latter. Residence implies the dwelling of a person in a place for some continuance of time, usually indefinite; and it is well applied to the abode of a domiciled inhabitant of one nation in a foreign country, as of a South-Carolinian in France. Domicil, from its etymology, implies a mansion, and is usually applied to a permanent residence, animo manendi. Domicil, properly, affects the national obligations of the person in question, and succession to his goods; whereas residence is commonly a matter affecting municipal rights and regulations. Lord Alvanley commends the wisdom of Bynkershoeck in not hazarding a definition of domicil; and Phillimore, in an excellent treatise on the subject, in his second Chap-

ter, gives many definitions attempted by publicists, and expressing preference for the attempts of American Judges, adopts substantially the definition of President Rush, that domicile is residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. Phil. on Dom. 11. 1 Am. L. C. 545. If domicile and residence be synonymous, and the jurisdiction of the Abbeville Ordinary be dependent on his just determination of the question of domicile of the intestate in this case; I should dissent from his judgment on the question of domicile. One is presumed to be domiciled at the place where he is resident at the time of his death; but this presumption is rebutted by proof that he is in a state of pupillage, and that his domicile of origin is elsewhere. The domicile of an infant not emancipated is that of his parents, and if his parents be dead it is that of his guardian. He is incapable of acquiring a different domicile for himself, although his

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domicil may be changed \*with the assent of the guardian or other person having legal tuition of the infant. 1 Am. L. C. 545, 562. In the present instance, there is no sufficient proof of the assent of the guardian to a change of his ward's domicile.

In my judgment, however, it was not the purpose of the Legislature to make the just determination of domicile a prerequisite to the Ordinary's granting administration of the estate of an intestate. Residence at the time of death is a fact easily settled by evidence; domicile is often a most difficult question of law, and one not likely to be left to the decision of subordinate judges. That the terms "resided" and "place of residence," in the 10 Sec. of the Act of 1839, above quoted, were purposely used by the Legislature as distinctive from "domiciled" and "domicil," is made more clear by reference to the parallel section of the Act of 1789, "directing the manner of granting probates of wills and letters of administration," &c., from which the posterior Act is taken in substance. The 12 Sec. of A. A. 1789 (5 Stat. 108) provides: "That if the testator shall have a mansion house, or known place of residence, his or her will shall be proved in the Court of the county, or before the Ordinary of the district, in case there are no county Courts, where such house is, or place of residence was; but if the testator had no such place of residence, and lands are devised in the will, it shall be proved in the Court of the county, or before the Ordinary as the case may be, where the lands lie, or in one of them, where there are lands in several counties: and if the testator had no such place of residence, and there are no lands devised, then the will shall be proved either in the county where such testator died, or where the whole or greater part of his or her estate shall be." The posterior Act in attempting brevity may have

introduced obscurity, but it does not seem to be intended to repeal the provisions of the former Act in this respect, nor to introduce new provisions. In the former Act, the distinction between residence and domicile is more obviously made; and the Ordinary in granting probate is required to ascertain, in any case only whether the mansion, or

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house, or known place \*of testator's residence be within his district: and if the testator devise no lands, and have no place of residence, the Ordinary's inquiry is limited to the place of testator's death. We must interpret the Act of 1839, in the light of the anterior enactment; and I hold, that the Ordinary of Abbeville district had jurisdiction in this case to grant administration of the effects of an intestate, having no lands, who dwelt and died in his district.

Another view may be presented. An Ordinary, although in general his jurisdiction is limited to a particular district, is a judge, and the granting of administration is a judicial function; and in performing this function, as is said in *Hays v. Harley*, 1 Mill, 269, he is frequently required to decide difficult questions of law. His judgment as to a matter within his jurisdiction operates throughout the State, and until revoked or reversed, is binding on all the tribunals of the State. *Brown v. Gibson*, 1 N. & McC. 326, and *Starke v. Woodward*, Ib. 329. In *State v. Mitchell*, 3 Brev. 520, 2 Tread. 703, it was decided in 1815, that an error of the Ordinary in granting administration could be corrected by appeal only, and not by mandamus. The appeal allowed to the Court of Common Pleas by 12 Sec. A. 1789 is amplified by 13 Sec. A. 1839 (11 Stat. 42) and affords an easy remedy to any person who may think himself aggrieved by any judgment, determination or order of the Ordinary. In the present case, the defendant had such timely notice of the judgment of the Ordinary of Abbeville as to enable him to prosecute an appeal from that judgment. He submitted to that judgment, or rather he has chosen to run the risk of its being a nullity. Parties are not to be encouraged in renewing a clamor once settled by a Court of competent jurisdiction; nor even in the re-investigation of a doubtful question of jurisdiction once adjudged by the Court of inferior jurisdiction, especially where prompt and facile remedy is afforded by appeal to higher Courts. The Ordinary of Abbeville, in granting administration to plaintiff, according to legal presumptions, adjudged all incidental questions in favor of plaintiff, such as domicile, if necessary, or residence, of intestate

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within the Ordinary's district, \*and title of plaintiff as creditor, or in some other way to the administration; this judgment should not be upset collaterally, in favor of a party having an easy and direct remedy by appeal,



although it may not be entirely approved as to some of the incidental points. I suppose it to be clear, that the Ordinary of Edgefield had no authority to review and reverse the judgment of his co-ordinate judge in Abbeville; and that the second grant of administration amounts to nothing.

It is ordered and decreed, that defendant, as late guardian of Brantly Tompkins, account for the estate in his hands belonging to said intestate, with plaintiff as administrator. And it is referred to the Commissioner of the Court to take the accounts.

The defendant appealed on the grounds:

1. That Brantly Tompkins had no such residence within the district of Abbeville as is contemplated by the 10th Section of the Act 1839: that the ordinary of that district had no authority or jurisdiction in respect to the administration of the said Tompkins' estate, and that his grant of the same to the plaintiff was extra-judicial and void.

2. That Brantly Tompkins having died intestate, and the defendant being the guardian of Richard Furman Tompkins, an infant, who takes by legal succession, the entire estate of the intestate, and there being no lawful debts or charges subsisting against the same, it results, that if the defendant shall be required to pay to the plaintiff the funds of Brantly Tompkins in his custody, then the plaintiff upon the receipt thereof will be bound immediately to repay the same to the defendant, and the only effect of this whole proceeding will be to subject the defendant's ward to heavy and most unnecessary expenses.

3. That there is no sufficient ground upon which the decree can be sustained, and the bill ought to have been dismissed with costs.

Carroll, for appellant.

McGowen, Moragne, contra.

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\*The opinion of the Court was delivered by

JOHNSTON, Ch. Without deeming it necessary to consider at large the statutes referred to in the decree, or the construction put upon them by the Chancellor, we are of opinion that the infant intestate had, at his death, a residence in Abbeville, sufficient, within the meaning of the statute law, to confer the grant of administration upon the Ordinary of that district.

His original domicile, or residence, in Edgefield, had been broken up by the sale of the premises; and it does not appear that he ever acquired any other in that district, as a substitute. He does not appear ever to have been domesticated with his guardian. And, although it is a principle that the domicile of origin, as a general right, continues until some new domicile, or residence, is acquired, yet we find that this infant was permitted to establish a residence at the house of his step-mother, in Abbeville, and to re-

tain it for several years. More than this, he was allowed to enter into pursuits of a local character, in which he was, not occasionally, but fixedly—engaged; and in the prosecution of which he died.

But if this were not so, the grant of administration by the Ordinary of Abbeville, which preceded that made by the Ordinary of Edgefield, was, as the Chancellor has properly ruled, such a judgment as carries the right, until vacated and annulled. This judicial officer having a general cognizance of questions relating to the right of administration—and, therefore, being legally competent to determine them—must, necessarily, be clothed with authority to consider and decide the sufficiency of the evidence presented to him for establishing the facts from which the right arises. The judgment rendered by him must be conclusive of the facts necessary to sustain it, until it is reversed. It cannot be impeached collaterally: and can only be set aside by a direct proceeding.

There was, therefore, no room for the second grant of administration in a different district. A second grant is null until the first grant is recalled. The Ordinary of Edgefield could not revoke the letters granted by the

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Ordinary of Abbeville: \*and until they were revoked, he had no authority to grant other letters. The authority conferred by letters of administration is a general authority operating throughout the State. There can be but one administration. And the conferring of the office, with the authority appertaining to it, exhausts the whole subject, and leaves nothing to be done, of like kind, until the authority conferred has been revoked. It would be highly pernicious if such a thing could exist as two administrations going on at the same time. If there can be two, there can be as many as there are districts in the State. How perplexing this would be to creditors, or others having claims on the estate, or liable to claims by it; and how impossible it would be to draw all these administrations to one final result, can scarcely be imagined.

But a point has been raised, on this appeal, which does not appear to have been suggested or argued on the circuit. We have considered it, however; and there seems to be nothing in it which should vary the decree.

It is said in the 2nd ground of appeal, that the intestate having left no lawful debts, or charges, subsisting against his estate, the administrator has no right to maintain a bill against the defendant—who is the guardian of the sole distributee—to take the assets out of his hands.

Certainly, if it appeared by the pleadings that there was no pretence of debts, as in *Thompson v. Buckner*, 2 Hill Eq. 499, the Court would do no such idle thing as to decree that he who is entitled to the estate as distributee should deliver it over to the administrator who has no right, in such case,

to the possession of it, except for the purpose of paying creditors. Therefore, no such bill could be sustained. But in this case, there is not only an averment of debts, but there was at the hearing a prima facie shewing of their existence. Surely this was sufficient. All that could be required of the administrator was to shew that there existed claims, which appeared to be presented in good faith. It could not be expected that the administrator

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should \*go further, and take upon himself the duty of the creditors, of proving the validity of their claims,—in opposition to his duty, which was not to substantiate such demands, but to offer all reasonable and legal opposition to their allowance.

But, then the case was likened to that of *Marsh v. Nail*, Rich. Eq. Cases, 115.

The intestate died in his minority; and it was contended that he could not have contracted any debts; and, therefore, the claims presented were to be regarded as nullities. When a Court undertakes to distribute an estate, or to sanction a distribution of it which has been made—as in *Marsh v. Nail* on the ground that no debts can possibly exist against it, it does a very strong act. It is impossible to say with positive certainty that an infant has not, at his death, left debts behind him. It cannot be affirmed with certainty, that it was perfectly impossible for him, in his lifetime, to have come, at some time, into circumstances, where legal obligations might attach to him. An infant is liable for necessities; and if he contracts for them, he is liable under his contract. His estate may be liable for the expenses of his last illness, and for his sepulture. It is certainly liable for arrearages of taxes; and may be for other public claims. The regular way is, certainly, to ascertain whether debts exist, and their amount, through the channel of an administration. It is the best way; and departures from it are not to be encouraged—though, after considerable lapse of time, during all which no creditor has appeared to claim administration, or compel the next of kin to take it—as a means of getting payment of his demands—a departure may be tolerated, and the Court may venture, as in *Marsh v. Nail*, to conclude that no debts exist. But as I have said, such a conclusion, or any course of procedure deduced from it, should be adopted with great caution. In this case, the plaintiff has not permitted great space of time to elapse, but has proceeded in a regular way, within a short period after the intestate's death, to give a fair opportunity to establish claims against his estate; and creditors have appeared and

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made regular claims. It would, under \*such circumstances, be inexcusable on the part of the Court, to shuffle the creditors out of the way, and hasten the distribution, by adopting

an inflexible conclusion that there exists no possible chance of fair and legal demands.

It is said that the defendant was guardian of the intestate; and that whatever liabilities could have arisen for supplies furnished the ward, were good charges against the guardian, and not against the ward; and consequently the estate of the latter can not be chargeable with them.

I take the law to be, that the guardian is not liable, personally, except for contracts made by himself. The ward—and of consequence the ward's estate—is liable for his own contracts, accordingly as they are, or are not, of that character, and founded on those considerations, which the law upholds.

The ward can only bind the guardian, (as a son can only bind a father,) as any third party might, viz., as agent: though it is not doubted that a contract may be inferred against a guardian, or father, from circumstances (a).

An infant's contracts are not all necessarily void. Some of them only are so—mostly depending on the form of the contract. Others of them are void until confirmed—not absolutely void. Others of them are good, unless avoided—purely voidable. Whether the exemptions of infancy constitute a personal privilege, which no other person can urge after his death, it is not necessary to decide. On all the infant's own personal contracts, the action is brought against the infant himself, though he is to be defended by guardian (b).

From this view of the law, it follows that claims may be established against the estate of the intestate.

It is ordered that the decree be affirmed, and the appeal dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

(a) See *Browne on Actions at Law*, Chap. 4, sec. 26, page 287, and notes r, s, u, x, y.

(b) See *Browne ut Supra*, p. 291; and see notes d, e, f, g, h.

#### 6 Rich. Eq. \*388

\*JAMES M. KEYS and Others v. E. L. NORRIS, Administrator, and Others.

(Columbia. May Term, 1854.)

[*Marriage* ⇐7.]

In February, 1836, J. K. was found of unsound mind by inquisition of lunacy. He never traversed the inquisition. In August, 1838, a marriage took place between him and L. in due form of law, and in 1850, he died, leaving issue of the marriage surviving him; who claimed to be his heirs at law, and distributees: *Held*, that the inquisition of lunacy, though prima facie evidence, was not conclusive upon the issue of the marriage as to the mental incapacity of J. K. at the time the marriage took place; that the issue had the right to try the question as to his capacity to contract the



marriage; and that an issue at law was a proper mode of trying it.

[Ed. Note.—Cited in *Sims v. McLure*, 8 Rich. Eq. 288, 70 Am. Dec. 196; *Walker v. Russell*, 10 S. C. 90.

For other cases, see *Marriage*, Cent. Dig. § 25; Dec. Dig. ¶ 7.]

Before Dargan, Ch., at Anderson, June, 1853.

A statement of the case is contained in the opinion delivered in the Court of Appeals.

Harrison, McGowen, for appellants.

Reed, Perry, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. For the purpose of understanding the judgment of the Court, it may be sufficient to state that John M. Keys died intestate, in 1850. Letters of administration on his estate were granted to the defendant, Ezekiel L. Norris, who had married a sister of the intestate, and, under certain proceedings in partition had in this Court, between him and the other defendants, being also sisters of the intestate, with their husbands, the real estate was sold on 2d December, 1850, for seven thousand five hundred and fifty-five dollars, secured by bonds bearing interest. Early in the following year, the plaintiffs in these proceedings, who are infants, with their mother, filed their bill, stating that they were entitled to the estate of the intestate under the Act of 1791, as his widow and children. The defendants interposed what they termed, "a plea in bar to the whole bill," averring that the plaintiffs were not the heirs at law of the intestate, for the defendants say they have been informed, and believe, that the intestate was never legally married to the plaintiff, (Lucinda,) but was incapable of contracting marriage for want of sufficient

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capacity, he, the intestate, \*having been found "of unsound mind" prior to the said pretended marriage by an inquisition returned executed into this Court; and further, the defendants aver that they have been informed, and believe that the said Lucinda was, at the time of the said pretended marriage, the lawful wife of another person, then living.

On a subsequent day, the bill was amended, setting forth that the alleged inquisition was on 8th February, 1836; that it was procured at the instance and by the means of some of the defendants—was irregular in form and untrue in fact; and moreover, that, whatever may have been the previous mental condition of the intestate, he was of sound mind at the time when the said marriage took place in due form of law, to wit: on the 23d day of August, 1838.

The cause was set down for hearing at June Sittings, 1853. On 28th June, 1853, the presiding Chancellor passed the following order: "On hearing the bill and plea read, and a paper signed by Lucinda Keys—at her instance it is ordered, that the bill as to her

be dismissed, but without prejudice to the minors;" and on the same day, it was ordered, that an issue at law be directed, in which the complainants should be plaintiffs, to try the question "whether the complainants are the heirs at law of John M. Keys, deceased"—and that the presiding Judge be requested to certify the verdict of the jury together with the testimony taken at the trial.

The defendants appealed from this order, and insisted that the bill should have been dismissed upon nine grounds, all of which may be resolved into this, to wit: that the inquisition of lunacy not traversed by the intestate in his life-time, was conclusive upon his heirs after his death, and that they had no right, either to traverse the inquisition, or to an issue at law to inquire into the capacity of the intestate; or, in the language of one of the grounds, "that those claiming as heirs under the intestate, have not the right, after his death, even to petition this Court for leave to traverse the inquisition, much less to have an ordinary issue at law, directed to assist the judgment of this Court."

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\*In reference to proceedings in lunacy, our Courts adopt the practice of Westminster Hall, as it existed prior to 1721, so far as is consistent with our institutions. In this view, the Stat. 2 Edward 6th, giving the right of traverse, has been held applicable, although not expressly declared to be of force in this State, by any legislative enactment. *Medlock v. Cogburn*, 1 Rich. Eq. 477. It is proper, then, to inquire what are the purposes of an inquisition of lunacy? In England, the care and custody of lunatics, both of their persons and estates, belong to the crown. This is for the benefit and protection, as well of the public, as of the individual who, by the dispensation of Providence, may be visited with this affliction. If by the inquest, the party is found to be of unsound mind, the care of his person and estate may be deputed to proper persons. The sole object of the proceeding is to inform the conscience, and guide the judgment of the Chancellor in reference to the duties which he has to discharge. As these proceedings were entirely *ex parte*, it was formerly doubted whether, in a contest where a third person was interested, the inquisition in lunacy was admissible at all in evidence in a controversy involving an inquiry as to the mental capacity of the party. It is now well settled in England, that the inquest may be received, but is not conclusive, in such cases.

By the Stat. 2 and 3 Edw. 6, c. 8, any person aggrieved by the inquest is authorized to traverse the finding of the jury, and this is done by an issue in the Court of King's Bench. By the Stat. 6, Geo. 4, c. 53, the petition for a traverse must be filed within three months from the return of the inquisition. Although the crown is not entitled to

traverse the inquisition which finds the party not to be of unsound mind, yet it is not concluded thereby, for what is called a *melius inquirendum* may be issued on behalf of the Crown; and, if a different finding is made, the party may then traverse the inquisition. 8 Rep. 168, b.; Shelf. Lunacy, 120. The writ of *melius inquirendum* is unknown in our

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practice, but in such case, an issue *\*at law* seems the appropriate remedy, and this course was adopted in the case of *"In re Susan Huff,"* (Circuit Court,) Charleston, June, 1851.(a)

(a) In the case referred to, the following is the circuit decree:

DUNKIN, Ch. Under the statutes 2d and 3d Edw. 6, after an inquisition of lunacy, or idiocy, the finding may be transversed, and this removes the record to the Court of King's Bench, in order that the traverse may be tried. But the statute, Edw. VI., was never adopted in South Carolina.(b) The consequence is stated by Chancellor Kent, in *re Wendell*, 1 J. C. R. 600. "The care and custody of idiots and lunatics being confided to this Court, the whole control of the inquisition, and the manner in which that control shall be exercised, would seem to depend entirely upon the discretion of the Court." In the case before him the inquisition had been returned, and the party found a lunatic. Being dissatisfied with the finding, the Chancellor directed an issue at law, "as being more conformable to the ordinary practice of the Court in those cases in which it becomes expedient that a jury should pass upon a matter of fact."

It appears from the return of the writ and inquisition, that two of the three commissioners were of opinion, that the party was of unsound mind, and so charged the jury, but the other commissioner entertained a different opinion, and the jury concurred in that view.

The evidence is in writing, and it is not proposed to analyse it. The party was also produced before the jury, and she was also examined at the hearing. She is forty-three years of age, and is quite deaf, or rather very hard of hearing. She can neither read nor write. On her examination before the jury, she stated she did not know who was her Creator. In the examination before the Court, she said "God made her, that the preacher had told her that since she was examined before." She did not know whether he had told her of Jesus Christ. In her first examination she was silent to the inquiry as to who redeemed her: said "she had heard of Jesus Christ," but made no answer to the question, whether she ever saw him, or where he is. Her countenance has a peculiar expression, partly foolish, and, at times, indicating something like cunning; she had never heard of the bible; said she could count 13, she had learnt that since she was previously examined. The witnesses who testified to her imbecility of intellect were her half sister Nancy Walling, Margaret Burbage, who had married her uncle, John McCollum, John Donnelly, and C. Vose. With the exception of the last named, who had known Susan Huff for sixteen years, all had been acquainted with her from childhood. Their testimony is to the same effect. Her mind was always weak. Her father and mother both thought she had not good sense. Her mother used to watch her, not let her go about much; she wanted to get married; her mother said whoever married her would only do

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*\*In ex parte Barnsley*, 3 Atk. 184, Lord Hardwicke ruled that after a traverse and two concurrent inquisitions, the party would not be allowed to traverse the second, "for,"

so for her money. Her mother sent some one with her always; said she was afraid somebody would marry her, and take away her property; her father and mother both thought she had not good sense. "She has common understanding in work, such as spin, wash, scour and cook; does not think her capable of thought; she couldn't make a bargain." None of these witnesses thought her capable of making a contract, or rather they declared her incompetent to make

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a contract. McCollum says she was not *\*competent* to contract; in his cross examination, he said, "she could not make a contract for money; thinks as to a contract of marriage, she would understand that better than other contracts." Her mother used to make bargains for her: after her death, her brother did. John Donnelly "knew her ever since she was born; always heard her father and mother say that she hadn't good sense." Her mother was a good woman; always took care of Susan; took more care of her after she grew up than before; witness "never himself thought she had good sense;" she told witness there were several persons she could marry, but that her mother would not let her; witness does not think she was competent to contract marriage; would not think it fair to make any bargain with her; has bargained with her, through her mother, for some spinning, &c.

It seems that Susan Huff lives in Goose Creek parish; owned some eight slaves, whom she had derived from her mother and grandfather. In April, 1850, she was married to Thomas Blankton. The ceremony was performed by John B. Earnest, who testified that he was a country magistrate; "that he received notice from Blankton, that he wished witness to come quite early the next morning, as he wished him to marry him; went to Mrs. Salisbury's, found no one there; Mrs. Salisbury went over, and called Susan Huff; she said she wished her brothers present; after some fuss, witness married them;" he said, "he had heard before that Susan Huff was not a person of good sense;" he was acquainted with her for upwards of 12 months before his examination. Lovey Salisbury proved that she was the only sister of Thomas Blankton; that they were married at her house. Blankton came to her and told her that he was to be married; asked her to go for Susan next day; witness had not seen Susan till she went for her." It does not appear that the marriage was previously known to any of her relatives. Nancy Walling, her half sister, and with whom she resided for two years after her mother's death, said "Blankton was at the house two or three times, but she never knew of the wedding; they were married in sight of the house, about one-fourth of a mile off, at Mrs. Salisbury's." The principal witnesses to establish the capacity were the father and sister of Blankton, or persons who had a very recent acquaintance with her. Hylton, who had known her for some years, says he had not seen a great deal of her, and his information seems principally confined to the periods when he "has stopped and dined at Blankton's house;" and the extent of Mrs. Hylton's evidence amounts to little more than that; "she has no doubt Susan knew and understood what getting married was." It appeared further in evidence, (John B. Earnest proves it,) that since the marriage, Blankton had sold all her negroes, one to Browning, and the rest to Wiggins.

It is not proposed by the Court, to decide any thing definitively. As is said by Chancellor Kent, in the case already cited, "The whole ju-

(b) The circuit decision of *Medlock v. Cogburn*, 1 Rich. Eq. 477, which has been since recognised, was not adverted to, but the statutes of Edward only apply where a person has been entirely "found lunatic or idiot" by the inquest.



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said he, "if, after \*two inquisitions in this case, finding Barnsley a lunatic, I should allow the petitioner to traverse the inquisition, I should spin out proceedings in lunacy to a

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very great length and infinite ex\*pende, and should make them a very heavy burthen to the subject, and therefore I shall dismiss the petition." Referring to what he had done in *ex parte Roberts*, 3 Atk. 5, he remarked that "in all these inquisitions, they are not at all conclusive: for actions may be brought at law, or a bill to set aside conveyances, so that it might have been disputed afterwards upon an issue to be directed." Of course it was not meant that the proceedings could be quashed or set aside by bill filed, as this could be effected by the more prompt and appropriate remedy of a rule, or a traverse, but that a party was still at liberty to inquire into the validity of any acts done, and thereby put in issue the mental capacity of the object of the inquisition. So in *ex parte Holyland*, 11 Ves. 12, it was held that, if, after a second inquisition, it be still sought

jurisdiction of the subject is in this Court, and the object of the inquisition, is merely ad informandum conscientiam, and to arrive at a safe conclusion as to the existence of the fact." None of the evidence materially varies from that to which the Court has particularly adverted. It is difficult to suppose that any member of the jury would, after that evidence, have been willing to contract with Susan Huff for any part of her property. Certainly no such contract could receive the sanction of a Court of Justice. Without any sense of religion, ignorant who made her, unable to read or write, very hard of hearing, scarcely able to count ten; considered by her own parents, and by her near-

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est connections, as unable to \*take care of herself; with whom none of them would make a bargain, even to spin a hank of yarn, but always made the bargain with her mother, and, after her death, with her brothers, how could a contract with such person, for the disposition of her property, be countenanced? The whole tenor of the evidence is, that she had not mind enough to comprehend, or to assent to, any such contract. Perhaps it may be supposed that a far less degree of intelligence is necessary to sustain a contract of marriage, and the jury may have supposed that the only issue, was whether she knew (in the language of the witness) what it was to get married. On this subject, the Court is not without authority in our own adjudications. *Foster v. Means*, 1 Speers Eq. 569 [42 Am. Dec. 332], was a case very fully considered. "Marriage," say the Court, "being regarded by our laws, as merely a civil contract, no one can enter into it who has not the legal capacity to contract." All persons who have not the regular use of the understanding sufficient to deal with discretion in the common affairs of life, are incapable of agreeing to any contract, and, of course, to that of marriage. 2 Kent Com. 75 (656.) Citing *Collinson on Idiocy*, the Court says that sanity or insanity can not depend upon, or, be collected from, particular actions, unless every part of a person's behavior constituted unequivocal evidence of his habits of mind. "The fact of soundness of mind does not depend on, nor can

to supersede the commission, this must be done by trial of an issue. "Indeed," says an elementary writer, "when the object is rather to establish a lucid interval than to negative the fact that the party was deranged, it may be advisable to waive a traverse, and apply for an issue; upon the trial of which, the question may be gone into at large; whereas a traverse is confined to the facts found by the inquisition." 2 Hovend. Frauds, 475; *Hall v. Warren*, 9 Ves. 609; *Ex parte Wragg*, 5 do. 452. In *Medlock v. Cogburn*, Chancellor Harper, recognizing the right of traverse, refers to, and approves what is said in *Southcote's case*, 2 Ves. Sen. 402, that such an inquisition is like inquisitions of escheat, post mortem, &c., which may be given in evidence, but are not conclusive. It may be important to a party, however, to get rid of the presumption arising from this prima facie evidence, and therefore to be permitted to traverse the inquisition. But if, from any cause, he has lost this right, (as where, under the Stat. Geo. 4, the time has elapsed within which the petition should be presented) the only consequence is to require the

it be collected from, particular actions, but upon the general frame and habit of mind." In that case, the Court held the marriage void, because it appeared, from consideration of the whole evidence, that, although reason occasionally manifested itself in particular circumstances, yet that "the prevailing characteristic of the mind of the intestate was the absence of the reasoning faculties." The same principles are fully maintained by the Supreme Court of North-Carolina, in *Johnson v. Kincade*, 2 Iredell Eq. 470, and in *Crump v. Morgan*, 3 do. 91. Those were cases of nullity of marriage, which, by the statute of North-Carolina, the Court of Equity has authority to declare. In South-Carolina, no tribunal is vested with such direct power. But this only renders more necessary the vigilance of this Court to protect those who are properly within its jurisdiction; to defeat the acts of those who "creep into men's houses, leading captive silly women." The whole prerogative, says the Chancellor in *Ex parte Crane-mer*, 12 Ves. 449, "is this: that it falls to the Court to take care of those who can not take care of themselves." In the same case it was held that to give this Court jurisdiction, it is not necessary to shew "such a state that the party could not see the light of the sun, or know his father. But, the inquiry is, whether his capacity is of that kind that fits him for the government of himself, and the management of his affairs."

Entertaining a strong impression from the evidence, that the party, at the time of her alleged marriage, was a proper subject for the protection of this Court, it is deemed proper to submit the inquiry, as was done in *re Wendell* to a jury of the Common Pleas.

It is, therefore, ordered that an issue be made up, and settled, to try the question, whether Susan Huff, sometimes called Susan Blankton, was, at the time of suing out the inquisition, and how long previously, of unsound mind, or mentally incapable of managing her own affairs, that the evidence taken here be received on the trial, and that the issue be tried by a jury of the Court of Common Pleas for Charleston District, in which issue the petitioners shall be the actors: and that the presiding Judge be respectfully requested to certify the verdict, together with the evidence.

party to try a general issue. See *ex parte* Sir Benjamin Wright, 1 Vern. 155.

It is insisted with great earnestness, that the inquisition of 1836, is conclusive upon the

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party found to be a lunatic, and \*his privies, until superseded; and that the right of traverse died with the party. If an individual, found to be of unsound mind by a proceeding to which he was not a party, should die on the following day, the rule would neither be consistent with reason or justice, which should thus preclude those claiming to be his heirs from contesting the truth of the inquisition. It may be true that for a technical reason, the heir may not be permitted to traverse, and for the same reason no third person might be allowed to traverse after the death of the party. The reason is stated by Lord Hardwicke in the authority cited for the appellants, *ex parte* Roberts, 3 Atk. 308, to wit, that on the trial of the traverse the lunatic is required to appear in person. In that case a traverse of the inquisition had been made by the lunatic in his lifetime, and found against him. After his death his heir applied for a second traverse. "A trial by inspection," said Lord Hardwicke, "is the proper trial by the Lord Chancellor as to his person: when there has been a solemn trial in the lifetime of a lunatic who is bound himself, to say that, after his death, when he cannot appear in proper person, and cannot be inspected by the jury, it should still be open to a traverse by the heir at law, carries a great absurdity with it." It is manifest, however, from the case that, although denying the right of the heir to a second traverse of the inquisition, he does not regard him as thereby concluded on the question of the sanity of his ancestor, arising in any future controversy as to property. "But I will suppose," says he, "that Roberts was not a lunatic, and that, on a future bill brought here, Roberts should be found not to be a lunatic," &c. His Lordship overruled the exception to the Master's report, taken by the heir, with this expressive reservation: "But not so as to prevent any right the heir at law may appear to have on trial at law."

But the plaintiffs are not in the situation of the heir at law of Roberts, who had already availed himself of the right of traverse allowed him by the statute. The plaintiffs here shew that no traverse had ever been taken by their ancestor in his lifetime, and he was never concluded as Roberts was

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said to be. \*As has been stated, the purpose of the inquisition was to guide the conscience of the Chancellor as to committing the person and estate of the lunatic, and his order thereon could only have effect during the life of the party. So far as to sustain the order of the Chancellor, and protect the committee in all lawful acts done under his appointment

it might be very proper to hold the inquisition conclusive after the death of the party. The distinction is taken in *Stone v. Damon*, 12 Mass. R. 488. It appeared that Isaac Stone was found to be non compos by an inquisition taken in April, 1808. After his decease, a will dated 1st July, 1811, was offered for probate, and rejected. An issue was then ordered, and, on the trial of the issue, the inquisition was permitted to go in evidence to the jury, but not as conclusive, and their verdict was in favor of the will.

On motion for a new trial, it was insisted that the inquisition was conclusive as to the unsoundness of mind so long as the same continued in force. But the Court confirmed the judgment, remarking that, in the authority cited for the appellant, the question turned on the right of the guardian of the lunatic to prosecute and defend actions, and to transact the business of his ward.\* That for these purposes, the decree appointing a guardian might be deemed conclusive, without injury to any one, as it would only go to confirm the lawful acts of the guardian during the continuance of his authority; without which no one could safely deal with the guardian as such. "But," (continued the Court,) "in the present case, the question was on the personal ability of the deceased to devise his estate; an act which the guardian could not do for him. The decree was evidence of his insanity in 1808: and, like any other evidence of that fact, would throw the burthen of proof on the appellant, to shew that the testator had afterwards recovered his reason. But evidence of insanity in 1808, would not shew conclusively that he was insane in 1811. If a lunatic should be restored to his reason, and become perfectly capable of devising his estate, it would be a cruel and unnecessary addition to his misfortune to deprive him of that right, and to set aside his will, because

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\*he happened to die before he could apply to the Probate Court for a reversal of the decree; or because those, who might be interested in avoiding the will, should, by appealing, or other means of delay, prevent the reversal of the decree before his death." The reasons of this decision commend it to the consideration of the Court, and would fully justify the order of the Chancellor from which this appeal is taken.

But the English authorities fully sustain the course pursued. In *Sir Benjamin Wright's* case, 1 Vern. 155—in *Clerk's* case, 2 Vern. 412, and in *Hall v. Warren*, 9 Ves. 605—inquisitions of lunacy were in force; nevertheless an issue at Law was directed in each case. In the last case, *Sir William Grant* remarked, that the inquisition was *prima facie* evidence of the lunacy, but that it was competent to dispute the fact, and to maintain that, notwithstanding the inquisition, the object of it was of sound mind at any period of time covered by it; and he directed an issue,



as in Clerk's case, whether the party defendant was a lunatic at the execution of the contract, and, if so, whether the lunacy was attended with lucid intervals, and whether the contract was made in such an interval.

It is not now to be questioned that marriage is a civil contract; and that in any question involving the right of property it is competent for this Court to inquire into the validity of the contract of marriage. [Mattison v. Mattison] 1 Strob. Eq. 388 [47 Am. Dec. 541]. In such cases, it seems peculiarly proper to invoke the aid of a jury; and this course was adopted in Foster v. Means, Speers Eq. 569 [42 Am. Dec. 332]. In that case the validity of the alleged marriage was impeached by the next of kin, on the ground of the insanity of the intestate. See also, In re Wendell, 1 Johns. Ch. 600.

It may not be out of place to conclude with the instructive language of Lord Eldon, in Sharwood v. Sanderson, 19 Ves. 286: "Before a commission issues, the duty of that person who has authority to issue it, requires him to have the evidence that the object of the commission is of unsound mind, and incapable of managing his affairs, and for that purpose the evidence of medical men is generally produced. But if the question is

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\*brought into controversy, the policy of the Law determines that the judgment on which the commission issues is not conclusive against either the person, or property, or any right of the object of it."

The result of all the authorities is, that so far as the establishment of insanity is involved, except for the purpose of justifying the Chancellor's order of commitment, these ex parte proceedings, like all others of that character, are wholly inconclusive. The in-

quisition may be traversed by those who have the right of traverse, or, as has been shewn, in any controversy involving the right of property, the right of traverse may be waived, and the party apply for an issue, on the trial of which the inquisition is prima facie evidence.

In the case before the Court, the intestate was not concluded by the inquisition, but might, at any time, have traversed the same. Until a traverse had been tendered by the lunatic, the proceedings were altogether ex parte in behalf of the State, and, as remarked by Chancellor Harper on this point, in Medlock v. Cogburn, "by the Common Law no one is concluded by proceedings to which he was not a party."

The plaintiffs, claiming to be his heirs, are no more concluded than he was by those ex parte proceedings. According to the most rigorous construction that can be adopted, until John M. Keys had tendered a traverse, and an issue had been made up, he had never become a party. It was not even necessary to have given him notice. At his death the character of the proceedings and their legal effect remained unchanged. Never having been made a party, he was not concluded. If he was not concluded, it is difficult to perceive upon what principle those claiming under him could be in a worse situation. A traverse being now impracticable for the reason stated, they are left to the ordinary mode of presenting and establishing their rights, subject only to the burthen of rebutting any prima facie inference which may arise from the inquest of February, 1836.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

# COURT OF ERRORS

COLUMBIA, MAY, 1854.

ALL THE JUDGES AND CHANCELLORS PRESENT.

6 Rich. Eq. \*399

\*THOMAS C. MATTHIS and Others v.  
CHARLES H. HAMMOND and  
Others.

(Columbia. May, 1854.)

[Perpetuities  $\S$ 4.]

Testator devised and bequeathed property, real and personal, to his mother for life, and at her death, to R. H., and, if he "should die without a lawful child," then to the five children of J. A., naming them, "or the survivor or survivors of them, or their lawful children, if any they may have." R. H. died without ever having had a child:—*Held*, that the limitation over to the children of J. A. was not void for remoteness.

[Ed. Note.—Cited in *McCorkle v. Black*, 7 Rich. Eq. 421; *Addison v. Addison*, 9 Rich. Eq. 61, 63; *Dupont v. Hutchinson*, 10 Rich. Eq. 2; *Williams v. Kibler*, 10 S. C. 427; *Selman v. Robertson*, 46 S. C. 266, 24 S. E. 187; *Robert v. Ellis*, 59 S. C. 160, 161, 37 S. E. 250; *Tindal v. Richbourg*, 91 S. C. 410, 74 S. E. 932.

For other cases, see *Perpetuities*, Cent. Dig.  $\S$  28; Dec. Dig.  $\S$ 4.]

Upon the question sent by the Court of Appeals in Equity to this Court, (ante p. 121.) the cause was now heard.

Petigru, Spann, for appellants.

Bauskett, Carroll, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. Allen Anderson devised and bequeathed his whole estate to his mother for her life, and at her death all his lands and one-half of the residue of his estate to his nephew, Robert H. Anderson, and the other moiety of the residue to the children of his deceased brother, James Anderson. In the fourth clause of his will he declares: "It is my will, if Robert H. Anderson should die without a lawful child, that his legacy, both real and personal, shall go to the above-named five children of James Anderson, viz.: Indiana, Louisiana, Andrew, James Allen, and Ignatius Anderson, or the survivor or

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\*survivors of them or their lawful children, if any they may have."

The question referred to this Court by the Court of Appeals in Equity is, whether the devise to the children of James Anderson be void for remoteness?

Under the operation of our Act of 1824, dispensing in such case with words of perpetuity and inheritance, the terms of gift to Robert H. Anderson are adequate to pass the fee or absolute estate. There is no direct gift to his children or issue; and under the decisions of our Courts, his children or issue, if he had any, could not take as purchasers by implication from the employment of the terms children or issue in the limitation over and must be restricted to derivative rights through their ancestor. He died without ever having had a child, and consequently any controversy is impossible between his descendants and those claiming under the conditional limitation, or those claiming that his legacy is lapsed.

The present suit is in behalf of persons claiming that the testator died intestate as to the estate given to Robert H. Anderson, except as to the interest given to this legatee, which has failed, against those claiming under the conditional limitation. The plaintiffs argue, that because grand-children, or remoter descendants of Robert H. living at his death, in the lack of a child might successfully contest the claim of those derived from the conditional limitation, plaintiffs have equal right to insist upon the enlarged construction of the term child, possible in any case to defeat the title of these substitutes for Robert H.

But there is a glaring difference between the cases of those representing the primary object of a testator's bounty and of those postponed not only to them but to others, explicitly declared to be the secondary and substituted objects of bounty. From the fact of making a will, in the absence of any declaration therein to the contrary, the intention of the testator is manifested to prefer his legatees who can in any event take to those whom the law appoints to the succession in the absence of a will. A construction of the

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same words may be properly made \*to fulfil the intention of a testator, which would not be adopted to defeat his intention.

It is a rule of construction that the validity of a limitation over is tested by events possible at the time of its creation, and is not



dependent on actual events. If the limitation over may not necessarily take effect within lives in being and twenty-one years afterwards, it is void for remoteness. On this principle, a gift over upon the death of the first taker without issue, is void upon the policy against perpetuities, for this form of words is established to intend a failure of issue in the remotest generations. It can hardly be disputed that this construction of the terms dying without issue, although now so firmly established as to be irreversible by Courts, violates in fact the intention of testators, and the grammatical construction of the words. The Parliament of Great Britain, and the Legislature of South-Carolina have evinced their dissatisfaction with the judicial construction of those terms, yet our enactment being prospective does not apply to the present case. Still the action of the Legislature declares the policy of the State, and admonishes us not to follow decisions originally wrong, or very disputable, beyond their necessary scope. If the term child does not necessarily import issue, we should not extend the original error as to the interpretation of issue. We ought by the ordinary rules of construction first to ascertain the meaning of the terms, "a lawful child," and then consider whether, if the first taker "should die without a lawful child," the estate should go over.

Without considering the difference which might possibly arise between the singular child and the plural children, there can be no dispute that the term children is not a technical word of limitation, and is ordinarily a word of purchase. Children, in its primary and ordinary sense, means the legitimate descendants of the first generation of the person named, and where there is nothing to show that the donor intended to use the term in a different sense, it will not include illegitimate offspring or step-children, or grand-children, or more remote descendants. Remoter descendants are sometimes

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permitted to take under an \*enlarged sense of the term children, in support of the intention of the testator, where the will would be otherwise inoperative, or where the context, by the employment of the terms issue or descendants, promiscuously with children, exhibits the intention of testator to use the term children in a secondary and liberal sense. Such liberal construction of the term children is never made, except for the benefit of the issue of children, or from the force of the context. *Hayes Est. Tail.* 35; *Dover v. Alexander*, 2 Harc. 282, and n. 1; *Mowath v. Grew*, 7 Paige, 382; *Marsh v. Hague*, 1 Ed. C. R. 186. It is not made when persons exist who accurately fulfil the terms of description. *Pringle v. Ravenel*, 3 Rich. Eq. 342; *Ruff v. Rutherford*, Bail. Eq. 9. In England, sometimes by implication an estate for life in the ancestor is enlarged into an estate

tail, or an estate in him in fee is cut down to an estate tail, by force of such terms as children, used in the direct gift, or in the limitation over; but this implication is never made except in aid of the intention of the testator, and for the benefit of the issue, or where it is rendered necessary by the context. *Blesard v. Simpson*, 42 E. C. L. R. 483; *Doe v. Webber*, 1 Bar. & Ald. 713. On the other hand, in many cases the terms issue or heirs of the body are interpreted to mean children for the sake of supporting the limitation over. *Doe v. Lide*, 3 T. R. 593; *Maddox v. Starnes*, 2 P. Wm. 421; *Knight v. Ellis*, 2 R. C. C. 569; *Gretton v. Howard*, 1 Meri. 488; *Fearne*, 374, 376; 2 Atk. 220. With us, where the estate tail does not exist, the implication of a fee conditional from words not technically creating that estate tends to defeat the intention of testators and the interests of issue. *Bedon v. Bedon*, 2 Bail. 231; *Williams v. Caston*, 1 Strob. 130. In *Morgan v. Morgan*, 5 Day, 517, a testator devised his real estate to his sons, A. B. & C., their heirs and assigns forever, and further provided that if either should die without children, his brothers should have his part in equal proportions. A. had issue, a son, who died in the lifetime of A., and afterwards A. died without children living at his death. It was held that the words die without children, imported a

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dying \*without children living at the death of the first devisee, and that the limitation over was good by way of executory devise. This is an authority directly upon the point in issue.

Our own case of *Brunmet. v. Barber*, 2 Hill, 543, is decisive, so far as the personality is involved. There the gift over of slaves was to the sons of the donors, if the first taker should "die without children to heir the said negroes." The Court supported the limitation over, defining children to be a particular class of descendants within the rule against perpetuities, and not equivalent to issue. There is little reason in this State, beyond conformity to English decisions, for making any distinction in the construction of limitations of real and personal estates.

In *Stone v. Maule*, 2 C. E. C. R. 513, the gift over was dependent on the first taker's dying without having any child or children. The Vice-Chancellor, in deciding the cause, makes the following remarks, which clearly intimate the occasions in which a liberal or exact construction of the term children should be made. He says, "It has been assumed in the argument that the words, 'without having any child or children' are to be taken as synonymous with the expression 'without issue.' But why am I to put a construction upon those words which they do not strictly bear, for the purpose of defeating the intention of the testator. The question is not, What is the effect of words creating an estate tail, but of words making a gift over. It appears to me that I should

defeat the testator's intention in this case, if I did not hold that the gift over took effect on the death of the first taker," who never had a child. See also *Weakly v. Rugg*, 7 T. R. 322; *Bell v. Phyn*, 7 Ves. 459; *Wall v. Tomlinson*, 16 Ves. 413. I suppose that this case would not have been referred to the Court of Errors, except upon the notion that the limitation over could not be supported in consistency with *Adams v. Chaplin*, 1 Hill, Eq. 281. In that case, the gift over upon the death of the first taker "without an heir lawfully begotten by him," was held to be too remote. But in truth, "an heir law-

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fully begotten by him" means precisely an heir of his body. The technical terms of a fee conditional are employed. Hayes, in his excellent treatise on estates tail, in commenting upon the case of *Gretton v. Howard*, (No. 37 in his tables,) justly remarks, that the phrase begotten by me merely imports an estate in special tail. Such was the construction given to the words "heirs of her body by him" (testator) in *Platt v. Powles*, 2 M. & S. 65. Such, too, is the phraseology of the Holy Scriptures. *Ezra*, vii. 3; *Isaiah*, c. xxxix. 7; *Matthew* i. 8.

We are of opinion, that dying without a lawful child, in this conditional limitation, means dying without a child living at the death of the first taker.

But the validity of the limitation over, in this case, may be supported by additional considerations. The gift over here is to five persons named as in existence. After *Guery v. Vernon*, 1 N. & McC. 69, and *Cox v. Buck*, 5 Rich. 604, we could not venture to hold that the naming of persons in esse in a gift over necessarily implies a limitation to take effect within lives in being at the creation of the gift; for the existing individuals might take an interest transmissible to their posterity or representatives, and the limitation over not necessarily take effect within the rule against perpetuities. In the present instance, however, the gift over is to five named persons, or the "survivor or survivors of them, or their lawful children, if any they may have." If the limitation over had stopped at the words, "survivors of them," it is clear that the surviving would be construed to refer to the epoch of Robert H. Anderson's death, and would limit the effect of such general words as dying without issue, much more of the actual phrase of dying without a lawful child, to death without descendants at the time of Robert H. Anderson's decease. *Pells v. Brown*, Cro. Jac. 590; *Anderson v. Jackson*, 16 John. 382; *Hughes v. Sayer*, 1 P. Wm. 534; *Stevens v. Patterson*, [Bail. Eq. 42,] *Treville v. Ellis*, Bail. Eq. 40; *Hill v. Hill*, Dud. Eq. 71; *Terry v. Brun-*

son, 1 Rich. Eq. 79. If, however, the words superadded to survivors "or their lawful children, if any they may have," exclude the no-

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tion of personal benefit to the survivors, and import an estate in them transmissible to their heirs or representatives, then upon the distinction declared by Sir William Grant, in *Massey v. Hudson*, 2 Meri. 130, and frequently recognized by our cases, the term survivor would be insufficient to fix the death of the first taker as the date of survivorship. But the words, "or their lawful children, if any they may have," are not equivalent to heirs and assigns, and representatives, or other words importing transmissibility. In the absence of any strong reason for construing "or" as equivalent to "and," it must have its natural disjunctive meaning. Here we think it is disjunctive and substitutional, and that the clause means, in case of the death of any of the children of James Anderson before the death of Robert H. Anderson, that their children then living shall take as substitutes of their parents. 2 Jarm. 666; *Anderson v. Smoot*, Speers, Eq., 312; *Girdlestone v. Doe*, 2 Sim. 225; *Price v. Locksly*, 6 Beav. 180; *Salisbury v. Pelty*, 3 Hare, 86.

We are of opinion that the limitation over to the children of James Anderson is not void for remoteness.

O'NEALL, WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., and JOHNSTON and DUNKIN, CC., concurred.

In the Court of Appeals in Equity the following judgment was then pronounced by

WARDLAW, Ch. This Court having heretofore determined, that the limitation over, under the will of Allen Anderson, jr., to the children of James Anderson, if not invalid by the vice of remoteness, did not lapse by reason of the death of Robert H. Anderson in the lifetime of testator; and the Court of Errors, to whom the question was referred, having determined that this limitation was not void for remoteness: it follows that the Circuit decree must be modified accordingly; and it is so ordered and decreed.

Other matters of controversy are involved in the cause not affected by the appeal, and our judgment sustaining this limitation over may need further administrative orders. It

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is therefore ordered, that the cause be remanded to the Circuit Court, with leave to the parties to apply for orders in execution of this decree and of the Circuit decree, so far as the latter is intact by this judgment.

JOHNSTON and DUNKIN, CC., concurred.  
Decree modified.



## 6 Rich. Eq. 406

JONATHAN WRIGHT and Others v. WILLIAM HERRON and Others.

(Columbia. May, 1854.)

[Curtesy ⇨7.]

The Court of Errors equally divided upon the question, Whether a husband is entitled to hold as tenant by the curtesy, the land in which his deceased wife was seized of a fee conditional.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. § 5; Dec. Dig. ⇨7.]

[Curtesy ⇨9.]

This case having been remanded to the Equity Court of Appeals, that Court held, (three Chancellors for, to one against,) that a husband is entitled to hold as tenant by the curtesy, in such case.

[Ed. Note.—Cited in Withers v. Jenkins, 14 S. C. 610; Gaffney v. Peeler, 21 S. C. 69.

For other cases, see Curtesy, Cent. Dig. § 25; Dec. Dig. ⇨9.]

[This case is also cited and affirmed in Withers v. Jenkins, 14 S. C. 597.]

Before Dargan, Ch., at Darlington, February, 1854.

For a full and proper understanding of this case reference should be had to it as reported 5 Rich. Eq. 441; where will be found the circuit decree of his Honor Chancellor Dargan, the grounds of appeal and the opinion of the Court of Appeals sending the case to the Court of Errors upon the following question, to wit: "Whether the surviving husband of a wife who is tenant in fee conditional, be entitled to hold by the curtesy the land for his life, conveyed to his wife in fee conditional:" upon which question the case was now heard.

Dargan, for the plaintiffs.  
Moses, contra.

Curia per O'NEALL, J. In this case the  
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Court of Errors are not able to decide the question. The members of the Court are equally divided in opinion. (a) Hence the case must be remanded to the Chancellors for their own disposition; and it is so ordered.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., and WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

The Court of Appeals in Equity afterwards pronounced judgment as follows:

JOHNSTON, Ch. The Court of Errors having certified that that Court "are not able to decide the question" sent to them from this Court: "the members of that Court being

(a) At the request of a member of the Court I state that the Court of Errors was divided as follows: For, JOHNSTON, DARGAN and WARDLAW, CC., and GLOVER and MUNRO, JJ.; Against, DUNKIN, Ch., and O'NEALL, WARDLAW, WITHERS and WHITNER, JJ.

JOHN BELTON O'NEALL, Pres't. Ct. of Errors.

equally divided in opinion" upon it: and having by its order "remanded the case to the Chancellors for their own disposition;" and the majority of this Court (Chancellors JOHNSTON, DARGAN and WARDLAW) being of opinion that the decree of the Chancellor, now under appeal, is correct:—it is, therefore, ordered that the appeal be dismissed and the decree affirmed.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

## 6 Rich. Eq. \*408

\*WILLIAM B. DORN v. WILLIAM BEASLEY and Wife.

(Columbia. May, 1854.)

[Injunction ⇨26.]

Equity has jurisdiction to enjoin a plaintiff at Law in an action of trespass to try title from executing his writ of habere facias possessionem so as to dispossess the defendant of the whole land—plaintiff being entitled only to an undivided part.

[Ed. Note.—Cited in Klinck v. Black, 14 S. C. 245.

For other cases, see Injunction, Cent. Dig. § 61; Dec. Dig. ⇨26.]

[Trespass ⇨48.]

Where plaintiff, in trespass to try title, has a verdict for an undivided fourth part of the land, the proper form of the writ of habere facias possessionem is to command the Sheriff to cause him to have possession of the said undivided fourth part.

[Ed. Note.—Cited in Stern v. Epstein, 14 Rich. Eq. 9, 10; Bannister v. Bull, 16 S. C. 229; Odum v. Weathersbee, 26 S. C. 248, 1 S. E. 890; Harrelson v. Sarvis, 39 S. C. 20, 17 S. E. 368; Whitaker v. Manson, 84 S. C. 31, 65 S. E. 953.

For other cases, see Trespass, Cent. Dig. § 132; Dec. Dig. ⇨48.]

[Trespass to Try Title ⇨48.]

And the proper mode of executing the writ, is for the Sheriff to cause the plaintiff to have possession of one undivided fourth part, and to leave the defendant in possession of the remaining three-fourths undivided.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 72; Dec. Dig. ⇨48.]

This cause was first heard at Chambers, February 17, 1853, before his Honor Chancellor Johnston, who made the following order:

"On hearing the bill and affidavits, and the answer with exhibit A. and on motion of McGowen, Perrin & Wilson, it is ordered that a writ of injunction do issue to restrain the sheriff, S. A. Hodges, Esq., and the defendants, William Beasley and Mary, his wife, from so executing the writ of "habere facias possessionem," issued in the case at law of William Beasley and Mary, his wife, against the said William B. Dorn, as to dispossess the said William B. Dorn of the land involved in the said suit at law; but leaving them at liberty to execute the said writ so as to put the said William Beasley and Mary, his wife, into possession of the said land in com-

mon with the said William B. Dorn—they having recovered the undivided fourth part thereof, and he, the said William B. Dorn, in the opinion of the Court, being entitled, as the effect of the said recovery, to retain as against them, the possession of the remaining three undivided fourth parts of the said land.

"The injunction to continue until the hearing of the cause, or until further order."

At Abbeville, June sittings, 1853, the cause was again heard before his Honor Chancellor Dargan, who pronounced the following decree:

Dargan, Ch. William Beasley and wife brought an action of trespass to try the title

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of a certain tract of land, against the \*plaintiff in this case. At October Term, 1852, the action at law was tried, and the plaintiffs in said action had a verdict "for one undivided fourth part of the land" described in the pleadings.

Mary Beasley was one of the heirs at law of Christian Towlune, and there were three others. Judgment was entered up upon the verdict, and a writ of habere facias possessionem was issued; under the authority of which, and by the direction of the plaintiffs in that action, the defendant, S. A. Hodges, the sheriff of Abbeville district, was about to eject Wm. B. Dorn, and put Beasley and wife in the exclusive possession of the whole tract.

Whereupon, William B. Dorn has filed this bill for an injunction to stay and enjoin the execution of the writ of habere facias possessionem. He alleges that he has been in possession of the premises for upwards of fourteen years, regarding it and using it as his own property. And he says that the effect of the verdict and judgment has made and constituted Wm. Beasley, and Mary, his wife, tenants in common with him—he interested to the extent of three-fourths, and they to the extent of one-fourth.

When the sheriff was about to execute the writ of habere facias possessionem, by delivering the premises into the possession of Beasley and wife, the defendant denied their right to eject him, but offered to deliver up a portion of the land to Beasley and wife, constituting, in his judgment, one-fourth part, to be held by them in severalty, he reserving for himself the exclusive possession of the remaining three-fourths to be held in his own right.

This arrangement not being acceptable to the adverse party, the said Dorn filed this bill, and has obtained an injunction to stay the execution of the said writ of habere facias possessionem. The only ground upon which he claims the aid of this Court is, that he is a tenant in common with Wm. Beasley and wife, as has been before stated. Upon this question he is concluded by the verdict at law. He either made this defence on that

trial and failed, or having an opportunity to

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make it, omitted to \*do so. In either case he is concluded. He cannot have another trial on that issue.

The plaintiff has not alleged or proved that he has acquired a title in common with the defendants, since the trial at law, from any of the defendants' co-tenants. He has not shown any title whatever in himself, or any facts from which title might be presumed.

He relies simply upon the terms of the verdict to make him a co-tenant with plaintiffs in the action of trespass to try title. He contends that inasmuch as the plaintiffs in that action only recovered one undivided fourth part of the premises, he, of necessity, must be a tenant in common with them of the remaining three-fourths—at least he must remain in possession until the parties entitled thereto shall recover against him.

The question whether he was a tenant in common is disposed of by the verdict. The action was trespass to try titles. The verdict was for the plaintiffs. And this could not have been the verdict, if the defendant in that action had been tenant in common. One tenant in common cannot maintain a possessory action against his co-tenant, except for an actual ouster. In that case, the action would be upon the ouster; and judgment would be that the plaintiff be let into a common possession.

The plaintiff in this bill contends that the judgment in the action to try the title must conform to the verdict, and the execution to the judgment. He further contends that inasmuch as the execution, conforming to the judgment and the verdict, only requires the sheriff to put Beasley and wife in possession of the undivided fourth part of the premises, that he (Dorn) is not to be ejected, but is to be suffered to remain in the possession of the remaining three-fourths. He asks, How is the sheriff to put Beasley and his wife in possession of the whole tract, under a judgment and execution, which requires him to put them in possession of only a fourth part. I apprehend that it would be impossible for these parties to be put in possession of an undivided fourth part, without being put in possession of the whole. As tenants in com-

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mon, they have a right in every \*foot—yea, in every particle of the soil of the whole tract. And the possession of the fourth must be a possession of the whole. When the other co-tenants are in with them, it is a joint possession of all the tract. Each is in possession of all. As against a stranger, each is entitled to the exclusive possession. The plaintiffs in the action at law recovered against this plaintiff as against a trespasser. Against him they are entitled to the exclusive possession of the whole. The rule of practice which restricts the recovery of the plaintiffs in an action of trespass to try title



to their proper proportion of the estate, is intended for the benefit and protection of their co-tenants, who are not parties to the suit; and not for the benefit of the defendant, who by the verdict is found to be a trespasser, and to have no rights.

The verdict, judgment and execution in this case is conformable with what has been the practice under similar circumstances.

And the duty of the sheriff to eject the defendant, against whom the verdict has been found, and all other persons in possession not being tenants in common, and to put the plaintiffs in possession, is also in conformity with the practice as I have known it. And this practice is sustained not only by its consistency with the rights of tenants in common, and the incidents of that estate, but by authority, which, so far as I known, has never been disputed.

The case of Dupont v. Ervin, 2 Brev. 400, is in all respects parallel to this, and is authority for every proposition which I have advanced. It is this case which has established the practice on this subject in the Courts of South-Carolina.

It is ordered and decreed that the bill be dismissed.

The plaintiff, W. B. Dorn, appealed on the grounds:

1. Because it is respectfully submitted his Honor erred in dissolving the injunction previously granted by Chancellor Johnston, and dismissing the bill under the circumstances of this case.

2. Because under a verdict and writ at law for an undivided fourth part of a tract of land, the plaintiff cannot oust the defendant of the whole tract, without transcending

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the terms of the recovery, affecting injuriously the rights of the defendant, and doing violence to truth and justice.

3. Because this Court will interfere by injunction in such case, to prevent the commission of an irreparable wrong, under the form of legal process.

Bauskett, McGowen, for appellant.  
Thompson, contra.

PER CURIAM. We see no sufficient reason to question the jurisdiction of the Court, as to which a doubt has been slightly intimated but not seriously urged at the hearing here.

In relation to the operation of the verdict at law, and the proper form of the writ of habere facias possessionem, and the mode in which it should be executed, as between the parties to the action at law,—this Court prefers to take the advice and judgment of the Law Judges:—these latter questions relating to doctrine and practice exclusively legal.

It is, therefore, ordered that this case be set down upon the docket of the Court of Errors, for the argument of the questions

just mentioned: and that a message be sent to the Law Court of Appeals, requesting the Law Judges to meet the Chancellors, for the hearing of them, and to appoint a time for that purpose.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

The questions sent up to the Court of Errors having been argued before it, the opinion of that Court upon those questions was now delivered by

WARDLAW, J. Of the two questions which have been referred to this Court by the Chancery Bench, that which relates to the proper form of the writ of habere facias possessionem, where the plaintiff in trespass to try titles has recovered an undivided share of an entirety sued for, presents no difficulty. In the case of Jones and Moore

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v. Owens, (5 Strob. 134.) the practice which had long established the proper form of the verdict in such a case to be for a certain share or fraction of the whole described, was maintained; and carried to the extent of holding a verdict to be too vague to authorise a judgment upon it, when it found "an undivided portion," without specifying what fraction of the whole the portion was, or otherwise defining the part that was to be recovered. The judgment must conform to the verdict, and the writ of hab. fac. poss. to the judgment. Run. on Eject. 401, 432.

It is true that in the case of Dupont v. Ervin, (2 Brev. 400,) the verdict was for four-ninths, and the judgment and writ of hab. fac. poss. seem from the report to have been for the whole; yet a motion to set aside the writ for irregularity was rejected. But the Court acknowledged the necessity for the conformity of the judgment and writ to the verdict, and seems to have acted in rejecting the motion upon the ground that the proper mode of executing the writ was the same, whichever of the two forms may have been given to it.

This Court is then of opinion, that in this case, wherein William Beasley and wife, as plaintiffs at law, had a verdict for "one undivided fourth part of the land" described, and entered judgment against the defendant, William B. Dorn, for recovery of the said undivided fourth part, the proper form has been adopted in the writ of hab. fac. poss. which requires the Sheriff to cause the said plaintiffs to have possession of "the said one undivided fourth part of the tract of land, and appurtenances described as aforesaid."

The other question, concerning the mode in which such a writ of hab. fac. poss. shall be executed, has been frequently mooted in the said Court of Appeals, for ten or twelve years last past, but hitherto has not been directly presented for adjudication. The

case of *McFadden and wife v. Haley*, (2 Bay, 457 [1 Am. Dec. 653],) decided in 1802, shews, that after grave doubts upon a point which was very plain in reference to the action of ejectment(a) it was there for the first time

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held that in our action of \*trespass to try titles, one tenant in common, suing singly for a whole tract, may recover his undivided share. The concluding remark made in that case, is this: "although the sheriff can not give possession of any particular part, it (the verdict and judgment) establishes the right of the party to a share, which, when divided and laid off, may be delivered to him by the Sheriff." Two other cases in the same volume ([*Perry v. Walker*] 2 Bay, 461 [*Perry v. Middleton*, 2 Bay] 541) sustained that case, and the principal point ruled in it has never since been questioned.

In 1810, the case of *Dupont v. Ervin* (2 Brev. 400) before cited, was decided; and that case is generally understood to rule, as its argument was certainly intended to maintain, that, in executing a writ of hab. fac. poss., where a plaintiff, one of several tenants in common, has recovered against a stranger an undivided share of a whole tract sued for, the sheriff should turn out the defendant, and give to the plaintiff exclusive possession of the whole. Brevard's Reports were not published until 1839: and so for nearly thirty years, the opinion in *Dupont v. Ervin*, was withdrawn from the notice of the profession. In the meantime, many of our cases had held that one tenant in common could not maintain trespass to try titles against a cotenant without proof of an actual ouster(b); and in at least three cases, (*Thomsen v. Gaillard*, 1832, 3 Rich. 423 [45 Am. Dec. 778]; *Davant v. Cubbage*, 1834, 2 Hill, 311; and *Henry v. Means*, 1834, 2 Hill, 334;) obiter dicta, arguendo, were made conformable to *Dupont v. Ervin*; which latter case had probably before 1832, come in manuscript to the knowledge of some members of the Court. But the intimation made in *McFadden v. Haley*, was familiarly known, controlled practice in some places, and led to inquiries, which resulted in the case of *Jones and Moore v. Owens*, (5 Strob. 134,) before cited, and the strong denial of authority for the conclusion reached in *Dupont v. Ervin*, which Judge Evans made in the dissenting opinion, which he delivered in *Hill v. Sanders*, (4 Rich. 533 [55 Am. Dec.

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696],) made \*merely for the purpose of overthrowing a reason upon which a distinction that he was assailing, had in a former case been rested. If, under recovery of any undivided interest in land described, possession of the whole shall be given to the plaintiff,

what more precision in a verdict is necessary than that which in *Jones and Moore v. Owens*, was held to be insufficient?

The question presented to this Court is not then considered to be settled, but must be resolved by the law of ejectment, modified, as that has been, by our Acts of Assembly and practice.

The modern action of ejectment, 3 Burr, 1292, "is the creation of Westminster Hall, introduced within time of memory, and moulded gradually into a course of practice by the rules of the Courts." When the writ of habere facias possessionem had grown out of the extension of the recovery from damages merely to the term itself, it followed that when this writ was awarded, the sheriff was authorised to obey its directions; and of course, where the writ was for the whole, to give to the plaintiff possession of the whole land described, by turning out every person whomsoever that might be in possession(c). But as the recovery is by John Doe, or some other nominal plaintiff, on the demise of the real plaintiff, and in default of appearance as well as in some other cases, is against the casual ejector, and not against the tenant in possession, it is apparent that, if the writ of possession, so effective, followed, of course, from a mere judgment had by the default, confession, or weakness, of the defendant on the record, the tenant in possession might be deprived of his possession, by process of law, without ever having had an opportunity to resist the title of the plaintiff. The action would then in reality be what, "in form it appears,—a trick between two to dispossess a third by a sham suit and judgment."(d) But this is prevented by the care with which the fictions have been contrived to facilitate the trial of titles with despatch, and without injustice. To every tenant in possession, express notice of the action and of the necessity of his

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\*defending it, must be given:(e) in various cases after judgment against the casual ejector, execution is stayed until leave to take it out has been granted upon motion after notice; and all irregularity, excess or injustice in executing the writ of possession, is corrected by the summary interposition of the Court(f).

In ejectment, the description of the land sued for is required, especially by the modern practice, to be much less exact than it was in the ancient real actions.(g) It is not expected that the Sheriff will be able, from the description in the writ of hab. fac. poss. to know of what to give possession; but the plaintiff is bound to point out what was recovered, and at his peril to take possession

(a) 3 Bulstrode, 185-6; 1 Burr, 329, Run. on Eject. 245, 222.

(b) 3 McC. 205, 303; 2 Hill, 311; 1 Bail. 307; 3 Rich. 418; Harp. 430; 1 Hill, 116.

(c) 3 Blac. Com. 203-4; Barnes' Notes, 791.

(d) 3 Burr. 1294.

(e) Runn. on Eject. 13, 146, 154, 403, 176.

(f) Runn. 434.

(g) Runn. 125, 203.



of no more.<sup>(h)</sup> Indeed, so loose a practice is sometimes indulged, even in respect to the thing recovered, that in *Doe dem. Drapers Co. v. Wilson*, (2 Stark. Rep. 477,) in ejectment for a house, it was admitted that the plaintiff was entitled to recover the lower floors, but it was contended that he was not entitled to the upper one, and evidence was offered in proof of this: Abbott, C. J. said, "where it is admitted that the plaintiff is entitled to recover a part of that which he claims, a question of boundary will not be tried. The generality of the description of the premises in an action of ejectment precludes an inquiry to the precise quantity which he is entitled to recover. If he takes too much on the execution of the writ of possession, the defendant may bring an action of trespass, in which the premises may be set out by metes and bounds—the action of ejectment decides nothing as to the quantum." But many cases are to be found where in ejectment an undivided share of land was recovered: some where the demise was laid of an undivided share—some where it was laid of the whole land; some where a tenant in common recovered against a cotenant, some where he recovered against a stranger.<sup>(i)</sup> In all such cases, the undivided share was considered as a part contained

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\*in the whole, but distinguished from the whole, just as a severed share is so contained and distinguished; and the plaintiff, according to general principles, must have sued out his writ of possession conformable to the judgment, and was bound to have it executed only to the extent of the recovery.

In North Carolina, where in ejectment verdict was rendered for the fictitious lessee upon only one of several counts, and that count contained a demise of the whole land, from a lessor who appeared at the trial to be entitled to only an undivided share, although the verdict was general, and the judgment and writ of hab. fac. poss. general too, (according to the practice indulged by the Court in the consciousness of its power over the whole action,) yet it was held that the plaintiff ought to have taken possession of only the undivided share, and should be permitted to recover, in trespass for the mesne profits, damages only to the extent of that share.<sup>(j)</sup>

So in New York, plaintiff in ejectment gave evidence of title to an undivided moiety only—there was, however, a general verdict, and motion for new trial. Per Curiam: "The motion is denied, but it is ordered that the plaintiff in the hab. fac. poss. take posses-

sion of an undivided moiety of the premises only."<sup>(k)</sup>

In Pennsylvania, too, it has been held that where the plaintiff in ejectment recovers an undivided part, he is to be put into actual possession thereof, with the defendant, by the sheriff. *Ash v. McGill*, 6 Whart. 301.

The case of *Roe ex demise of Saul v. Dawson*, 3 Wilson 49, shews that in England, if the plaintiff has recovered an undivided share, and the sheriff turns the defendant out, the Court will restore to the defendant the possession of the shares not recovered. That case was the case of recovery by one tenant in common against another: but that circumstance was immaterial to the matter ordered in it. The order depended upon the identity in principle between a share undivided, and a share severed—the difference be-

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tween either and the whole, and the \*right of the defendant to hold that to which the plaintiff had shewn no title. The proceedings in ejectment by one tenant in common against another, are precisely the same, as in ejectment by either of them against a stranger; except that in the former case actual ouster, if denied, must be proved, and therefore the defendant, in entering into the consent rule, will not be required to confess the ouster, but only the entry and lease:<sup>(l)</sup> after the ouster has been established, the defendant in one, is as much a trespasser as in the other, but in neither does his trespass against the plaintiff go beyond the title which the plaintiff shews. No case has been found where upon recovery of a part or share, divided or undivided, possession of the whole given to the plaintiff, has been sanctioned by a Court in England; and although neglected hands, unknown titles and divisions by death, are less frequent there than here, the absence of such a case, and of all distinctions to be found in any book of practice, as to the executing of the writ of possession, between share divided, and those undivided, or between defendants cotenants, and defendants strangers seem to shew that the rule deduced from *Saul and Dawson* is one of general application.

Our Act of 1744, 3 Stat. 612, (repealing the 4th sec. of an Act of 1712, 2 Stat. 584, which had confined the plaintiff to one action of ejectment for the same land, and against the same defendant,) allowed a plaintiff who failed in the first action, only a second one, and that to be brought within two years from the failure. The Act of 1791 (5 Stat. 170, § 4 and 5,) substituted the action of trespass to try titles for the two actions before used, of ejectment and trespass for the mesne profits; required that the real names of the plaintiffs and defendants should be used, and not fictitious names: and made applicable

(h) 1 Burr. 350, 144, 365; 5 Burr. 2673.

(i) 6 B. & C. 289; 1 Bur. 326; 1 Sid. 229; 3 Lev. 334; 1 Esp. 369; 11 East. 268; 6 East. 173; 3 Taunt. 120; 3 M. & W. 332; 5 Id. 564; Fitzh. N. B. 208; Run. 215.

(j) N. C. Rep. Iredell Law, vol. 9, p. 224, Holdfast v. Shepard.

(k) 1 John. Cases, 101, *Jackson ex Dem. Moore v. Van Bergen*.

(l) Runn. 160; 2 Taunt. 357; 3 Burr. 1895; 3 M. & W. 333; Add. 1227.

to the new action, all enactments before made for the action of ejectment. Another Act of 1791 (7 Stat. 276, § 16,) prescribed the notice whereby the writ of trespass to try titles is distinguished from that of trespass *quare clausum fregit*, and required the "Judges

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\*of the Court of Common Pleas, to form such reasonable and equitable rules, and lay the parties in actions of trespass to try titles under such just and reasonable terms, as will bring them to trial on the merits of the case, conformably to the principles of trials by ejectment under the former law and practice of the Courts."

In our action of trespass to try titles, the description of the premises recovered must be made by the pleadings or by the verdict, much more exact than is required in ejectment. The summary interposition of the Court to confine execution to the proper extent, has not been familiarly exercised with us, and would, with great caution, if at all, be carried to any inquiry concerning what was proved distinct from what appears by the finding of the jury. No subsequent action of trespass, brought by the defendant to have the boundaries defined, would be permitted to contravene what the judgment in the action of trespass to try titles established. That judgment, if for the plaintiff, concludes the defendant, and if for the defendant, concludes the plaintiff, who has brought no other action within two years, and is conclusive of quantity and boundary no less than of title. Even in ejectment, if the plaintiff suing for the whole, obtains a verdict for a part only, the judgment is, that he shall recover that part:(*m*) but for the other part whereof the jury acquitted the defendant, the judgment is, that the plaintiff be in mercy, and that the defendant go hence without delay. The necessary inference from the finding of part only for a plaintiff, has, with us, been held to be, even without the *sit in misericordia*, or *eat sine die*, that the other part is found for the defendant:(*n*) and that inference after two years, is not a mere acquittal of the defendant from the first action, subject to the plaintiff's right to bring another, but is a protection against all further attempt of the plaintiff to set up any title which was in proof, or might have been put in proof in the first action.(*o*) It amounts nearly to the judgment of *sit quietus* rendered for a defendant in a real action: (Cro. Eliz. 768,) and clearly then authorises the deduction that the plaintiff's demand as to the

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part not recovered \*was groundless, which deduction is made even in ejectment.

Tenants in common cannot make a joint demise:(*p*) but under the liberty which the

fictitious lessee, in ejectment, has of laying different demises in different counts, or one demise from a real lessee of some or all of such tenants, they may, in effect, join in ejectment:(*q*) of course, they may sever, and any one of them may bring ejectment for his share, and upon proof recover it, or may bring ejectment for the whole, and upon proof recover his share. After recovery upon various demises, they may join in the action of trespass for the mesne profits: and one who has recovered separately, may have his share of the profits in a separate action of trespass.(*r*) As our action of trespass to try titles is of the nature both of ejectment and trespass, tenants in common, may in it either join or sue severally, with like results as in the actions for which it was substituted. But in joining, they encounter more risk of improperly introducing too many plaintiffs, than is run where they can use the name of a nominal plaintiff, to represent all the interests which may sustain the demises. And in joining a less number than all, they, in strict pleading, may be liable to a plea in abatement for omission, in a writ of trespass, of third persons having common interests with the plaintiffs named. Ejectment is in form an action of trespass to recover damages for an ouster laid without a *continuando*. It is made peculiar by its fictions and its writ of possession: yet its form is carefully made to represent a real action of trespass between the nominal parties.(*s*) The indulgence as to joinder of plaintiffs, not being all the persons in interest, which has been extended to our action of trespass to try titles, has resulted from our adopting the practice in ejectment, without attempt to reconcile all its facilities to the change of form which our new action requires.(*t*)

Under our action to try titles, no less than under that of ejectment, the writ of *hab. fac. poss.* is amply sufficient to give to the plaintiff possession of that to which he has

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established \*title: and if a whole be described in the writ, the sheriff is authorised, by direction and at the risk of the plaintiff, to turn out from the whole every body in possession. ([*Broughton v. Broughton*] 4 Rich. 492.) But a low opinion of the wisdom of the Legislature, or of the conscientiousness of the Courts, must be conceived, if it is supposed that by this is meant, that wherever a plaintiff has recovered land in trespass to try titles, and sued out his *hab. fac. poss.* all persons who are in possession, although they may not be in any way privies to the suit, nor have any knowledge of its existence or result, shall, at the pleasure of the plaintiff, be necessarily turned out.

(*q*) Runn. 292-3; Tidd. 1205; 3 Camp. 190.

(*r*) 5 Maule and Sel. 64; 3 Wils. 118; 2 W. Blac. 1077; Runn. 443.

(*s*) Runn. 23, 138, 221.

(*t*) 4 McC. 144, *Boyleston v. Cordes*; 2 Brev. 400; [*Syme v. Sanders*] 2 Stro. 332.

(*m*) Runn. 405.

(*n*) *Dyson v. Leek*, 5 Stro. 141.

(*o*) *Farmer v. Miller*, 5 Rich. 480.

(*p*) 2 Wils. 232.



No such conclusion can be fairly drawn from the case of *ex parte Black*, (2 Bail. 9:) for although general expressions are loosely used there, it may be seen that reference is made to the means by which the rights of third persons in proper cases may be protected, and that in that case, no third person was claiming the interposition of the Court, but a delinquent sheriff was making hearsay an excuse for neglect of his duty.

In our State, there have been many grants for large tracts of land, and upon some of them have been many settlers, claiming with every variety of right, from the honest and perfect title to the most frivolous pretence. If a plaintiff, having or pretending a just claim to one of these tracts, should sue a squatter found upon it, describing the whole tract in his writ and declaration, and through the default of the defendant, or by collusion with him, should obtain a verdict, it can not have been ever considered that this plaintiff could be permitted to turn out all the other settlers as well as the defendant, and take to himself exclusive possession of the whole tract. If, in such a case, or in the case of a small grant, the plaintiff should, in his writ, describe only a specified parcel, but should bring his action against a mere occasional occupant, or casual ejector, and recover the whole parcel described, or any specified part thereof, the law would, by abuse, become an instrument of monstrous wrong, if the real occupant could, by a writ of *hab. fac. poss.* be deprived of the possession which he rightfully held. It might well be said that a

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Court which would permit this, had \*neglected the injunction of the Legislature to form reasonable and equitable rules for rendering the action, which was provided, a fit means for the trial of titles. It can not be doubted that in every such case the Court, in the conscientious exercise of its summary jurisdiction, would, upon proper application, interpose and confine the plaintiff to acquiring possession, only of that which he had recovered, and only from him against whom he had recovered, and such other persons as might be considered privies.<sup>(u)</sup> To persons claiming under the defendant, and perhaps to all who came in after commencement of the suit, with that notice which *lis pendens* is presumed to give, the recovery might be allowed to extend: but there is plain propriety in the rule laid down by Spencer, J., in *New York*, where he ordered restitution to an applicant who had been dispossessed: "It is a settled rule of practice that no tenant who was in possession, anterior to the commencement of an ejectment, can be dispossessed upon a judgment and writ of possession to which he is no party." (*Ex parte Reynolds*, 1 Cains, Rep. 500.)

The reasons which have been stated in the

case of *Dupont and Ervin*, and in the argument here, for supposing that the sheriff may go beyond the exigency of the writ of *hab. fac. poss.*, and give to a plaintiff possession of the whole, when possession of part only, or partial possession only, is commanded, seem all to be insufficient.

First. The plaintiff has an undivided interest—his right is a right in every particle—therefore he must have possession of the whole.

Answer: An interest in the whole is not the whole: a right in every particle consists with the enjoyment of every particle in common with persons who are in possession of interests, to which the plaintiff has no right.

Second. The share recovered cannot be distinguished from other shares, and therefore possession of the whole must be given.

Answer: If the recovery is too vague to

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shew the thing re\*covered, there can be no execution: but there is no vagueness; the recovery is of a specified share—an ascertained interest in the whole to be enjoyed in common with others—a thing incapable of being separately pointed out before partition.

Third. The co-tenants not named in the judgment are also entitled to their undivided shares.

Answer: Where a plaintiff sues for the whole, and recovers an undivided share, it can not appear that there are any persons entitled besides plaintiff and defendant. The judgment in effect is, that the plaintiff recover part, and the defendant continue to hold the remainder. The plaintiff can not recover at all but on the strength of his own title, and of course can not found any right upon the weakness of the defendant's. The defendant was not bound to shew any title, but for the purposes of the action to try titles must be presumed to have every interest shewn to exist, and not shewn to be in the plaintiff.<sup>(v)</sup> Possession gives right against all but the plaintiff who shews an unobjectionable title; the party who would disturb the possession must first establish a legal title to whatever the law is required to take from another and give to him. Recovery of part, where the whole is sued for, is just the same as recovery of the same part in a suit brought for it only. In a suit for an undivided share only, defendant might have admitted the plaintiff's right to the share claimed, and have made no defence, under the just assurance that more than was claimed would not be recovered, and that the rights of neither defendant nor other persons to something more would be investigated. So, where in a suit for the whole, the plaintiff has established a title to only an undivided share, the defendant may have been willing to admit the plaintiff's title to that extent,

(v) *Runn*, 15, 117; *McColman v. Wilkes*, 3 Strob. 474 [51 Am. Dec. 637]; [*McCall v. Boatwright*] 2 Hill, 439.

(u) *Rubb*, 436-7; 4 *Burr*, 1395.

and was not bound to shew that other shares belonged to himself, and not to third persons who may have been former owners. If the possession had been held in common by the defendant and other persons, and the plaintiff acknowledging those other persons to be rightfully tenants in common with himself,

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but not with the defendant, had sued the defendant only for the undivided share claimed by the plaintiff, and recovered it, the necessity of turning the defendant out, might then have resulted from the impossibility of otherwise giving to the plaintiff possession of the thing recovered. Four being in, each entitled to one-fourth, recovery of a fourth against one should not disturb the others, and without disturbing them, could be executed only by crowding the defendant out in the process of transferring the possession of a fourth from him to the plaintiff. The result and its propriety would be made plainer by the plaintiff's describing in his original writ and declaration, the fourth sued for, as a share of a whole owned by himself and others as tenants in common, to wit: himself and the three other persons, who, at the commencement of the suit, were in possession along with defendant, or by his otherwise so defining the share as to shew exactly which of the persons in possession, are entitled to hold, and in what proportions. But by suing for a whole, the plaintiff acknowledges the defendant to be in possession of a whole: and the recovery of part of what defendant has in possession, raises no necessity for turning him out to put plaintiff in possession of that part.

Fourth. The Sheriff cannot disturb co-tenants in possession: but the plaintiff at his peril may point out who are not co-tenants, and so turn out the defendant.

Answer: The suit for the whole contradicts the supposition that any co-tenants are in possession: if the suit had been for the undivided share only, a recovery of that would be executed by giving that to the plaintiff, without disturbance of third persons, who ever else might be left in possession of shares not recovered: the case of an undivided share specially defined, where the other co-tenants are in possession, is not the case before us. If the sheriff should unnecessarily, at the instance of the plaintiff, turn the defendant out, upon the supposition that third persons have right, it might be that upon defendant's application to the Court, on the ground that he is really the co-tenant, an issue as to shares not recovered and therefore before

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found for the defendant, would result in defendant's establishing a right to them, which he was not before required to shew in answer to the plaintiff's title shewn only to the share recovered.

Fifth. The defendant must be presumed to have no right to keep possession, "because if

he had been co-tenant he might have pleaded that circumstance in abatement."

Answer: No plea in abatement upon the ground of co-tenancy between the parties, plaintiff and defendant, could be sustained (1 Salk. 4): such co-tenancies shewn in evidence under the general issue would be a bar to the action, in either ejectment or trespass, without proof in reply of an actual ouster, destruction or some equivalent matter. The plea in abatement must have been suggested by the rules applicable to the action of trespass, where all of those joint owners of an interest, who should have joined in an action, have not been made plaintiffs against a stranger.

Sixth. The recovery against the defendant of an undivided interest shews that he is a mere trespasser, not entitled to hold any share of the land; because the possession of one tenant in common is the possession of all, and no action of trespass lies by one of them against another for possession of the land owned in common.

Answer: The legal conclusion from defendant's possession, and the plaintiff's failure to recover part, is that plaintiff has no title to that part, and that against him the defendant has a right to hold it. If a trespasser, the defendant is not, as to that part, a trespasser against the plaintiff. By proof of actual ouster, a tenant in common may maintain ejectment or trespass to try titles against his co-tenant. An actual ouster is not now a matter so difficult of proof as formerly it was considered. It no longer means "some act accompanied by real force:" the sole perception of the profits, with nothing more, will not constitute it: but such perception, with refusal of entry to the co-tenant, or denial of his title, will be sufficient evidence of it. (11 East. 49.) It may be inferred from circumstances which are matter of evidence for a jury. The relaxation of the ancient doctrine

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\*on this subject, and full explanation of it made by Lord Mansfield and Justice Aston in the case of *Fishar v. Prosser* (Cowp. 218,) have been adopted by our Courts, ([*Johnson v. Payne*] 1 Hill, 111,) and are nowhere more fully recognized than in *Henry v. Means*, (2 Hill, 334,) where Judge O'Neill says that "the defendant's plea of the statute of limitations would be such evidence of the assertion of an adverse title as would amount to an ouster" sufficient to sustain trover by one tenant in common of a chattel against another. The possession of one tenant in common is that of his co-tenant only when the one holds "as tenant in common eo nomine," or as Justice Aston says, "when the one holds possession as such, and receives the rents and profits on account of both."

Suppose a case, much like that of *Fishar v. Prosser*, where a plaintiff in ejectment sues a defendant who enters into the ordinary consent rule, and for defence relies on the



statute of limitations: the plaintiff shews the entry of defendant as tenant in common: the defendant shews adverse possession, accompanied by denial of plaintiff's right—which amount to actual ouster—but fails by reason of some disability to make good a defence under the statute of limitations; and the plaintiff recovers an undivided share:—where is the difference between a tenant in common and a stranger in this case? Suppose that under our law and practice a defendant in possession believes himself to be the true owner, and is sued in trespass to try titles by a plaintiff whom he does not know, but who has acquired a title to one undivided sixteenth part of the land, by taking a conveyance from some person who retained the sixteenth by reason of a trifling defect in one of the links which constitute the defendant's chain of title: the defendant in the trial shews himself fairly entitled to the other fifteen-sixteenths, but the defendant shews an actual ouster, and recovers one undivided sixteenth part. Ought the defendant to be turned out of the whole, and put to the hazard of bringing (3 Burr. 1290) his action in turn, with all the disadvantage which pertains to a plaintiff more than a defendant in

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an action to try titles? Would the summary interposition of the Court prevent it? Upon what ground could the Court interpose in many cases where the evidence would leave it uncertain what had been established? No ground in any case could be suggested more plain than this, that the plaintiff must be confined to what he has recovered, as that is shewn by the verdict, judgment and writ of hab. fac. poss. and not by doubtful inferences of equivocal circumstances, nor by the rash assumptions of a plaintiff willing to encounter the risk of taking more than has been awarded to him.

Seventh. The plaintiff should not be required to go into possession with one whom he would not select for a companion, or who as he knows has unjustly intruded upon his possession.

Answer: Tenants in common are always subject to the chance of unpleasant companionship. The plaintiff is in no worse condition than if his acknowledged co-tenant had sold or leased to the defendant. If the plaintiff or any person holding for him was in possession, and was intruded on by the defendant, then in an action of trespass *quare clausum fregit* grounded on the possession only, damages could have been recovered from the defendant unless he shewed his right to enter.

Eighth. The plaintiff will be subject to various embarrassments in obtaining partition, if the defendant is allowed to remain in possession of an undivided interest:—by going in with the defendant, he will acknowledge him to be co-tenant:—he may make actual partition of the land with the defendant, and

then the share assigned to him will still be subject to the undivided interests held by the other true co-tenants:—whilst his interest in other shares will be vested in defendant:—or the land may be sold for partition, whereby the plaintiff's right will be divested, and the price be reduced to his disadvantage by the doubts which will rest on the defendant's title:—or the land may be assigned by Commissioners appointed to make partition, to the plaintiff on his payment of money, and afterwards he may lose shares of it by establishment of the rights of the other co-tenants.

Answer: All of the inconveniences here

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suggested are consequences drawn from the presumption that the defendant is a co-tenant with the plaintiff, which presumption is supposed to be made when the defendant is left in possession. This presumption, however, is not raised, and the consequences therefore do not follow. The conclusion of the law, the judgment itself and not a mere presumption, is, that the defendant has a right to hold the shares not recovered by the plaintiff: all presumptions in favor of the defendant relate only to the action tried, and are but objections which may be suggested to the title shewn by plaintiff. By what right the defendant is entitled to hold, has not been investigated, nor has the title of any third person been concluded or in any way examined.

Where the plaintiff has recovered and been put in possession of one-fourth, if one of the other tenants in common, (supposing there to be three, each entitled to a fourth,) should recover against the defendant another fourth, that one must also be put into possession along with plaintiff and defendant, thus reducing the share left in defendant's possession: and by successive actions of the two remaining co-tenants, the defendant might be entirely excluded. The like result might be effected by a joint action of the three other tenants in common: and under either course of proceeding, it would, as we have said before, be probably facilitated by apt specifications of the undivided shares sued for and recovered.

By taking possession to be enjoyed in common with the defendant, the plaintiff acknowledges that beyond this he has no right to disturb the possession which the defendant before held: but he makes no acknowledgment of defendant's title to the shares left in defendant's possession—that is a matter in which third persons as well as the defendant may have interest—no right to interfere with it has been shewn by the plaintiff.

By making partition with the defendant, (either voluntarily or under compulsory proceedings to which only plaintiff and defendant were parties,) the plaintiff might admit the defendant's title, and might be subjected to inconvenience and loss, upon the defects of that title being shewn by the establish-

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ment \*of rights in third persons,—just as every vendee may suffer from defect in his vendor's title. But whether actor or respondent, in proceedings for partition, either at Law or in Equity, the plaintiff, by bringing properly to the view of the Court the rights of third persons, might defeat any attempt of the defendant to have a share assigned to him, in severalty, of that in which he is entitled to no share at all: and moreover, the plaintiff, by proper proceedings, might procure adjudication of questions between the defendant and third persons, and obtain partition between himself and the persons really entitled.

Upon the second question referred to it, this Court is, then, of opinion that the proper mode of executing the writ of habere facias possessionem in the action at law, W. Beasley and wife, plaintiffs against Wm. B. Dorn, defendant, is for the sheriff to cause the said plaintiffs to have possession of one undivided fourth part of the tract of land and appurtenances described in the said writ: and to leave the defendant in possession of the remaining three-fourths undivided.

And it is ordered that this opinion be certified to the Court of Appeals in Equity, in answer to the two questions referred to this Court as above mentioned.

JOHNSTON, DUNKIN and WARDLAW, CC., and WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

O'NEALL, J., dissenting, said, that believing the decision in this case was subversive of a long course of practice in this State, and was calculated to involve the Court in many difficulties, he hoped that stating his views in his own way might not be considered either as the result of too much self-confidence or the want of proper respect for other members of the Court. He said that he had been for forty years concerned as a lawyer, and a judge in the administration of Law, and if with twice the term of experience prescribed by Sir John Fortescue, he was still unable to see this case in the clear light in which the majority think they see it, it must be ascribed to either his lack of knowledge, or to an opinion founded on a long settled practice.

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\*Said he, I think, however, the whole error of the decision is in the confusion produced by general terms. I admit that trespass to try title will lie, by one co-tenant against his fellow, when there has been an actual ouster. But can he sue his co-tenant for the whole close? I conceive not. He must sue for the undivided share or shares to which he is entitled. Runnington, 432, of his treatise of Ejectment, tells us, the plaintiff, as tenant in common, recovered possession of five-eighths of a cottage. The case itself, in 3 Wilson, 49, shews that the plaintiff claimed, as ten-

ant in common, possession of five-eighths with the defendant who was entitled to the other three-eighths; and hence the recovery and execution. In Fitzherbert's *Natura Brevium*, 91, he states: "If a man have a fold in common with two other men, and the one do disturb him to set up his clays and pales, and break them, he shall have an action of trespass against them in this form *quare vi et armis*, thus:

"If the prioress of T. shall make you secure, &c., then put, &c. E. &c., to shew wherefore, seeing that the same prioress ought to have a certain fold at F., together with the aforesaid E. and M. of B, and she the said prioress and her predecessors, from time out of mind, always hitherto have been accustomed to have such fold with the aforesaid E. and M. and their ancestors; the aforesaid E. with force and arms broke the clays and pales of the said prioress, in the fold of the said prioress, E. and M., at the said town of F., lately erected, and placed, and hindered her the said prioress, so that she could not put her clays and pales in the fold aforesaid, as belongeth to her, or partake any profit of the said fold, and other, &c."

This form shews the kind of writ which lies in trespass, by one tenant in common against another for an ouster. Our action to try title is trespass, and ought to shew the nature of the interest affected. One tenant in common might very well sue his co-tenant to answer to him in a plea, wherefore with force and arms he, the defendant, did oust him the plaintiff from the close or plantation, &c., whereof he, the said plaintiff, was seized with the defendant, in equal, undivid-

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ed moieties, so that \*he could not have the possession of the same, according to his interest therein, and other wrongs and enormities, &c.

Such a writ, followed up by the proper declaration, plea by the defendant, and verdict for the plaintiff, would authorize the execution, as said in *Saul and Dawson*, so as to put the plaintiff in possession with the defendant. The error of the Court, with due deference be it said, is in adopting this mode of execution when the plaintiff, by his writ, claims the whole close against the defendant, and acknowledges no title to be in him.

Cases like that which we are considering are an innovation on the Common Law rule. At Common Law it was held that all tenants in common, joint tenants or co-parceners, must join against any stranger in possession. *Com. Dig. Abatement*, E. 2-8.

But in *McFadden v. Haley*, 2 Bay, 457 [1 Am. Dec. 653], this rule was modified, and it was held that one of several distributees suing for the whole close against a stranger, may recover his undivided share. In that case, the Court says, "that the sheriff cannot give possession of any particular part: it establishes the right of the party to a share,



which, when divided and laid off, may be delivered to them." This does not mean that the defendant is tenant in common with the plaintiff, and that his share is to be laid off in partition with him. It means directly the contrary, that the defendant is not entitled to the possession of the close against the plaintiff, and that he may have his undivided share laid off, with others who may be entitled with him. For remember, the plaintiff has asserted and established a hostile title, paramount to the defendant, and which he can never again set up. In *Taylor & Young v. Stockdale*, 3 McC. 302, the plaintiffs were entitled to two-eighths and defendant to six-eighths, yet, in that case, as soon as the fact appeared of the tenancy in common, the plaintiffs were non-suited. Why? Because they had claimed the whole close against the defendant as a stranger. In *Harman v. Gartman*, Harp. 430 [18 Am. Dec. 659], it was held that each tenant in common was entitled to possession: defendant, a tenant in

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common, having possession, \*the tenant of the other enters and plants his close; defendant ploughed it up, and was held to be no trespasser. Why? Because it was his actual possession. Instead of ploughing it up, he might have sued in trespass, q. c. f. for breaking and entering his close, and relied upon his possession, and recovered.

Such a thing as a recovery of an undivided share of an entire close, claimed by the plaintiff in trespass to try title against the defendant, as a stranger, being considered as establishing a tenancy in common with the defendant, is a startling proposition; for I have always supposed that the verdict for the plaintiff, in such an action, was conclusive of the title of the plaintiff, as paramount to that of the defendant. The defendant cannot after it bring an action on it. For, as is said in *Manigault v. Deas*, Bail. Eq. 293, it is a general rule, "that a direct final judgment of a Court of competent jurisdiction on the same subject matter between the same parties, and privies in law or estate, is conclusive, and cannot be examined in a subsequent original action in the same or any other Court."

Let us now see how the defendant at law, Dorn, stands against the co-distributees of the plaintiffs, Beasley and wife. The recovery at law is produced, and it is shown that other persons are co-distributees of the plaintiffs, Beasley and wife. Can Dorn dispute their title? Certainly not: for it has been established against him by their privy in estate. A recovery by one co-distributee tenant in common, or joint tenant, against a trespasser, must be a recovery of the whole close, or our cases which declare the nonage of one of the distributees or tenants saves

the others from the operation of the Statute of Limitations, are wrong. If the recovery reaches only the separate interest, then it can not be that minority could protect any one save the infant. Our Courts have always regarded all as so interested, that if one was entitled to recover, it secured to all the whole close. *Thomson v. Gaillard*, 3 Rich. 418 [45 Am. Dec. 778]; *Gourdine v. Theus*, 1 Brev. 326; *Hill v. Sanders*, 4 Rich. 521 [55 Am. Dec. 696].

So much has been deemed necessary to put this case right on the general doctrine. It

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now remains to consider the specific \*question: How ought the writ of habere facias possessionem to be executed? I agree with Chancellor DARGAN in the view expressed in his circuit decree. The writ ought to be executed by putting the defendant out, and putting the plaintiffs in possession. It is the only way in which the judgment of the Court can have effect. The plaintiffs have established a right to be possessed of an undivided share of every part of the close against the defendant as a stranger. How can this recovery be enforced? It must be by turning him out. If the record shewed he was a tenant in common, then it would be very true, that the plaintiffs must have possession with him. But that is his misfortune: by the record he appears to be a mere trespasser. The case of *Dupont v. Ervin*, 2 Brev. 400, settled the practice, that the execution of the hab. fac. poss. in just such a case as this, should be as I have already stated. I never knew it to be doubted, until the question was agitated in *McCall v. Campbell*, in '42 or '43. Then, however, it was a mere doubt, expressed by my brethren EVANS and WARDLAW. It was, however, then waived. Since then it has often been agitated, and has at last reached a decision in which, although I cannot concur, yet I am sure I shall rejoice if it be found, on trial, a wise and practical one.

DARGAN, Ch., concurred.

In the Equity Court of Appeals the following judgment was then pronounced by

JOHNSTON, Ch. The judgment of the Court of Errors upon the points submitted to them having shewn the correctness of the order of injunction granted in this cause the 17th of February, 1853, and the incorrectness of the decree dismissing the bill, it is ordered that said decree be set aside; that the said order be restored; and that the case be remanded to the Circuit Court for hearing upon the points yet undetermined.

DUNKIN, DARGAN and WARDLAW, CC., concurred.



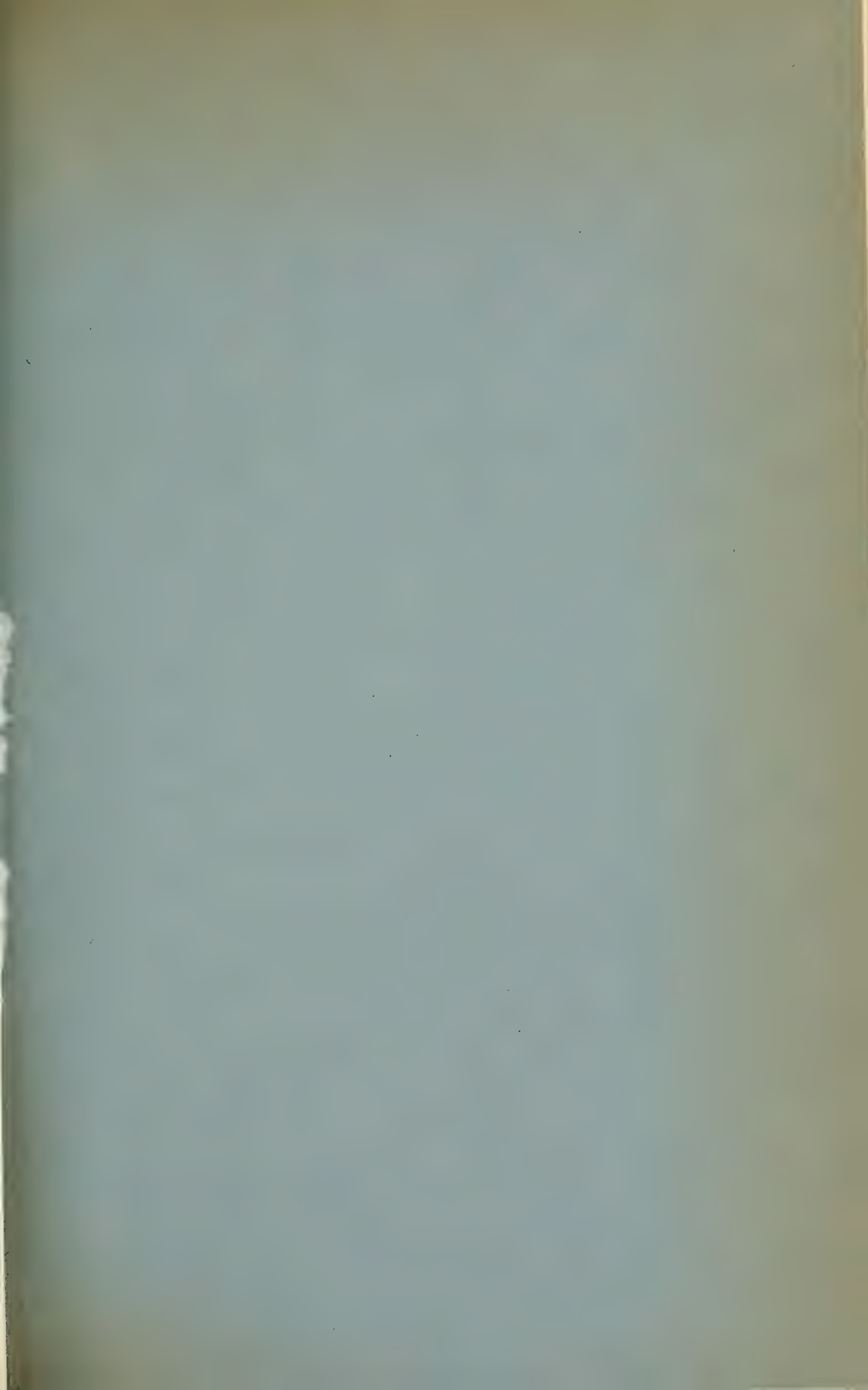




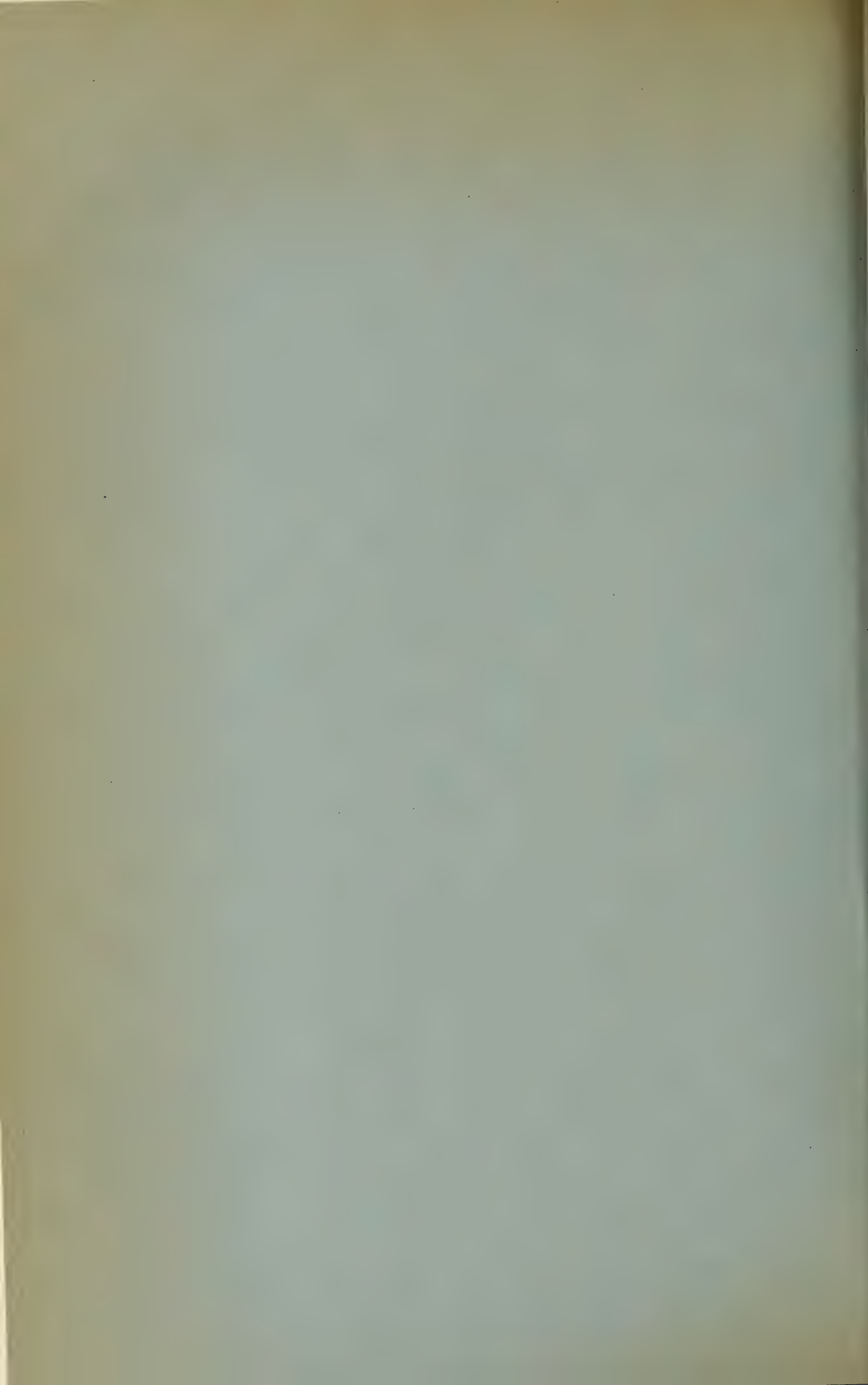












REPORTS  
OF  
CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS AND COURT OF ERRORS  
OF SOUTH CAROLINA

VOLUME VII

FROM NOVEMBER, 1854, TO MAY, 1855, BOTH INCLUSIVE

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# CHANCELLORS

DURING THE PERIOD COMPRISED IN THIS  
VOLUME

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HON. JOB JOHNSTON,  
“ BENJ. F. DUNKIN,  
“ GEORGE W. DARGAN,  
“ F. H. WARDLAW.



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# CASES IN EQUITY

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA, NOVEMBER AND DECEMBER TERM, 1854

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,  
“ BENJAMIN F. DUNKIN,  
“ GEORGE W. DARGAN,  
“ F. H. WARDLAW.

7 Rich. Eq. \*9

\*DANIEL PRESCOTT v. JOHN B. HOLMES.

(Columbia. Nov. and Dec. Term, 1854.)

[*Executors and Administrators* ⚡388.]

A purchaser of personal property at an administrator's sale, who has paid the money, cannot recover it back, either from the administrator or distributees, on the ground of an implied warranty of title or soundness.

[Ed. Note.—Cited in *Commissioner in Equity v. Smith*, 9 Rich. 522; *Welsh v. Davis*, 3 S. C. 118, 16 Am. Rep. 690; *Latimer v. Wharton*, 41 S. C. 511, 512, 19 S. E. 855, 44 Am. St. Rep. 739; *People's Bank of Greenville v. Bramlett*, 58 S. C. 486, 36 S. E. 912, 79 Am. St. Rep. 855; *Godfrey v. E. P. Burton Lumber Co.*, 88 S. C. 145, 70 S. E. 396.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1577; Dec. Dig. ⚡388.]

Before Dargan, Ch., at Edgefield, June, 1853.

Dargan, Ch. E. M. Collier, (defendant's intestate,) died in possession of a negro man slave named Isaac. By virtue of an order from the Ordinary, the defendant, John B. Holmes, as administrator of E. M. Collier, on the 3d December, 1839, sold the personal estate of his intestate; and at that sale, he sold the negro Isaac to the plaintiff, for \$900, which was paid.

It seems that at his death, E. M. Collier had a good title only for a life estate in Isaac: that is to say, he had a good title to Isaac during the life of one Rachel Holloway. At her death Isaac was to go by way of re-

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mainder, to Lucy Reese, \*the daughter of the said Rachel Holloway. The latter died about the 10th December, 1847; and afterwards Lucy Reese filed her bill in this Court,

against Daniel Prescott and several other persons, for the recovery of Isaac and other negroes from Prescott, and for the recovery from the other defendants of negroes to which she had a similar title.

Upon the hearing of that cause, it was adjudged that Lucy Reese should recover the negroes, Isaac among the others, and they were decreed to be delivered up.

The plaintiff has filed this bill against the administrator of E. M. Collier, and his distributees, (the whole estate having been divided,) to recover damages for the failure of the title, upon the implied warranty; for it is not pretended that there was any express stipulation as to the title.

The defendants contend, that if the plaintiff has a right to recover, he has an adequate remedy at law, and they except to the jurisdiction of this Court to entertain a suit upon a warranty. This objection cannot prevail, because the estate of E. M. Collier has been distributed, and the plaintiff is seeking to subject said estate in the possession of the distributees to the payment of his claim. The plaintiff rests his claim to recover upon the implication of law, that where the vendor has received full consideration, he warrants both the title and the soundness.

In the application of this doctrine in cases involving questions of soundness in the physical qualities of chattels sold, it is clear that the implication of a warranty does not arise, where the defects amounting to unsoundness are patent; or where the vendee has been fully informed of them by the vendor; or where the vendee has information from other sources. These circumstances rebut the implication. For it is unreasonable to suppose, that a person purchasing property with a full



knowledge of its physical defects, would not require an express warranty, if such were the stipulation between the parties.

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\*The principle applies with equal force in sales, where the title proves to be defective. Where the purchaser buys with a full knowledge of the defects of the title, it\* must be presumed to be a waiver of the warranty; which would otherwise be implied. In the reason of this distinction, there can be no difference in its application, whether to questions of soundness or of title.

The intestate E. M. Collier purchased Isaac from Lewis Holloway who was the son of Rachel Holloway, the life tenant, by whom Isaac had been conveyed to the said Lewis Holloway.—It appears from the evidence of Lewis Holloway, that E. M. Collier, when he purchased Isaac, had notice of the claim of Lucy Reese. The contract was not to be considered consummated, until Lewis Holloway had extinguished the claim in remainder of Lucy Reese. This was supposed to have been accomplished by the release of Lucy Reese and her husband James Reese, and the contract between Lewis Holloway and E. M. Collier for the sale of Isaac was carried into effect. This release was considered and held to be null and void by the decree in the case of Lucy Reese v. Prescott and others. It does not appear that J. B. Holmes, the administrator of Collier, had notice of the defect in the title to Isaac at the time of the sale to the plaintiff Prescott. But it does very clearly appear, that at the date of his purchase of Isaac, from the administrator of Collier, on the 23d December, 1839, the plaintiff Prescott had notice of the claim of Lucy Reese. He was the son-in-law of Rachel Holloway, and in the divisions by her in 1829, he received portions of the negroes claimed by Lucy Reese in remainder, amounting to about one-sixth thereof. And in 1829, with the view of quieting his title to the one-sixth, which he got in the division of 1820, he obtained a release from James Reese (the husband of Lucy Reese) of the interest and estate of the said Lucy Reese therein.

In 1819 and 1822, James Reese and Lucy Reese had instituted proceedings in the Court

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of Equity in the nature of a bill \*quia timet, against Edward B. Holloway and Rachel Holloway, the object of which was to secure the forthcoming of the property at the termination of Rachel Holloway's life estate. In his answer of the 15th November, 1849, to the bill of Lucy Reese, Daniel Prescott sets up in bar to her claim, James Reese's release of 18th December, 1839. And he says, he was induced to obtain that release in consequence of the proceedings of 1819 and 1822. In the division by Rachel Holloway, Isaac fell to the share of Lewis Holloway, her son, and he sold to E. M. Collier, and at the sale of his estate as has been before

stated, he was bought by Daniel Prescott. Isaac was of the same stock of negroes to which claim was set up by James and Lucy Reese in 1819 and 1822. I think the inference is irresistible, that Prescott, a party to the division, in which Isaac fell to Lewis Holloway, was aware of the claim of Lucy Reese upon Isaac, as well as upon his own share in that division. I think he was as fully informed of the state of the title as was the intestate E. M. Collier, and better than even John B. Holmes the administrator, who made the sale.

I cannot doubt, but that\* when the plaintiff purchased Isaac he knew the state of the title, and intended take the risk.—Under these circumstances, I am of the opinion that the implication of a warranty is rebutted.

It is ordered, and decreed that the bill be dismissed.

The plaintiff appealed from the decree made in this case, and moved to reverse the same, and for a decree for the plaintiff on the grounds:

1. Because it is respectfully submitted that his Honor misconceived the facts, in stating that Lucy Reese was a party to the proceedings in Equity in the nature of a bill quia timet, in 1819 and 1822. Those proceedings having been in the name of James Reese alone, as plaintiff, and in which the protection of his rights only, although claimed through his wife, and not of her rights, was sought and asked of the Court.

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\*2. Because, it is submitted, the plaintiff, Prescott, did not, at the time of his purchase of Isaac in 1839, have notice of the claim of Lucy Reese; and the price given, being the full value, repels the presumption that he knowingly took the risk of Lucy Reese surviving her husband.

3. Because an administrator by a public sale of the chattels of his intestate, under authority of law and by an order of the Court of Ordinary, warrants the title, as well as the soundness of the property, in all cases where public notice is not given to the contrary, and such warranty forms a part of the terms of sale, applicable as well to those who may have, as to those who may not have notice of an imperfection in the title.

4. Inasmuch as E. M. Collier, the intestate, had equal notice with the plaintiff Prescott, of the claim of Lucy Reese to the negro in question, and the sale having been made by public auction without any reservation of warranty, no inference can be drawn that the sale was with warranty as to such persons as had no notice, and without warranty, if bought by one having notice of Lucy Reese's claim; that is to say, assuming that both Collier and Prescott had notice of the claim of Lucy Reese, yet the public sale by Holmes, the administrator, without a public disavowal of warranty of title, implied a general war-

ranty to whomsoever might become purchaser, whether with or without notice.

Bauskett, for appellant.

Carroll, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. This Court is not dissatisfied with the views of the evidence taken by the

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Chancellor from which he infers \*that, at the time of the purchase in 1839, the plaintiff had notice of the infirmity in E. M. Collier's title, and consequently would not be entitled to recover on an implied warranty. But a majority of the Court are also of opinion that, after the contract has been fully executed and the money paid, it cannot be recovered back either from the administrator or distributees of an estate upon the ground of an implied warranty. It is very difficult to add anything to what is said by Mr. Justice Evans (whose judgment was that of the Court,) in *Evans v. Dendy*, 2 Speers, 9 [42 Am. Dec. 356]. The doctrine of an implied warranty was an innovation upon the principles of the common law which required parties to examine for themselves, and, if they deemed it necessary, to protect themselves by proper covenants. Judges of the largest experience have often regretted the introduction of a different doctrine as the source of much unprofitable and vexatious litigation; and the universal opinion seems to prevail that it should not be further extended. It has been repeatedly held that the common law rule of caveat emptor applies to sheriff's sales. No case can be found in which a purchaser of personal property at the sales of an executor or administrator, who has paid his money, has been allowed to recover it back for unsoundness in the property or defect of title. In all the cases cited for the plaintiff this was relied upon by way of defence in an action for the purchase money, and the equitable distinction may have been recognized between an executed and an executory contract. Attempts have been made to go further, and to recover back the purchase money, but, so far as may be learned from the reports, the right has never been recognized. In *O'Neill v. Abney*, 2 Bail. 318, the Court ruled that an administrator de bonis non was not liable on an implied warranty in a sale by his predecessor, the former administrator.—It was also there held that an administrator has no authority to bind the estate of his intestate by any contract, express or implied. That was an action to recover back the purchase money on account of the unsoundness of the property

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sold. But \*Fuller v. Fowler, 1 Bail. 75, was an action by the purchaser of a negro to recover from the distributee of an estate, the share of the purchase money which the dis-

tributee had received, the negro having been sold under an order of the Court of Equity for partition, and having proved to be unsound at the time of the sale. The plaintiff was non-suited on the ground that there was no privity of contract; which could not be, as was well declared in *Evans v. Dendy*, if the law implied a warranty in the sale by the commissioner. Substantially that case is decisive of this. The mode of distribution makes no difference in regard to the liability of the distributee. Without in any manner calling in question what has been heretofore decided in cases where the purchaser of personal property was defendant, we are content to adopt the rule of *Evans v. Dendy*, when it is sought to recover back the purchase money either from the administrator or distributees of an estate, on the ground of an implied warranty.

It is ordered and decreed that the decree of the Circuit Court be affirmed and the appeal dismissed.

DARGAN and WARDLAW, CC., concurred.

Decree affirmed.

#### 7 Rich. Eq. \*16

\*WILLIAM L. YANCEY and Wife v.  
CHARLES B. STONE.

(Columbia, Nov. and Dec. Term, 1854.)

[*Specific Performance* ¶85.]

Bill by donee against the administrator of donor for specific delivery of a slave. Gift sustained on proof of declarations of donor that she had given, although she retained possession until her death.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 219; Dec. Dig. ¶85.]

Before Wardlaw, Ch., at Greenville, June, 1854.

Wardlaw, Ch. The plaintiffs in this bill, in right of the wife, seek specific delivery of the slaves Judy and her child Noe, alleging a parol gift of the slaves to the wife by her late mother, Elizabeth Earle, who died intestate in 1852. The slaves remained in possession of Elizabeth Earle until her death, or until some date recently previous, when they passed into the possession of the defendant, who has refused to deliver them on the demand of the plaintiffs. The defendant is son-in-law and administrator of Elizabeth Earle, and claims the slaves in behalf of the distributees of his intestate. Judy is represented to be a good cook, brought up by Mrs. Earle, and belonging to a stock of which several members were given by Mrs. Earle in her lifetime to her children.

The only question in the case involves the fact of gift of the slaves by Elizabeth Earle to her daughter, Sarah Yancey. The testimony of Mary Foster, Susan W. Thruston, and Ann Ervine, respectable neighbors and



friends of Mrs. Earle, is in writing, as taken by the Commissioner of the Court. The first of these witnesses, while she states strongly her impression that a gift was made, does not testify to any act or declaration of Mrs. Earle, satisfactorily demonstrating actual gift. She says that in 1841 and '42, she has heard Mrs. Earle, while chiding Judy, declare her wish that Yancey had the servant, and state that when he did get Judy, the servant would be made to know her place better. In

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the same conversations, Mrs. E. stated \*that she intended a child, now dead, of Judy, for Betty Robinson. The latter two witnesses examined by the Commissioner, testify distinctly, and that they have, very often, and until dates shortly before her death, heard Mrs. Earle declare that she had given Judy to Sarah Yancey, without expressing any condition of gift or reservation of interest in herself,—that she expressed desire to send the slave to Mrs. Y., in Alabama,—and that she refused to sell Judy to Mrs. Harris, because the slave belonged to Mrs. Yancey. Still, the former of these witnesses, Mrs. Thruston, states her belief (which I do not regard as competent testimony,) that the gift was to take effect whenever Mrs. E. saw fit to deliver Judy; and further proves a somewhat equivocal conversation with Mrs. Yancey, in which the latter claimed that her mother had given Judy to her, and expressed her wish for the services of Judy as a cook, but declined to apply for the delivery of Judy, on the consideration that her mother needed the services or hire of Judy, and would not probably accept hire from Mrs. Y. The latter of these two witnesses, Mrs. Ervine, also proved that it was only when provoked with Judy, that Mrs. E. proposed to send Judy to the plaintiffs, in Alabama, and without ever mentioning a specific time of delivery; and that she had heard Mrs. E. express the purpose of giving the infant child of Judy (probably Noe,) to John Robinson. Two witnesses who were examined before me, Austin Bruce and M. B. Earle, testify to offers of Mrs. Earle to sell Judy, some of them shortly before Mrs. E.'s death; the former witness stating that Mrs. E., while rejecting an offered price as inadequate, said it made no difference, as she intended Judy for Mrs. Yancey.

The case is submitted to my determination without the aid of argument from counsel, and it is certainly not free from doubt and difficulty.

Parol gifts of slaves are disfavored by the Act of 1832, against the rights of creditors of the donors or subsequent purchasers from them; but here the rights of volunteers

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only are \*involved. As to the latter class, the general doctrine is well declared in *Miller v. Anderson* [4 Rich. Eq. 1] and *Busby v. Byrd*, 4 Rich. Eq. 9; that there cannot be a

valid gift of a slave by parol, (although a formal delivery be employed,) to take effect at the donor's death, or, by parity of reasoning, at any uncertain future time; for there can be in such case no delivery, that is, a present parting with control over the chattel. Yet, if the donor intends, at the time of delivery, to part with the whole title and control of the chattel, the gift may be valid, although he retains the custody of the chattel. As title to personalty passes by delivery, if one who was owner declares that he has given a chattel, it will be presumed that he used in the gift the form of tradition necessary to the transfer of title; but the force of his declaration, and of the presumed tradition, may be impaired or defeated by proof that he reserved a life estate, or any interest dependent on his dominion of the chattel.

The question here is, did Mrs. Earle intend to retain control over Judy until she chose to deliver her, or did she, for convenience, and with consent of the donee retain possession of the slave after transferring all dominion? On the testimony of Mrs. Thruston and Mrs. Ervine, I conclude to adopt the latter alternative. Declarations of gift by an owner of a chattel, are to be construed most strongly against him, and are to be defeated only by unequivocal proof on his part, that a present gift was not made. The circumstances in the present case, repelling a present gift, such as that the donor afterwards offered to sell the chattel, or expressed a purpose to make a different gift of the issue, at most show some change or reluctance of purpose to make the gift beneficial, and are too equivocal to rebut the inferences from her positive acknowledgments of the gift. The unwillingness of Mrs. Yancey to demand from her mother the immediate delivery of the slave, although she needed her so much as to make possession desirable on hire, implies no doubt of title, and merely exhibits a becoming filial delicacy.

It is ordered and decreed, that the defend-

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ants deliver to the \*plaintiffs the slaves Judy and Noe, and account with the plaintiffs for the hire of the slaves since the death of Elizabeth Earle.

The defendant appealed, and now moved this Court to reverse the decree on the following grounds:

1. That the evidence of the gift of the negroes by Mrs. Earle to Mrs. Yancey, was not sufficient to justify the decree.
2. That the decree is inconsistent with equity and good conscience.

And, failing in this motion, then he moved for a re-hearing of the cause, on the ground:

That an order may be obtained for a trial of the fact of the gift before a jury.

Young, Elford, for appellant.  
Perry, contra.

The opinion of the Court was delivered by

**JOHNSTON, Ch.** The decree appears to be according to the weight of evidence.

A doubt has been suggested, whether a bill will lie by a mere donee against the donor, to enforce delivery. But no such ground is taken in the appeal; and, if it were, it may be that when the gift is completed, so as to transfer title, the case may stand upon the same footing as a completely declared trust, which a volunteer may enforce against him who created it, though if it were defective, the Court would not interfere. Decree affirmed, and appeal dismissed.

**DUNKIN, DARGAN, and WARDLAW, CC., concurred.**

Decree affirmed.

### 7 Rich. Eq. \*20

**\*FRANCES POLOCK et al. v. THEODORE S. DUBOSE, Executor, et al.**

(Columbia. Nov. and Dec. Term, 1854.)

[Equity  $\hookrightarrow$  397.]

Bill against the executor of a deceased Commissioner in equity, for negligence in taking insufficient security to a bond, and in not taking prompt measures to collect it by suit, dismissed upon the evidence—no negligence being shown.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 861; Dec. Dig.  $\hookrightarrow$  397.]

Before Dunkin, Ch., at Richland, June, 1854.

Dunkin, Ch. Levi Pollock died intestate in 1848—his heirs and distributees were, his widow, Frances Pollock, and ten children, six of whom were of age. One of the daughters had intermarried with Lewis Levy, who administered upon the estate. Another daughter was the wife of Benjamin Mordecai, and all were at one time residents of Columbia.

On the 17th July, 1850, proceedings were instituted in this Court by Frances Pollock and her son, David J. Pollock, against Benjamin Mordecai and wife, and the other distributees and the administrator for a settlement and partition of the estate. The answers were filed on the same day exhibiting some conflicting claims.

On the next day (18th July,) after hearing the Commissioner's report, an order was made that the real estate and the slaves of the intestate should be sold on first Monday of October, or some subsequent sale-day, on terms therein prescribed by the Commissioner of this Court—that the cash part of the sales of the negroes should be paid over to the administrator, to be applied by him: and the "cash part of the purchase of the real estate should be invested by the Commissioner in well secured bonds, which, together with the residue of the purchase money of both real and personal estate, should abide the further order of the Court, all equities being reserved."

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\*In obedience to this order, sales were made by the late August H. Porcher, then Commissioner of this Court, on sale day in November, 1850. The cash part of the sales of the real estate rather exceeded nine thousand dollars. The amount was invested in various bonds, payable with interest on demand.

On 4th June, 1851, the Commissioner reported to the Court his transactions under the order of sale, and also in his general annual report of estates in his hands, he set forth as belonging to the estate of Levi Pollock, deceased, the several bonds with the sureties thereunto which he had taken as investments of the cash part of the proceeds of the real estate. Chancellor Dargan made the usual order, that the annual report should be filed for the information of the parties. But on 21st June, 1851, he made a special order in the case, commencing, that "upon hearing the bill, answers, and reports of the Commissioner, it is ordered and decreed that the report of the sales of the estate, real and personal, of Levi Pollock, be confirmed." Other matters are contained in that decretal order not necessary to be repeated.

But this order is especially noticed and made the basis of the future and final decretal order, made by Chancellor Johnston on 16th October, 1851. It is as follows (after stating the case) "the Commissioner having reported the amount of the balance of the estate of Levi Pollock in his hands in bonds and the same having been confirmed by the Court: It is ordered, upon motion of Mr. De Saussure, and by consent of the parties, that the Commissioner pay to the parties, complainant and defendants the widow and children of the intestate, their respective shares of the said bonds in the Commissioner's hands, in the proportions set forth in his report made June 4, 1851, and confirmed by the decree of the Court dated 21st June, 1851." The rest of the decretal order is irrelevant to this matter.

Among the bonds in which the Commissioner had invested the nine thousand three

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hundred dollars, (being the cash portion \*of the sales of the real estate, was the bond of William B. Carlisle for two thousand dollars, with William Carlisle and John Lewis as sureties. When the parties came to a settlement, and to receive their share of the bonds in the Commissioner's hands, "some of the heirs (says the witness Mr. Levin) objected to receive this bond of Carlisle. After the settlement, this bond, says he, was left in the Commissioner's office."

It may be here remarked that this bond was taken on 8th November, 1850, (four days after the sale.) Several of the heirs were borrowers of part of the same fund.



It is difficult to suppose that they were not aware of this loan about the time or at any rate, very soon after it was made; certainly all were apprised of it when the Commissioner made his reports in June, 1851. Yet there is no evidence of any remonstrance, of any notice, of any objection whatever, until the Fall of 1851, when the report of sales was confirmed. When the report of investments was placed on file for the notice and information of the parties, it was due to a proper regard for their own interest that parties should have set on foot measures for calling in any securities which they supposed doubtful. But from that day to this the parties have applied for no order to further the collection of the debt. It is true, that the late Commissioner, when apprised of their dissatisfaction, did of his own motion, cause proceedings to be instituted which as to one of the sureties would probably have proved successful but for the lamented death of the Commissioner, which abated the suit on the 15th May, 1852.

A. H. Porcher had resigned his office in consequence of ill health about a month previous to his death, when the present Commissioner was appointed, and this bond with his other official papers was turned over to him by his predecessor. On the 8th May, 1854, these proceedings were instituted by the plaintiffs against the present representative of the late Commissioner, and the sureties on his official bond, praying that the executor of A. H. Porcher may be decreed to pay to

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the "Plaintiffs the sum which shall appear to be due to them by reason of the official negligence of his testator in taking insufficient security to the said bond of investment (W. B. Carlisle's) and in failing to collect the same."

The order requiring the Commissioner to invest the fund in "well secured bonds," it was his duty to make the investment with all proper dispatch in order to realize interest for the parties. The mode of investment was prescribed, to wit: in bonds, well secured. In the discharge of his duty no other rule can well be adopted than that the officer should exercise the same care, diligence and caution, which a prudent man would employ in the management of his own funds. Perhaps there is this difference, that the officer, being required to make an investment, acts not only under the pressure of official duty, but it may be, is stimulated by the impatience of the parties interested. The money was to be repaid on demand. In other words, it was what is termed "a loan upon call," and it seems to have been well understood that it was at the usual rate of interest. In commercial communities it is believed that such investments are not easily made on satisfactory security. Mr. Crawford testified that in October and November, 1850, the Banks in Columbia were discounting freely.

So far as the Court can judge from the papers, a part of this fund of nine thousand three hundred dollars was invested on the day of sale (4th November); a part on the 6th: the loan to Carlisle on the 8th; but the balance to Scott & Ewart was not invested until 28th November.

The charge of the plaintiffs is that the loan to William B. Carlisle was on such insufficient security as rendered this act of the Commissioner an official defalcation.

One of the leading witnesses of the plaintiff's was W. W. Walker, a person of intelligence and respectability, and who had an opportunity of intimate acquaintance with some of the matters to which he testifies. The bond was conditioned for the payment of two thousand dollars, with interest, and

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was \*executed by William B. Carlisle, with William Carlisle and John Lewis as sureties. Mr. Walker says that in 1850 William B. Carlisle became part proprietor of the Telegraph newspaper—that the contract was not to be completed until he paid the money, and that the two thousand dollars borrowed from Porcher was obtained for that specific purpose, and was so applied. That Carlisle was a young man of ability though irregular, but that he was at that time neither intemperate nor dissipated in his habits; that in November, 1850, the Telegraph had a good deal of reputation, and was conducted with ability; that he knew of no lien upon the Telegraph property in November, 1850: he knew of no other property that William B. Carlisle had; witness lived next door to the Telegraph office; the paper was conducted with ability, but miserably managed financially, and to that he attributed the failure of the establishment, which took place, as he thinks, in the Summer of 1851.

The first surety on the bond was William Carlisle. He is the father of William B. Carlisle; and he testified that the two thousand dollars was borrowed to take up a note in the Branch Bank which William B. Carlisle had given to pay for one-third of the Telegraph, and that the note was taken up with this money. The witness in November, 1850, resided in Kershaw District near the Fairfield line. He was then the proprietor of the place on which he resided and of negroes which have been since sold by the Commissioner in Equity for six thousand five hundred dollars; that his indebtedness in all did not exceed two thousand five hundred dollars; that he never recollects to have been refused credit, nor was there ever an execution against him until here recently; that he did his transactions chiefly in Camden and Columbia; that since 1840, W. E. Johnson, J. M. De Saussure, Henry Clarke, Richard Cathcart, and others, have indorsed for him; but that he has never applied for indorsements since 1851 (when it seems some family difficulties arose); he says that he

stated to Porcher the number of negroes he

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\*had in possession (nine) of more than ordinary value; that he had mortgaged a part of them to carry a son through College, but that the mortgage was paid, (which the Court understood to be so,) and that there was no other incumbrance.

Dr. Henry Clarke, a resident of Fairfield, was examined by commission. He stated that he had known William Carlisle from his (witness's) childhood; that in November 1850 he lived six or seven miles from him; that Carlisle had at that time a plantation on which he resided containing from three to five hundred acres, about nine or ten negroes, and the usual quantity of farming utensils, and stock, &c.; that it was the impression of the witness, and was the general impression that he was the owner of the property, and that on the faith of this he obtained credit from the witness and others as indorsers. Among those who indorsed for him on the faith of his ownership of this property were A. D. Jones, Sr., John Cunningham, and John Harrison, Sr.; that the witness never heard any doubt expressed about his title to the property until the Fall of 1851; that it struck every one with surprise; witness would in November, 1850, have considered William Carlisle responsible for three or four times the amount of this bond. In reply to a cross-interrogatory, he says, that the solvency of William Carlisle will depend upon a suit in Equity now pending, in reference to the property which he claims as his own.

R. E. Ellison, Sheriff of Fairfield District, said that he knew William Carlisle in November, 1850; that he was in possession of property, and that the witness "would have considered his name good for two thousand dollars, and would have taken his name on a bond for that amount."

James B. M' Cants, Esq., testifies that he had known William Carlisle for the last fifteen years; that until the Fall of 1851 he had never heard his solvency questioned;

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that he held land \*and negroes in his possession of which he was the ostensible owner, and on the faith of which Dr. H. H. Clark and others indorsed his papers; he says that from appearances exhibited, and his never having heard his solvency questioned, he would have considered him responsible for two thousand dollars in November, 1850, if the witness from his knowledge of the records of the Court of Equity had not known that the negroes had been settled upon his wife and children. He further testified that in the Fall of 1851, a separation took place between William Carlisle and his wife; she and her children left him and took away the negroes; "that at that time his credit was talked of and suspected and since then he has been considered insolvent."

Samuel G. Barkly testified, that in 1850, William Carlisle had property in possession, which witness thought belonged to him, and so far as he knew was not involved; he was educating and supporting his family decently and genteelly.

D. McDowell, Esq., said that in 1850 William Carlisle had property in his possession, "and had the reputation of being solvent."

I. Z. Hammond, Esq., testified that in 1850 William Carlisle had a tract of land and some slaves in possession; resided in Kershaw, about Long Town; that he never suspected his solvency till his difficulty with his family, and until that time never heard his title to the property questioned, and would have considered him good for two thousand dollars.

Such is the current of the evidence as to the reputed solvency and pecuniary responsibility of William Carlisle, in November, 1850, in Fairfield and Kershaw. It is believed that the only witness residing in Fairfield or Kershaw, who differs upon this point is A. Laughlin, who was at one time Clerk of Fairfield. But the plaintiffs exam-

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ined J. A. Crawford, the highly \*respected President of the Commercial Bank, in Columbia. The result of his testimony is certainly no impeachment of the conduct of the late Commissioner. Mr. Crawford, with large financial experience, abundant means of information, cautious and scrutinizing, wanted confidence in William Carlisle as early as 1846; "he thought he had more credit than he was entitled to; always had good indorsers, &c." About this time witness examined into his affairs; witness was opposed to his getting accommodation; he borrowed money to educate his children, &c.; yet he says that he applied for a loan in 1850; that the witness opposed the loan; never had any confidence in him, but that he was overruled by the Board of Directors. This was a loan of one thousand dollars, on a note indorsed by the late John Cunningham and Perry.

L. T. Levin, was a writer in the office of the late Commissioner; had kept the books of the Telegraph office. He said "that the general impression in 1850 was that his (W. Carlisle's) reputation as a solvent man was bad."

W. T. Brown, testified that in 1850 he (the witness) resided in Chester District. He speaks much of the condition of W. Carlisle, but he concludes by saying that Laughlin was the only person he ever heard speak of the property in W. Carlisle's possession belonging to his wife and children; that "there was no general reputation here (in Columbia,) as to Carlisle's solvency in 1850 to witness' knowledge; don't know that he ever heard any person speak of William Carlisle's solvency in 1850."

T. P. Walker; witness was a young man



who some time in 1850 was also book-keeper in telegraph office, and testified against the general reputation of W. Carlisle for solvency in 1850, but neither he nor the other witness J. B. Ewart, appear to have had any particular means of information; on

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the other \*hand James Cathcart was examined at the hearing. He said he had been transacting business in Columbia for twenty-seven years; during half that time he was also doing business in Fairfield District; he had been a bank director for the last twenty-four years; he had known William Carlisle since 1819, and never heard his solvency questioned till 1851; up to that time witness would cheerfully have credited him for any reasonable amount; his name was frequently before the board at which witness was a director, and passed freely on witness' representation. Witness always inquired particularly about borrowers, and he never heard any question about the solvency of William Carlisle. On cross-examination said he never heard of any question about the negroes until to-day.

H. G. Wilson, said he had known William Carlisle for twenty years; knew him in Fairfield in 1832; never heard his solvency questioned till 1852; his credit was very good; he traded in Camden, where witness lived; witness now lives in Alabama.

R. S. Morrison, is a merchant of Columbia; has known William Carlisle for some twelve years; some connexion; witness never heard William Carlisle's solvency questioned till here recently; in 1850 he had heard nothing to induce doubt of his solvency.

The irresistible deduction from the whole evidence is, that in November, 1850, William Carlisle was generally regarded as entirely responsible for the amount of this bond; he was the ostensible owner of a respectable estate, and enjoyed the confidence of many intelligent, wealthy and cautious individuals, who evinced the sincerity of their convictions by acts of unequivocal significance. According to the clear preponderance of the evidence, no question of his responsibility was ever suggested, or had any currency, until the unhappy breach in his family in the fall of 1851,

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twelve months, or nearly so, after \*the loan had been contracted, at a time when John Cunningham, A. D. Jones, John Harrison, H. H. Clarke, not to mention W. E. Johnson and J. M. De Saussure, were willing to become his friendly endorsers, and James Cathcart to recommend his name to the confidence of his board. When the Sheriff of Fairfield District would have been willing to take his bond for two thousand dollars, how can it be affirmed that the Commissioner violated his duty, was wanting in the care and diligence which prudent men exercise in the management of their funds, when he

received William Carlisle as a security on the bond in question? If the defendant's case stopped here the Court would have great difficulty in declaring the Commissioner guilty of a negligent execution of the order of investment. No law required him to demand more than one good surety, nor is the Court aware of any established usage to that effect. But the late Commissioner took another surety, and all the witnesses examined upon the subject seem to vie with each other in testifying to the unquestionable sufficiency of John Lewis "His name was as good as any man's name." "His responsibility undoubted for ten thousand dollars." Such an investment "first rate," &c., and in conclusion that he is worth at this time twice as much as when the bond was taken, in November, 1850, (see Leitner's evidence.) No one pretends to doubt his pecuniary ability now or then. But it is said that Mr. Lewis, who was a planter in Fairfield District, at that time contemplated a removal to Florida, and that he did actually remove in January, 1851, and now resides there. A deed of conveyance of a plantation from him to J. P. Mobley, was put in evidence, bearing date 5th November, 1850, and recorded 13th January, 1851. There is no evidence that A. H. Porcher had any knowledge or suspicion of such intended removal, if it then existed. William Carlisle says that at that time John Lewis had no intention of leaving the State, but that he wished to sell the plantation which he then owned, and purchase other lands. That when he sold in the fall of 1850

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he intended to \*rent other land; that after he signed this bond he went to Chester to buy land, but he did not succeed. In the Christmas holidays of 1850 he tried to rent a place, but failed; that he then determined to go to Florida, and in a week he started. This was the latter part of December, 1850.

But it was intimated that, although the security of the bond was abundant at the time it was received, yet some negligence was attributable to the late Commissioner for not collecting it. The bond was not payable on any fixed day. It was intended as an investment until the right to the fund could be determined. During the whole of the winter and spring of 1851, no reasonable doubt could be entertained of the sufficiency of the bond. The telegraph was conducted with ability, and was in popular favor. William Carlisle's domestic troubles and consequent pecuniary embarrassments did not fall upon him till the summer of 1851. It seems that about that time Porcher informed him that he would be obliged to bring suit, as he was notified that the security was insufficient. W. Carlisle says he then tried to get other securities, but the rumpus in his family had taken place—his title to the negroes was disputed, and he was unsuccessful in his efforts to get other security. In

September, 1851, the late Commissioner placed the bond in the hands of Messrs. Moore & Arthur, who obtained judgment against William B. Carlisle, in Richland, and the Messrs. Gregg sued William Carlisle, in Fairfield, and recovered judgment, but in November, 1851, he had confessed a previous judgment to secure his indorsers. In the fall of the same year, Porcher hearing that John Lewis was in the State on a visit, caused him to be arrested by a bail writ on 28th October, 1851; he gave bail and the suit was on the docket of the Common Pleas for Fairfield District, when it became abated by the death of the plaintiff, in May, 1852. It appears to the Court that the charge of negligence in collecting the bond has as little foundation as that of want of diligence or caution in making the investment. It was said in the argument that he should have

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\*applied for an order in June, 1851. Why did not the parties themselves apply for an order? and why have they never yet applied for any order for the collection of the bond? But what order could A. H. Porcher have obtained in June, 1851, which would have been more effectual than the prompt and decisive measures which he adopted without any order?

Finally, it is suggested that John Lewis may have some defence to the bond, as James H. Carlisle, a brother of William B. Carlisle, did not also sign as co-surety. It is not intimated that John Lewis entered into the contract upon any such condition. On the contrary the evidence is that he came down from Fairfield for the purpose of completing the arrangement; he was in the commissioner's office; Porcher would not let William B. Carlisle have the money till the bond was executed; the bond was all prepared but no witness was present; Lewis went himself for the witness; the bond was executed and the money paid on the spot to William B. Carlisle. But the only foundation for the suggestion is that William Carlisle, (who had negotiated the matter,) had told Porcher that James H. Carlisle should also sign the bond, and he says he thought he would have done so, as the money was to take up a note in bank on which James H. Carlisle was indorser. But it seems that when James H. Carlisle was afterwards applied to, he declined. A. H. Porcher was indignant at what he may well have regarded a breach of promise on the part of William Carlisle. The whole transaction, however, shows that the signature of James H. Carlisle was no condition precedent to the validity of the contract, but was only suppletory security for the Commissioner.

After a careful review of all the circumstances of this case, the Court is well satis-

fied that the reputation of the late Commissioner for intelligence, fidelity, and an anxious desire to discharge his duty, and his whole duty, may well rest upon his conduct in this transaction. He may have been the friend of William B. Carlisle, but in his of-

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ficial capacity, he dealt with \*him as a stranger. He refused to part with the fund committed to him until he had received a bond, properly executed and secured, (as must now be conceded,) beyond doubt or question. So soon as any suspicion arose, or dissatisfaction was expressed, he lost no time in proceeding against all the parties, and adopting the most energetic measures to secure the interests of those whom he officially represented. These efforts ceased only with his life, and so far as the Court can judge, were rendered fruitless only by his lamented death.

It is ordered and decreed that the bill be dismissed.

The complainants appealed, and now moved this Court to reverse the decree of the Chancellor on the grounds

1. Because negligence on the part of the late Commissioner in taking insufficient sureties to William B. Carlisle's bond, was clearly established by the testimony.

2. Because the late Commissioner failed to discharge his official duty in not taking prompt and energetic measures to collect the bond by suit, and therefore incurred liability.

3. Because (as is respectfully submitted) his Honor erred in ruling that it was the duty of the parties beneficially interested in the fund, and not of the late Commissioner, to look after the sureties, and to take out all necessary orders for suing or securing the bond.

4. Because in considering the question of William Carlisle's solvency, his Honor utterly ignores the Equity proceedings A. D. 1835, of Record in Fairfield District, which (it is respectfully submitted) was notice to the world that the property in his possession was trust property settled by the will of Buchanan on the wife and children of the said William Carlisle, and not liable for his engagements.

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\*6. Because the decree is contrary to law, equity, and evidence.

Bellinger, De Saussure, for appellants.  
Boylston, contra.

PER CURIAM. We concur in the decree, and it is ordered that the appeal be dismissed.

JOHNSTON, DUNKIN, DARGAN, and  
WARDLAW, CC., concurring.  
Appeal dismissed.



7 Rich. Eq. \*34

\*FREDERICK W. SOLLEE and LYDIA G. SOLLEE, by Next Friend, v. RANDAL CROFT, et al., Ex'ors.

(Columbia. Nov. and Dec. Term, 1854.)

[*Limitation of Actions* ⇨103.]

Trustee, who claimed in his returns a balance as due him on account of the trust estate, and who had placed the trust negroes in the possession of F., the cestui que trust, before he arrived at age, denied to F., shortly after he arrived at age, any liability further to account to him as trustee:—*Held*, that the denial gave currency to the statute of limitations, and that F.'s bill for an account was barred after four years.

[Ed. Note.—Cited in *Dickerson v. Smith*, 17 S. C. 305; *Fricks v. Lewis*, 26 S. C. 240, 1 S. E. 884.

For other cases, see *Limitation of Actions*, Cent. Dig. § 508; Dec. Dig. ⇨103.]

[*Executors and Administrators* ⇨437.]

Doubted by Wardlaw, Ch., whether a creditor is entitled in Equity, as at law, to nine months, in addition to the four years allowed by the statute of limitations, within which to sue the executor of his deceased debtor.

[Ed. Note.—Cited in *Kirksey v. Keith*, 11 Rich. Eq. 39; *Cleveland v. Mills*, 9 S. C. 437.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1747; Dec. Dig. ⇨437.]

[*Judgment* ⇨691; *Trusts* ⇨194.]

Orders obtained upon the ex parte petition of the trustee do not bind the cestui que trust as estoppels.

[Ed. Note.—Cited in *Moore v. Hood*, 9 Rich. Eq. 328, 70 Am. Dec. 210; *Snelling v. McCreary*, 14 Rich. Eq. 302; *Bull v. Rowe*, 13 S. C. 367.

For other cases, see *Judgment*, Cent. Dig. § 1214; Dec. Dig. ⇨691; *Trusts*, Cent. Dig. § 239; Dec. Dig. ⇨194.]

[*Trusts* ⇨198.]

Where a trustee to sell purchases without leave of the Court, it is absolutely at the option of the cestui que trust to have a re-sale, or to hold the trustee to his purchase.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 261; Dec. Dig. ⇨198.]

[*Trusts* ⇨350.]

The trust negroes had been sold by the trustee on credit and the purchase-money secured by bond and mortgage of the negroes. The trustee bought one of the negroes on his own account from the purchaser, and gave credit on the bond. Afterwards, by leave of the Court, the contract of sale was rescinded:—*Held*, that as to the negro so purchased by the trustee, the cestui que trust might claim the negro, or the money, at his option.

[Ed. Note.—Cited in *Bacot v. Heyward*, 5 S. C. 448.

For other cases, see *Trusts*, Cent. Dig. § 517; Dec. Dig. ⇨350.]

[*Trusts* ⇨219.]

*Held*, further, that the trustee, under the circumstances in proof, must account for interest, or hire, from the time he sold until the rescission.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 316; Dec. Dig. ⇨219.]

[*Trusts* ⇨198.]

Also that the trustee, upon the proof made, must account for the value of a negro, which

before the rescission had been sold by the sheriff as the property of the purchaser.

[Ed. Note.—Cited in *Parks v. McDaniel*, Executor, 75 S. C. 9, 54 S. E. 801, 117 Am. St. Rep. 878.

For other cases, see *Trusts*, Cent. Dig. §§ 258-265; Dec. Dig. ⇨198.]

[This case is also cited in *Sollee v. Croft*, 9 Rich. Eq. 474, as to facts.]

Before Wardlaw, Ch., at Greenville, June, 1854.

Wardlaw, Ch. This is a bill by the plaintiffs, two of the children of Florida or Florilla P. Sollee, for an account of a trust estate, of which the testator of defendants, Edward Croft, was the settlor, and became the trustee.

Edward Croft, late of Greenville, on June

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23, 1829, conveyed by deed to George Croft and Richard Harrison, fifteen slaves, and some horses, mules, cattle, hogs, household and kitchen furniture, and farming tools, in trust for the sole and separate use of his daughter, Florida P. Sollee, then the wife of Frederick W. Sollee, the elder, for the term of her natural life, and at her death for the issue of her body living at the time of her death. The trustees named in the deed never accepted the trust, and the settled property passed into the possession of Sollee and wife. In the year 1835, Sollee removed with his family and the trust property to Marengo County, Alabama, where he established a plantation, and continued to reside until his death, in October, 1837. He was unsuccessful in his management, and was much embarrassed with debt at the time of his death; and his creditors attempted, by suits against his widow, Florida, who, it seems, became his administratrix, to render the trust property liable to his debts. She remained in possession of the trust property until about Christmas, 1838, when, by a stroke of paralysis, she became blind and bedridden, and greatly enfeebled in mind and body. She was soon afterwards removed to the house of her brother-in-law, Bird M. Pearson, where she remained nearly a year. In the course of the year 1839, Bird M. Pearson, under the instructions of Edward Croft, sold most or all of the trust property except the slaves, and in some way accounted with his principal. He also received and accounted for the balance of the cotton crop of 1838. In the fall of 1839, Edward Croft removed his daughter, Mrs. Sollee, two of her children, the plaintiffs, and Martha and four children, five of the trust slaves, from Marengo to Greenville, S. C.; the eldest child of his daughter, Edward C., having been brought back, probably in 1838. Florida P. Sollee died in the fall of 1840, leaving as her issue three children, Edward C., Frederick W., and Lydia G.

On June 25, 1839, Edward Croft, upon his own petition, was provisionally, by the order

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of the Court of Equity for Greenville, substituted as trustee for George Croft and Richard Harrison, under the deed of June 23, 1829; and on October 15, 1840, he became trustee by complying with the prescribed condition in the order of the Court, and gave his bond in the penalty of twenty thousand dollars, with his sons, Randall and Theodore, as his sureties for the faithful performance of his trust. It is quite clear, that before his authority as trustee was formally consummated, Edward Croft had undertaken the management of the trust estate, to a great extent. In his returns as trustee to this Court, he charges two hundred dollars, in April, 1838, for the traveling expenses of a trip to Alabama concerning the trust estate, and bringing back Edward C. Sollee to Greenville, and three hundred and twenty-five dollars for a like trip, in November and December, 1839, and bringing back Mrs. Sollee and the plaintiffs, and Martha and four children. These charges, with an additional item of one hundred and fifty-five dollars, for a third trip in October, 1841, were allowed to the trustee, (after an abatement of eighty dollars,) upon his petition, by order of this Court, in June, 1842, and the last sum was again allowed by order of June 26, 1843, for a trip in 1842. These, however, are small matters compared with the transaction of 1839. At that time, Edward Croft sold twenty of the trust slaves, being all the slaves except Martha and her children, to his son-in-law, Bird M. Pearson, for ten thousand dollars, with interest, at eight per cent., from January 1, 1840, secured by the bonds of B. M. Pearson, and his brother, President Pearson, payable in five, six and seven years, from said January 1, 1840, and by a mortgage of the slaves sold. It is alleged that this sale was made under an order of the Court of Chancery, in Alabama, granted by my excellent friend and preceptor in the law, Chancellor Bowie, but formal proof of the fact is not made.

On January 15, 1842, upon the petition of Edward Croft, this Court passed an order

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granting him leave to sell Martha and her children, at such time and place and on such terms and conditions as he might think most advantageous to the beneficiaries. Instead of selling these slaves, he had them appraised by some of his neighbors, and took them for himself at the appraisement of twelve hundred dollars. I do not perceive in the voluminous documentary evidence, that this act of the trustee was ever affirmed by the Court, beyond the passing of his annual returns by the Commissioner of the Court, in the course of which, and in some of the trustee's petitions, the fact of his purchase of these slaves, at the price named, is mentioned.

On November 30, 1843, this Court, on the

petition of Edward Croft, and the report of the Commissioner that B. M. Pearson and President Pearson were hopelessly insolvent, and that slaves had much depreciated in price since January, 1840, and, generally, that the rescission was for the benefit of the beneficiaries, granted an order, that the trustee be allowed to accept from B. M. Pearson a surrender of the mortgaged trust slaves and their increase, discharged from other claims and incumbrances, in satisfaction of Pearson's bonds for the purchase of the slaves; and further, that the trustee, after receiving the slaves, might sell them on such terms as the Commissioner should approve. Edward Croft had previously purchased from B. M. Pearson two of the trust slaves, Frances and her infant child, for six hundred and fifty dollars, which sum was credited on the bond. And about the time of the foregoing order, probably in anticipation of it, Randall Croft, as agent of his father, received in satisfaction of Pearson's bond and mortgage twenty of the slaves, which, with Frances and child, were all the slaves which had been sold to Pearson, except a boy, Jim, which had been sold by the sheriff for Pearson's debts; and R. Croft brought back to South Carolina, at an expense of three hundred and fourteen dollars and thirty-seven cents, all of these slaves except Chaney, who died on the road. Edward Croft retained

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the negroes under his control until about October 20, 1845, when Edward Sollee attained full age; and at that time the trustee made division of them into three parts, and delivered six of them to Edward Sollee, as his portion; and Edward Sollee gave a receipt for them in full of his share, which receipt contained many expressions of gratitude for the benevolence and generosity of his grandfather. About the same time, the trustee delivered provisionally to the plaintiff, Frederick W., seven of the slaves as his portion, he being married, although yet a minor, and desiring to employ himself in farming. On October 17, 1846, the plaintiff, Frederick, still a minor, gave a receipt for the hire of his portion of the slaves, as received from the trustee through Randall Croft, to whom they were nominally hired, by the request and arrangement of the said Frederick. On May 3, 1848, Frederick W. Sollee gave another receipt to Randall Croft, for the hire of the slaves assigned to him on the partition (as he says, with his sanction) for the years 1847 and 1848. It appears that Frederick W. Sollee attained the age of twenty-one years on May 19, 1848; and immediately afterwards, in the course of the same month, he, with his father-in-law, Richard Ward, examined the returns of the trustee in the Commissioner's office; and although dissatisfied with them, as exhibiting a balance of money in favor of the trustee, and at first refusing to give a release to the



trustee, who insisted that the negroes, which had been in Frederick's possession for some years satisfied all of his claims under the trust deed: yet, on November 7, 1848, said Frederick W. did execute a full release to the trustee, in consideration of the negroes delivered to him, of all claims upon the trust estate. The bill alleges that this release was executed by the said Frederick, in mistake of his rights; but the proof of Richard Ward is, that it was executed upon his advice, from considerations of harmony in the family, and from inducements of legacy held out by Edward Croft to his grandson.

Upon the division of negroes by the trustee,

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seven were assigned to Lydia G. Sollee. On February 7, 1846, this Court, upon the petition of the trustee, sustained by the report of the Commissioner, ordered that the trustee have leave to sell these slaves of his ward, Lydia, in his discretion by public or private sale, on a long credit, with interest from the day of sale. On October 22, 1846, the trustee procured these slaves to be appraised by competent neighbors, C. B. Attwood, E. Waddell and Randall Croft, and took them to himself at the appraisement of one thousand nine hundred and seventy-five dollars, and deposited with the Commissioner of the Court his bond with sureties for this sum, and his mortgage of the slaves. On June 1, 1848, an order of this Court was passed, founded on the petition of the trustee and the report of the Commissioner, that this arrangement for the trustee's taking the negroes of Lydia to himself, should be affirmed.

All of the orders of this Court which I have recited in the matter of this trust estate, were upon the ex parte petitions of Edward Croft, without bringing the beneficiaries formally before the Court; and, as to the matters outside of the personal knowledge of the Commissioner, were founded on the evidence of the two sons of the trustee, who were the sureties to his official bond.

The plaintiff, Lydia, now in her nineteenth year, has resided in Charleston with her paternal relations since the death of her mother, without expense to the trust estate.

Edward Croft died in September, 1851, leaving of force his will, dated September 17, 1851, and admitted to probate on October 1, 1851, whereof the defendants (and Robert Cunningham, who did not accept) are appointed executors, whereby, after some specific legacies, he devised the residue of his estate to his two sons, Randall and Theodore, and his daughter, Mrs. Pearson, without any legacy to his grand-children, Sollee. The portion of Mrs. Pearson, except some articles of plate, is given to his executors in trust for her sole and separate use, without liability for her husband's debts or contracts.

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\*This bill was filed on April 4, 1853, and

the defendants mainly rely on the bar of the statute of limitations, and the estoppel of the plaintiffs by the decrees of this Court.

There is no serious pretence that the plaintiff, Lydia, who is still an infant, is barred by the statute of limitations, but the question as to the other plaintiff under the statute, is full of hazard to him. Frederick W. Sollee did not file his bill within four years and nine months after he attained full age, and was informed by his trustee that all claim beyond the negroes in this plaintiff's possession was resisted by the trustee; nor within four years after the date of his release to the trustee. This extension of the term of four years, provided in the statute of limitations as the bar to account, assumption, &c., to four years and nine months, grows out of the exemption for nine months of executors and administrators, by the Act of 1789, (5 Stat. 112.) from "any action for the recovery of the debts due" by their testators or intestates. Upon construction of the statute of limitations, it has been held that the bar should be suspended for the term during which the claimant was inhibited from suing. It is not settled that this exemption of executors and administrators from suit for nine months, and the consequent extension of the term of bar, are applicable to proceedings in equity. A bill in equity is not strictly an action; and a claim for account is not, strictly, a suit for a debt. In practice, many bills are exhibited against representatives within the time of nine months from the dates of death of their testators and intestates; and without troubling myself to look for precedents, I remember a case in our last volume of Reports of that description. *Duke v. Fulmer*, 5 Rich. Eq. 122, was a bill for account against administrators filed within six months from the death of the intestate. In *Joyce v. Gunnels*, 2 Rich. Eq. 259, an administrator objected, in his answer, that the bill had been filed within nine months from the death of his intestate, and therefore prematurely; but the Court held that this objection was in the nature of a dilatory plea—not a plea

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in bar—and was overruled by his answer. In *Sarter v. Gordon*, 2 Hill, Eq. 137, the Court said, that if it appear on its face, that a bill has been prematurely filed, demurrer on this score will be fatal; and that, without demurrer, if the cause be brought on for trial before the proceedings should have been instituted, the bill should be dismissed; but that was a case affecting the time fixed by the parties for the performance of a contract, and not relating to the act of 1789; and, in point of fact, the Court sustained the bill and executed the contract, not enforceable when the bill was filed, because for another object, the bill was not premature. It is always within the power of this Court, by suspension of the suit or other administrative order as to costs and time of execution, to pro-

tect a defendant from the too prompt pursuit of claims against him. Proper time for the investigation of the affairs of an estate, without reference to the time of filing a bill against him, may be always secured to a representative, in exemption of any improper personal liability on his part. To declare that he is exempted from proceeding by bill against him absolutely for nine months, merely for the purpose of postponing the time within which the estate and himself can be quieted and protected, is not generally desirable. While, however, I do not distinctly perceive the reason why this plaintiff should not be barred by the term of four years, I place my decision on the ground, that allowing him the additional nine months, he is still barred. In my judgment, the statute began to run against him when the trustee declared to him, in May, 1848, that he denied all liability on account of the trust beyond the negroes already in possession of this plaintiff. This act disturbed the fiduciary relation between the parties, and put them in the position of strangers. As between the beneficiaries and trustees, express trusts are not within the scope of the statute of limitations; but if a trustee of this description perform an act importing an end of his fiduciary character, the statute begins to run in his favor from the date of

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such act. A settlement made by the \*trustee with the beneficiary apparently in full, or such settlement in part, with claim of the remainder in his own right, and denial of further obligation to the beneficiary, are among the acts which create an origin for the bar of the statute. See *Brockington v. Camlin*, 4 Strob. Eq. 197, and *Long v. Cason*, 4 Rich. Eq. 63, where our cases on this point are collected. I am of opinion that the refusal of the trustee of liability to Fred. W. Sollee, in May, 1848, when the latter was of full age, and in possession of all the share conceded to him in the trust estate, accompanied by the claim of the trustee to a pecuniary balance from this beneficiary on account of the trust estate, dissolved the fiduciary relation between the parties, and formed a starting point for the statute of limitations. Of course, on this view, the bill must be dismissed, as to this plaintiff. It is alleged, however, that he executed his release in mistake of his rights. In point of fact, it is not true that there was such mistake, for himself and his father-in-law before the release, had examined the accounts current of the trustee, and both were then dissatisfied with the result, and afterwards acquiesced from expectation that the just claims of the plaintiff might be otherwise reimbursed. The disappointment of the plaintiff of a legacy from his grandfather, cannot be relieved in this suit, for no such case is within the pleadings; and if such case had been made, I should have hesitated long before treating vague promises of remembering one

in a will, as a fraud in the testator, entitling the disappointed one to compensation from the testator's estate.

The plaintiff, Lydia, in any view of the case, is entitled to an account; and the questions between her and the defendants relate principally to the subjects and measure of the accounting. I shall hereafter speak of her as the plaintiff. The defendants insist that she is estopped by the decrees of the Court, made on the petitions of her trustee, and is bound to accept her share of the moneys into which the trust estate has been converted under these decrees. If this defence were stable, it would not

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\*shelter Martha and her children, and Frances and her children, and some other matters, from plaintiff's claims, in specie. It is, however, plainly unjust, that one should be barred by a determination in a case in which he was not practically represented. "Upon the general principles of Courts of Equity, there would be an impropriety in binding either the legal or the equitable claimants, unless they were fully represented and permitted to assert their rights before the Court; and if not bound, the decree would not be final on the matter litigated;" Story, Eq. Pl. Sec. 207, 208. In all the proceedings in which the decrees in question were made, the trustee was pursuing his own interests, and yet his beneficiaries, having the equitable and ultimate interests to be affected, perhaps injuriously, by the decrees, were not made parties to the litigation. In all forensic contests between those *sui juris* and infants, the weaker parties are in peril of injury; but it is some safeguard to infants to require that they shall always be before the Court when their rights are in question, and that they shall be represented by responsible next friends, who have no adversary interests to obstruct the proper presentment of the infants' claims. I must treat these decrees as binding the trustee, at the option of the beneficiaries, and not binding the beneficiaries.

As to Martha and her children, I have already said, that I do not find in the defendants' exhibits that even an *ex parte* order of the Court was passed to confirm the purchase of the slaves by the trustee. He had leave to sell them; but that very authority inhibited his purchase of them. Where a trustee to sell purchases at his own sale, it is absolutely at the option of the parties interested, coming before the Court within a reasonable time, to have a re-sale, or to hold the trustee to his purchase. If they elect to have a re-sale, the course is to begin the biddings at the price offered by the trustee, and if more be bid, the property is re-sold; if not, the trustee is held to his purchase. *Ex parte Wiggins*, 1 Hill, Eq. 354. Such a purchase by a trustee is not absolutely unlawful, but is



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always \*made subject to the timely choice of the beneficiaries to set it aside. "The only thing a trustee can do to protect his purchase is, if he sees that it is absolutely necessary the estate should be sold, and he is ready to give more than any one else, to file his bill and apply to this Court for leave to become the purchaser." *Campbell v. Walker*, 5 Ves. 681. In this case the plaintiff is an infant, and while, of course, the application to the Court is timely, she is incapable of making the election to affirm or avoid the sale, and the duty of making the choice devolves on the Court. In the present state of information before the Court, this choice cannot be made intelligently; and it must be referred to the Commissioner, to ascertain which course is for the benefit of the infant. If he shall determine that it is for the benefit of the infant to retain her third part specifically in these slaves, (which are understood to be in possession of defendants,) he must further inquire and report as to a proper scheme of division of them by sale or otherwise, and also as to the hire to which the plaintiff is entitled. If he shall ascertain that it is for the benefit of the infant to affirm the purchase by the trustee, the plaintiff will be entitled to her share of the hire before such purchase, and afterwards to her share of the purchase-money and interest.

It is urged for the plaintiff, in the prayer of her bill, and in the argument of her counsel, that the sale of the remaining trust slaves by the trustee to B. M. Pearson should be affirmed, and that she should be declared entitled to one-third of the purchase money, with interest at eight per cent. If this claim be equitable, it is so obviously for the interest of the plaintiff to charge the trustee with the proceeds of this sale, and to set aside the subsequent rescission, that I might safely now make the election for her, without the aid of the master. The defendants, however, say that both sale and rescission were made in good faith, and that it would be manifestly unjust to the trustee to set aside the latter only. This is the most important, and the most difficult question in the case. I have

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already \*adjudged that the order of this Court authorizing the rescission, was not an absolute estoppel to the plaintiff; but I am far from intending that the order of rescission, and the facts accompanying it, should be overlooked. It is my duty to give all legitimate effect to the formal acts of the Court. It is quite proper to sanction now, when all the parties are represented, whatever the Court should have then authorized, and especially what the Court did then authorize upon sufficient evidence, but not in a form to bind all parties in interest. I have looked into the report of the Commissioner, and the evidence on which the Court acted in granting this order, and I believe that if

the plaintiff had been a party to the proceedings, the same order would have been passed. It is true, that the evidence taken in a cause to which the plaintiff was not a party, cannot be formally used against her here; and it is necessary to review the testimony on this point taken under the present proceeding. Two of the defendants' witnesses on this point, examined by separate Commissions, were Bird M. Pearson and his wife Isabella; and to them the plaintiff objected, before their depositions were read, on the ground of interest in the event of this suit. The objection was taken in writing, in the case of the latter, when the cross interrogatories were filed; but the cross interrogatories to B. M. Pearson were filed without reservation. At the hearing, I sustained the objection to Mrs. Pearson, but received sub modo the depositions of B. M. Pearson, principally upon a doubt whether the objection had been taken in time. The general rule, arising from the preliminary nature of the objection, is that it should be taken as soon as the party becomes aware of the existence of the interest; for he has the election to admit the testimony of an interested person against him, and cannot depart from his choice once made, upon becoming dissatisfied with the bearing of the testimony. Where the testimony is by deposition, the objection ought to be taken in limine, if the interest be known, as it was here. Still, it seems, the practice on this point admits of considerable

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latitude, \*in the discretion of the Judge. 1 Greenl. Ev., sec. 421, n. 1. Certainly B. M. Pearson has a disqualifying interest in this cause. *Mayrant v. Guignard*, 3 Strob. Eq., 119. And considering that the plaintiff is an infant, and that the objection was taken before the reading of the depositions, I sustain the objection. I do not believe that defendants sustain loss on account of the rejection of this testimony. There is, however, other testimony on this point. F. S. Lyon, a distinguished lawyer of Alabama, under the counsel of whom Edward Croft acted both in the sale and rescission, testifies generally to the faithfulness of the trustee, and, in substance, that the security taken from Pearson at the time of the sale; was regarded as adequate, but that, from the subsequent failure of the obligors in the bond, and the depreciation of the negroes mortgaged, the rescission was judicious. The declarations of Edward Croft, proved by the plaintiff's witnesses, Caroline Sollee and Henry Sollee, have the same tendency and effect, yet with the unfavorable admission that the trustee had some view to securing Pearson's private debt to him, in allowing such extended credit in the sale. There is not a tittle of proof that in the rescission itself, the trustee acted at all unfaithfully. There may have been some improvidence in the sale to one who, although in the possession of a large estate, and in

good credit, certainly owed considerable debts. But the rescission, after the purchaser and his surety had become bankrupt, and creditors had seized one of the slaves of the trust, and were threatening all, was the course that a prudent man might have adopted.

If a trustee act faithfully, and with common diligence and sagacity, he is protected from liability for losses which may arise from his mistake of judgment. *Hext v. Porcher*, 1 Strob. Eq., 170. *Knight v. Plymouth, Dick.*, 120. *Boggs v. Adger*, 4 Rich. Eq. 411. I am of opinion that the conduct of the trustee, in the matter of the rescission, is protected by this rule. The trustee here is to be regarded with some favor, as having himself created the trust estate, and having

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become \*trustee to save it from great loss. I add that, although the bill does alternatively pray that the rescission may be disaffirmed, yet in the stating part and general frame, it recognizes the rescission.

While, however, I sanction the rescission, I must hold the estate of the trustee liable to account for reasonable hire of all the slaves, while in the possession of B. M. Pearson, or instead of hire, for interest on Pearson's bond until the rescission. The witness of the defendants, F. S. Lyon, testifies, that Edward Croft, in settlement of sundry claims he held against Pearson, for money paid as his surety in South Carolina, and for negro hire, took from Pearson several negroes, which he subsequently conveyed in trust for the benefit of his daughter, Mrs. Pearson. These negroes were levied upon by Pearson's creditors. On a trial of the right of property between Croft and Pearson's creditors, the consideration proved by Croft, consisted of debts paid by him for Pearson as surety, and certain notes of Pearson for negro hire, and certain notes of Pearson to R. and T. G. Croft, transferred to E. Croft. Of the notes for negro hire, was one of five hundred and eighty-three dollars, for balance of hire for 1840; one for one thousand three hundred and seventy-five dollars, for hire of 1841; one for one thousand dollars, for hire for 1842; and one of six hundred dollars, for hire of shoemaker for three years. It is the belief of the witness, that all of these notes for hire, except the last, were on account of the trust estate; and, looking at the dates and sums, one can hardly doubt it. Richard Ward, witness of plaintiff, also testifies that in several conversations with Edward Croft, the latter said he had received twenty negroes from Pearson, afterwards settled on Mrs. Pearson, in satisfaction of the claims of the trust estate and himself on Pearson, and that he had received every dollar due to the trust estate, and all due to himself, except for some liabilities as surety, not paid or due. Of one of these conversations, on March 8, 1848, the

witness made a written note. I am of opin-

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ion that this proof \*is adequate to fix the estate of the trustee with liability for hire or interest, subject, of course, to all proper charges.

The witness, F. S. Lyon further testifies, that, in his opinion, the value of Jim, which he understood to be some three hundred dollars, might have been recovered from the sheriff, who sold him as Pearson's property, but that E. Croft, acting on his advice, declined to bring suit, lest he might be prejudiced in his litigation with Pearson's creditors concerning the twenty negroes sold to him individually by Pearson. I am of opinion that the estate of the trustee must account for the value and interest of this slave, as substantially received by E. Croft, or abandoned, in quieting and securing his private interests.

The proof is very obscure, as to any other property belonging to the trust, besides the negroes, sold by the trustee or his agent, and the Commissioner must inquire and report as to this matter. As to the two slaves, Billy and Edwin, said to be sold by Sollee before E. Croft assumed the management of the trust, I see no ground in the evidence for liability of the estate of the latter.

The plaintiff, in her bill, strongly charges that the estate of the trustee should be made liable for the value of Chaney, who died in the transportation from Alabama to this State, alleging that this slave was removed prematurely after the birth of a child, against the advice of a physician, under circumstances of exposure, in very inclement weather. All the circumstances in this statement, inferring carelessness or inhumanity, are thoroughly disproved. This slave was not started for six weeks after her confinement, and then, with the approbation of a physician; she was carefully conveyed, in moderate weather, in a covered wagon; was rested on the road, and in every respect treated with care and kindness; and her child survived. This claim is extravagant, and apparently unkind.

The plaintiff objects to the claims of the trustee for his traveling expenses and fees

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to counsel, alleging that these were \*principally incurred about his own business. There is some foundation, in the evidence of F. S. Lyon, Caroline Sollee and Henry Sollee, for this allegation; but as this is a mere matter of detail, and as I do not undertake to audit the accounts, I leave it to the Commissioner, with the expression of my opinion, that the estate of the trustee should have credit for so much of these expenses as was incurred on account of the trust estate, and not for the expenses of E. Croft, about his private business.

On the principles already declared, in relation to Martha and her children, the plain-



tiff is entitled to the option of taking, specifically, one-third of Frances and her issue, and hire proportionally; or taking one-third of six hundred and fifty dollars, and of the interest accrued since the purchase of these slaves by the trustee. The Commissioner must ascertain which is more for her benefit, and if the former alternative be adopted, must report a plan of partition, specifically or by sale.

I do not understand the bill to make complaint, that the slaves assigned to the plaintiff were not equal to one-third of the whole value of all those which were divided, by the trustee, among the three children in 1845. It would be impracticable now, at least in this proceeding, to have a new actual partition of the slaves; for Edward is no party, and he has removed with his share, from the State, and some of the slaves of Frederick have been sold. If the plaintiff, however, is advised that her share was not equal, at the time of division, to one-third of all then divided, she may offer proof of the fact before the Commissioner, and obtain pecuniary recompense for such deficiency. The burden of the grievance set forth by the plaintiff in relation to the slaves assigned to her, is, that the trustee himself purchased them at inadequate price. Having already determined that she is not bound by an order obtained on the ex parte petition of the trustee, and that a purchase by a trustee of the trust estate, without the regular author-

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ity of the Court, is voidable at the option of the beneficiary, my conclusion follows, that this purchase must be set aside, if the advantage of the plaintiff so require. Let the Commissioner inquire and report whether it is for the benefit of the plaintiff to take these slaves, with their increase and hire, or one thousand nine hundred and seventy-five dollars, with interest from the time of purchase. There is little doubt as to the proper election in this instance, but it is safer to have the report of the master before making a decree for the specific delivery of the slaves to the plaintiff's guardian.

In the returns of the trustee to the Commissioner, all the expenditures for the trust estate, whether in the lifetime of Mrs. Sollee, or after her death, are thrown into one common mass, and divided equally among the children. It is proper that the charges on the trust estate during Mrs. Sollee's life be defrayed from the profits for that term, and then that the third part of each child in the estate, including an equal share of any remnant of profits of the life estate, separately sustain the expenses of such child, and of his share of the estate. So, also, as to the profits.

All fair charges in behalf of the trustee, should be liberally allowed. I shall not pursue further the details of this long case. The accounting on the principles of this

opinion will probably be unexpectedly onerous to the defendants; but it is my duty to uphold what I suppose to be the doctrine of the Court.

It is ordered and decreed that the plea of the statute of limitations be sustained, as to Frederick W. Sollee, and that the bill as to him be dismissed, without costs.

It is ordered and decreed that the Commissioner of this Court state the accounts between Lydia G. Sollee and the defendants, on the principles of this opinion; and that he make the inquiries herein directed.

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\*The defendants appealed on the grounds:

1. Because the actings and doings of Edward Croft, the trustee, were done in obedience to the orders and sanction of the Court of Chancery, after full reports by the Commissioner, and should not now be disturbed, after the death of the trustee.

2. Because it is manifestly unjust, and against equity, to make the estate of the trustee liable for the increased value of the slaves, when it was, at the time of sale, to the interests of the trust property, that they should be sold, and a sale was absolutely necessary to defray the expenses incurred by the trustee, in recovering and saving the property.

3. Because the trustee should not be made liable for the value of the boy Jim, there being no one whom he could find to sue for the said boy. He was sold as Col. Pearson's property, and immediately run out of the country. Col. Pearson had, at the time, a legal interest in the boy, and the sheriff was no trespasser, in levying on and selling him as Pearson's property, although he stood mortgaged to the trustee.

4. Because the trustee ought not to be made responsible for interest or hire of the slaves in the possession of Col. Pearson, beyond the extent of what he received when the slaves were taken back by sanction of the Court.

5. The sale of the slaves, Martha and her children, was made by order of the Court, to pay the debts of the trust estate, and at fair prices, and should not now be rescinded, because the negroes have increased in value.

6. Because the sale of Frances and her children, having been made by Col. Pearson

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to the trustee at the time he was the owner of the property, and the trustee having accounted for the same, should not now be disturbed.

7. Because the corpus of the estate should be liable for all the expenses in rescuing and saving the same by the trustee, and not simply the hire and proceeds of the property, till the death of Mrs. Sollee.

8. The testimony of Col. Pearson having been taken without objection, should not have been excluded by the Chancellor.

9. The taking of the negroes assigned

Lydia, by the trustee, by order of the Court, and at fair and full prices, should not now be rescinded, because the negroes have increased in value.

10. The purchase, of administrators and executors, at their own sale, for a full price, has been legalized by act of the Legislature, and, consequently, the purchase of property by a trustee, under the sanction of the Court of Equity, ought not to be disturbed, when it was made fairly, and for a full consideration.

11. The parties now all being before the Court, the Court should be disposed to decree what would have been right and proper to have decreed at the time the ex parte orders were obtained by the trustee for the interest of the trust fund.

12. Because the decree is, in other respects, contrary to law and equity.

The complainant, F. W. Sollee, also appealed on the grounds:

1. Because it is respectfully submitted,

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that the said F. W. \*Sollée was not barred by the statute of limitations, and that his claim to an account from the defendants ought to have been sustained by the Court.

2. Because the decree dismissing the bill as to F. W. Sollee's claim, is contrary to the equity and justice of the case.

Perry, Young and Elford, for defendants.  
Sullivan, for complainants.

PER CURIAM. This Court concurs in the Circuit decree: and it is ordered that the same be affirmed, and the appeal dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

#### 7 Rich. Eq. \*54

\*ARTHUR S. GIBBES v. JESSE COBB, E.  
M. COBB, GEORGE SEABORN and  
A. C. CAMPBELL.

(Columbia, Nov. and Dec. Term, 1854.)

[*Husband and Wife* ⚭35.]

Bill by trustee under marriage settlement to recover trust property, purchased from husband. The only fact proved in order to connect S., one of the defendants, with the purchase, was that a blank note which he had previously executed by way of lending his name as surety to C., one of the purchasers, for general purposes, was without his knowledge, filled up and given by C. for part of the purchase-money:—*Held*, that the evidence was insufficient to make S. liable.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 214; Dec. Dig. ⚭35.]

[*Husband and Wife* ⚭30.]

An unregistered marriage settlement is valid against subsequent creditors and purchasers with notice.

[Ed. Note.—Cited in *Wingo v. Parker*, 19 S. C. 15, 16.

For other cases, see *Husband and Wife*, Cent. Dig. § 176; Dec. Dig. ⚭30.]

[*Husband and Wife* ⚭29.]

Notice of such facts as are sufficient to put the party on the enquiry, is sufficient.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 167; Dec. Dig. ⚭29.]

[*Husband and Wife* ⚭30.]

Bill by trustee under unregistered marriage settlement against a purchaser with notice from husband. The purchase-money had been paid to creditors of husband:—*Held*, that the purchaser could not under this bill claim, by way of defence, to the extent of husband's interest, nor be subrogated to the rights of the creditors.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 176; Dec. Dig. ⚭30.]

Before Wardlaw, Ch., at Abbeville, June, 1854.

Wardlaw, Ch. This bill was originally instituted March 20, 1854, by Collin Campbell and Arthur S. Gibbes, as trustees under a postnuptial settlement, executed by Archibald C. Campbell for the benefit of himself and wife Emily and the issue of their marriage, for the special delivery, or compensation in lieu, with hire, of some of the settled slaves, namely: Jim, Molly, George, Sam, and Frances, alleged to have been sold by Campbell to the other defendants, and by them removed beyond the limits of the State. Colin Campbell has died since the filing of the bill, and the suit is continued in the name of the plaintiff as surviving trustee.

A. C. Campbell, by deed, dated August 10,

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1835, conveyed \*and transferred to Collin Campbell and Arthur S. Gibbes, and to the survivor of them, and the heirs of the survivor, a plantation in Beaufort district called Burlington, and twenty-seven slaves, (the five in question being either named, or the issue of such as are named) in trust, for the use of the said A. C. Campbell and wife Emily during their joint life, free from their debts, then for the use of the survivor for life, free from his or her debts, but in case the wife should survive and marry again, then the income in equal shares for the use of herself and any children of the marriage; and upon the death of the survivor, then for the use in equal shares of the children of the said Archibald; with power in the trustees to sell the settled estate, and invest the proceeds in other lands and slaves, or in certain stock and securities at their discretion. This deed was recorded in Anderson District where A. C. Campbell resided, within three months from the execution, namely, Nov. 6, 1835, but it seems to have never been recorded in the Secretary of State's office, as required by statutes.

On September 8, 1836, A. C. Campbell executed a new deed to the same trustees, of the same estate, upon the same trusts, and before the same witnesses, but not precisely in the same words exhibited in the former deed. This latter conveyance was recorded in the Secretary of State's office, April 2, 1838, (not within three months from the date of execu-



tion as required), but not recorded at any time in the registry of Anderson District. It was stated at the bar, in the course of the case, that a third deed of similar effect with the two above mentioned, had been executed by A. C. Campbell at an earlier date, and not recorded in either of the offices where registry is required. If this repeated execution of the deed was with the view of its proper registry and the consequent affecting of third persons with implied notice, as I infer that it was, there has been a curious miscarriage of purpose, for none of the deeds have been regularly recorded. I remark now, to conclude at once this portion of the case,

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that it is settled by \*the decisions of this State, that an unrecorded marriage settlement is good between the parties, and as to all other persons who have express notice of its existence. *Fowke v. Woodward*, Speers, Eq. 233; *Givens v. Branford*, 2 McC. 152 [13 Am. Dec. 702]; *Steele v. Mansell*, 6 Rich. 437. The main question in this case is as to the fact of express notice of the settlement to the defendants who are pursued for the purchase of the settled slaves.

It is unnecessary to regard specially any of the trusts declared in this settlement, except the first for the use of the estate to A. C. Campbell and wife during their joint life, for these primary beneficiaries are still living. The husband is intemperate in his habits, and improvident in his expenses, and he has been for some years encumbered with debts beyond the reach of the income of the settled estate, and without other means of satisfying his liabilities. The trustees resided in Beaufort District; the beneficiaries near Pendleton. Some of the settled slaves who were needed by Campbell and wife as domestic or menial servants, were from the beginning in the possession of these beneficiaries, and all of the slaves seem to have been sent from Beaufort to Anderson about new year, 1851.—For the years 1851 and 1852, John T. Sloan, as agent of the trustees, hired out the slaves and appropriated the avails to the support of the family and the satisfaction of their previous liabilities. He was separately, and as a partner of the firm of Gaillard & Sloan, a large creditor of A. C. Campbell, and finding that the hire of the slaves was inadequate to more than the support of the family, he abandoned his agency in January, 1853. In the course of his agency, he had bought many claims against A. C. Campbell, some at large discount, and had received others for collection. In January, 1853, Campbell and wife, under the advice of the late agent, sold the slaves, Jim, George, Sam, and Frances to Jesse Cobb, nominally, for two thousand six hundred dollars. As to Molly, the answer of Jesse Cobb alleges, that she was not sold to him, but delivered to him by Campbell and

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wife as their agent for the purpose of \*sale,

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and that he has sold this slave, and paid the price to his principals; but as there is no proof of this statement, I shall treat Molly as sold with the other four slaves. The purchase money, two thousand six hundred dollars, was paid as follows: cash to J. T. Sloan eight hundred dollars, and by notes dated January 29, 1853, of E. M. and J. T. Cobb and George Seaborn, to Gaillard & Sloan for one thousand and sixty-four dollars; to E. B. Benson for three hundred and ninety dollars; to James Hunter for forty-nine dollars and fifty-three cents; to John B. Sitton for two hundred and ninety-six dollars and seven cents. All of the payees of these notes were creditors of A. C. Campbell, and almost entirely for necessities furnished to his family. It does not appear to whom the bill of sale was made, if any were executed; but the witness, Samuel Reed, proves that the slaves were to be taken to Georgia, and the title to be made there by somebody. Jesse Cobb is the younger brother of E. M. and J. T. Cobb, and nephew of George Seaborn, and he was scarcely of the age of twenty-one years at the time of the purchase, and without visible means of making the purchase. He resided with his mother in Alabama until about a year before the purchase, during which year he resided with E. M. Cobb. He did not sign the notes for the purchase money; and in this respect his answer is contradicted. At the time of sale, E. M. Cobb paid the cash to J. T. Sloan, and produced a blank note signed by himself in the name of E. M. & J. T. Cobb and by George Seaborn, which was filled up for the amount of the liabilities of A. C. Campbell to J. T. Sloan, and to Gaillard & Sloan. It is manifest that, at first, it was supposed the whole transaction would be perfected through J. T. Sloan, and as George Seaborn did not attend in person, he sent one blank note. In event, however, this note was filled up for the amount of liabilities of A. C. Campbell to Sloan and to Gaillard & Sloan; and on the same, 29 January, 1853, E. M. Cobb gave the other notes to Benson, Hunter and Sitton, in the partnership name of E. M. & J. T. Cobb,

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and \*George Seaborn called a few days afterwards and added his signature to the last three notes. Jesse Cobb did not make his appearance on the day of sale, until the notes had been given, and the principal arrangements perfected; although he did come to the counting-room of Gaillard & Sloan the same evening, and received a statement of the application of the purchase money. E. M. Cobb, J. T. Cobb, and George Seaborn were at the time partners in the business of buying and selling slaves; E. M. Cobb being the principal actor in making purchases. Jesse Cobb was sometimes employed by the firm to a limited extent. The notes have been paid as to the greater portion by E. M. Cobb and George Seaborn, although some small part

of them remains unpaid. J. T. Cobb is dead. The negroes purchased from Campbell including Molly, were taken from the State by Jesse Cobb and E. M. Cobb, in company with other slaves of the firm, and have been sold abroad by Jesse Cobb. In the opinion of the witnesses the sum of two thousand six hundred dollars was not a full price for the slaves in question, and Jesse Cobb swears that having bought on speculation, he sold the other slaves (not mentioning the price of Molly) at a profit of two hundred and twenty-five dollars. All the defendants deny knowledge of the present residence of the slaves, and of any increase from them, and as Molly, the only one capable of increase is described as forty-five or fifty years of age at the time of the sale, unhealthy and unlikely, any increase is improbable.

The scope of the bill is that E. M. Cobb, and George Seaborn were partners with Jesse Cobb in the purchase of these slaves, and that all of them had express notice of the marriage settlement.

All of the defendants deny partnership in the purchase, and insist that the purchase was by Jesse Cobb alone. Jesse Cobb explicitly denies all notice of the marriage settlement, and whatever may be my suspicions, I cannot point to the evidence which satisfies me judicially that his answer is contradicted.

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\*He must go free, as his codefendants sustain his denial; but they are left to uphold their own burdens.

I am of the opinion that E. M. Cobb and George Seaborn must be treated as interested in the purchase, nominally made by Jesse Cobb. They gave the securities for the purchase; they paid the money. Jesse Cobb, their near relation, was irresponsible, and was put forward to avoid the consequences of notice to them of the settlement, which will be presently considered; but they do not deny their being sureties for the purchase money, and their actual payment of the price. When, in addition to this, there are the facts above narrated of their being partners in the traffic of slaves, and of the active interposition of E. M. Cobb (who was usually the prominent actor in purchases for the firm) in this particular purchase; I think that I should sacrifice substance to form, and be over exacting in proof of particulars, if I did not hold that E. M. Cobb and George Seaborn were practically interested in the purchase of the slaves in question. Moreover, there is a letter from George Seaborn to the plaintiff, dated May 10, 1853, which certainly commits the writer, and as I think E. M. Cobb as well as himself, after the previous proof of partnership and complicity between him and E. M. Cobb. In this letter, while endeavoring to excuse himself, he clearly admits notice of the trust to himself, and asserts communication of this knowledge to E. M. Cobb, and in substance asserts that

E. M. Cobb was the real purchaser of the slaves.

In his answer, E. M. Cobb states that he understood "that the slaves, or a part of them in the possession of A. C. Campbell, was a trust estate, but he had no definite knowledge of any settlement thereof by deed or otherwise"—that the defendant, George Seaborn, as agent of the trustees, sold some of the trust slaves—and that J. T. Sloan acted as agent for the trustees for some years—and that he was advised by George Seaborn not to purchase the slaves from Campbell and wife as a law suit might follow by the trustees. I think this answer

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\*admits notice of the settlement, or which is the same thing, notice of such facts as were sufficient to put the respondent on the inquiry as to the settlement. Besides this, the prompt negation of this defendant at Gaillard & Sloan's and again at E. B. Benson's, that he was buying the slaves, serves to show that he knew of the trust, and wished to avoid the consequences of notice, by putting forward as the ostensible purchaser an irresponsible brother to whom it might be impossible to trace notice.

George Seaborn in his answer admits that he had heard of the trust deed, but says that he does not recollect having ever seen it. This with his letter and his previous management of the trust estate, clearly affect him with notice.

I think that the liability of E. M. Cobb in this case might be established independently of his supposed partnership in the purchase of the slaves, from the fact of his aid and co-operation in the removal of the slaves from the State. *Pickett v. Pickett*, 2 Hill Eq. 471; *Bird v. Aitken*, Rice, Eq. 73; *Pettus v. Smith*, 4 Rich. Eq. 197. In this particular certainly, and I may add generally, the case is not so strong against George Seaborn, and I have had some hesitation in holding him liable at all. But the faith to be attached to his answer is impaired by the fact that originally in his answer, and again in his letter, he denies all connection with this transaction although so recent, even that he signed the notes for the purchase money; although he admits the latter fact in his amended answer. E. M. Cobb in his answer professes that E. M. and J. T. Cobb took from Jesse Cobb his obligation for the purchase money, but he produces no such paper.

It seems to me plain that a fraud has been practiced in the purchase and removal of these slaves; and my only apprehension is, that from imperfect discrimination, I may have fixed the offenders upon insufficient evidence.

The defendants insist that the creditors of A. C. Campbell should be made parties to

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the bill, and that defendants should \*have a discount at least to the value of A. C. Camp-



bell's equitable interest in the slaves. The conduct of some of these creditors, as exhibited by the present state of the pleadings and proofs, is certainly not approved by the Court, but it may be that they could justify themselves, if they were regularly litigants, and nothing is intended to be prejudged. The plaintiff having the legal estate in the slaves, has properly interposed to prevent the destruction of the trust property by him having an equitable estate for life in combination with others; and the liability of his equitable interest to creditors is not a defensive equity to be made by answer, although it might constitute ground for relief in a bill properly framed by creditors or those entitled to represent them. But in such a bill the Court would not permit those claiming through the husband to despoil the equitable estate of the wife, without a careful consideration of all the equities and securing some provision for the wife. *Burnett v. Rice, Speers, Eq. 579* [42 Am. Dec. 336]; *Jones v. Fort, 1 Rich. Eq. 50*; *Brooks v. Penn, 2 Strob. Eq. 113*.

It is ordered and decreed that E. M. Cobb and George Seaborn account before the Commissioner with the plaintiff for the real value of the slaves Jim, Molly, George, Sam and Frances, and for their hire or interest from January 29, 1853, and that they pay the costs of the plaintiff. Let Jesse Cobb and A. C. Campbell pay their own costs.

The defendants, Edwin M. Cobb and George Seaborn, appealed and moved this Court to reverse the decree and dismiss the bill, on the grounds:

1. Because, the deed of trust set up by the plaintiff is in effect a marriage settlement, and is void and of no effect, for want of registry in the offices of Secretary of State, and of Mesne Conveyance, within three months from its execution.

2. Because these defendants are neither

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parties nor privies \*to the said deed, but are strangers; and it is earnestly insisted, that, under a proper construction of the Act of 1823, the deed is, as to them, an absolute nullity, and that even notice to them of its existence, would not, and could not, give it validity.

3. Because, if notice can be made to supply the place of recording as to strangers, it must be direct and express notice of the deed itself, and not a vague, indefinite impression derived from hearsay, or other unauthentic sources; and neither the pleadings nor the proof in this case brings home to these defendants such notice as dispenses with registry.

4. Because, it is not shown by either the pleadings or the proof, that these slaves are a part of the trust estate. Nor do the pleadings or proof affect these defendants with notice that they are of the trust estate.

5. Because, it is respectfully submitted,

that the facts of this case do not show any such interference by these defendants with the slaves in controversy as would amount to a conversion at law, and as equity follows the law, no recovery can be had in this court.

6. Because, it is of the essence of a conversion, that the party sought to be charged, should intend to interfere with the rights of property, and should not do so by accident, mistake, or ignorance; and it is respectfully submitted, that the proof fails to show an intentional interference on the part of these defendants with the rights of the plaintiff.

7. Because, it is again submitted, the facts of the case do not establish a combination between these defendants and Jesse Cobb, to defraud the trust estate, or any one else, or that these defendants were in any way interested in the purchase of these slaves. On the contrary it is submitted, that the

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facts are susceptible of an explanation, and ought to receive it, which exonerates these defendants.

8. Because these slaves were in law and in justice and equity liable for A. C. Campbell's debts—especially for purchases for necessities for his family and the trust estate; and as the whole purchase money was thus applied, there is neither law nor justice nor equity in this proceeding.

And failing on these grounds, they moved for a new trial, or modification of the circuit decree, on the grounds:

1. Because, it is respectfully submitted, the Chancellor erred in refusing to make the creditors, who received the purchase money of these slaves, parties to this proceeding; to the end that they might be required to show that these slaves, or at least A. C. Campbell's interest in them, were liable for their demands, and that they were entitled to the money they had received, or failing to do that, that they might be required to refund the money.

2. Because, it is competent for the Court to decree between defendants, on pleadings and proof arising between plaintiff and defendants; and to make a proper decree in the premises, all the parties in any way interested, and especially such as instigated the sale of the slaves, should be before the Court.—Whereas the circuit decree only reaches or operates on a part of them, and its effect is to give the slaves to one, their proceeds to another, and make a third pay their value.

3. Because, if these defendants are to be made liable at all, they should only be made liable for the difference between the true value of the slaves and the price (\$2,600) that they sold for, as that much of their value has already been properly applied; or if not properly applied, it is in the hands of

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A. C. \*Campbell's creditors, and should be

refunded by them; to which end they should be parties.

Reed and Vandiver, for the motion.  
Sullivan, McGowen, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. I cannot concur in the decree against the defendant, Seaborn.

It is true that this defendant, (having been agent of the trustees,) is chargeable with notice of the trusts, though he never saw or read the deed. But the offence for which the decree makes him responsible, is the having been a party to the purchase of the trust property, with a view to its being carried off: which is far from a necessary consequence of his knowledge of the trust deed.

It appears to me that Seaborn is shown to be above all suspicion in this matter. He cautioned E. M. Cobb against having any thing to do with the purchase; and the only fact that connects his name with the transaction, is, that one of several blank notes, which he had previously executed by way of lending his name as surety to Cobb for general purposes, was filled up and used by the latter for the purpose of taking up the demands of Campbell's creditors. This was done in the absence of Seaborn, and without his knowledge.

With regard to the defendant, E. M. Cobb, I am of opinion the decree is sustained by the facts put in evidence, and the reasoning of the Chancellor;—to which nothing need have been added, had not a new point been suggested in the argument here.

The trust deed, (properly regarded as a post-nuptial settlement,) was not duly registered under the statute of 1823. The decree, however, holds the deed to be effectual as to

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E. M. \*Cobb, who is concluded to have had notice of it; and the point raised here is, whether notice to a subsequent creditor or purchaser deprives him of the right of objecting to the non-registration of the instrument.

It is admitted to have been settled in the case of *Fowke v. Woodward*, Speers Eq. 233, and subsequent cases, and upon the soundest principles and authorities, that the parties to the instrument are as much affected by actual notice as they could be affected by the constructive notice arising from registration. But it is contended that the doctrine should not be extended to third persons. The objection assumes, for example, that though it is right to conclude the parties from averring against their deed, on the ground that, being parties to it, they must have full knowledge of it,—yet it would be wrong to conclude the scrivener who drew it up and attested its execution, and, therefore had the same notice. It would be a fraud in either of the parties to defeat the provisions of an instrument of which they had notice: but

an attesting witness may, without fraud, turn round, purchase the property, and defeat the conveyance.

It has always been the law,—and the authorities quoted in *Fowke v. Woodward*, show it,—that it is fraud in any party, whether party to the instrument or stranger, to do any act going to frustrate or defeat the rights created by or arising under a deed of which he is cognizant: and the act done by him is set aside for that fraud, and the deed declared to be unaffected by it.

It is true that if the deed be incomplete,—if it be not fully executed,—and if it be left in that condition,—and there be no consideration in the case upon which a complete execution can be enforced; then, not only strangers, but the parties themselves, may disregard the instrument, notwithstanding their knowledge of what has been done towards its execution. It is null, and cannot affect them. But if all has been done that

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is necessary \*to its execution, it is to be taken as a complete conveyance, and every attempt on the part of those who have notice of the fact, to destroy the rights existing under it, is to be treated as a fraud.

Now, in *Fowke v. Woodward*, it was settled, as a necessary point in the case, that the statute of 1823, does not contemplate registration as part of the execution of the instrument. The terms of the statute were considered, and compared, among others, with those of the statute for the registration of leases, and the Pennsylvania statute for recording mortgages: and, taking the decisions in these analogous cases into consideration, it was deliberately held that the instrument was complete as to its execution the moment it was delivered. Besides being expressly decided, it was a necessary point in the judgment; for how could the Court make the deed binding on the parties, any more than on strangers, unless it was executed, so as to be in fact and in law a deed?

If the deed, while unregistered, is a deed between the parties, why may it not be a deed as to third persons? It is a deed between the parties because of their knowledge: why should it not operate as to others having knowledge? It is a deed, a valid and effectual instrument, as to all who have knowledge or notice, whether party or stranger; and, if it be not so regarded in law, an agent by whom the instrument is transmitted for registration, may keep it off the registry for the statutory period, and then purchase and hold the property.

"The Legislature," as observed by Chief Justice McKean, in *Levinz v. Will*, 1 Dallas, 430 [1 L. Ed. 209], "did not mean, nor did they, in fact, enact that express personal notice when given, shall have no effect: nor could they entertain an idea of defeating fair and honest bargains." The Chief Justice here refers to a principle which operates



apart from, and would have operated if no registry law had ever been enacted. If we

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transport ourselves, \*in imagination, to a time anterior to all laws requiring registration, we shall see that the principle to which he tacitly refers, was a principle necessary in the administration of justice: to wit., that the contracts entered into for the purpose of defeating prior contracts well known to the actors, are fraudulent, and should be set aside for mala fides. This principle still exists and must prevail, notwithstanding the enactment of recording Acts, unless expressly and clearly repealed in those Acts: just as a jurisdiction existing in a Court is not abrogated by the creation of a similar jurisdiction in another Court. The statute before me does not repeal the prior doctrine in relation to the effect of notice, in terms: and the generality of its phrases should not be construed into a repeal, when we consider that the object of the statute was to extend and not to abridge the effect of notice, by providing additional means for communicating it:—thus superadding presumptive to actual notice for the preservation of existing contracts.

If I am not grossly mistaken, it is impossible to sustain the objection made in this case, without trenching upon the substance of what is decided in *Fowke v. Woodward*. But there is a subsequent case which in my opinion very materially bears upon the objection brought forward here. I mean the case of *Footman v. Pendergrass*, 3 Rich. Eq. 33.

That was the case of a voluntary post-nuptial settlement made by a husband on his wife and children, which was not recorded. Several years after its execution, the husband borrowed money from a person who was held to have had notice of the deed, which debt he secured by a mortgage on the settled personal property. The difference between that case and the present, is, that in that case the defendant was a subsequent creditor;—here, he is a subsequent purchaser, or assisting in a subsequent purchase.

That difference was held, by Chancellor

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Dunkin, in that \*case, to be immaterial. "I am unable," says he, "to find any decision of our own Courts, in which a deed has been declared void in favor of a subsequent purchaser, which would not have been declared void in favor of a creditor."

And in that case it was held that the subsequent mortgagee was so affected by notice of the settlement, that his mortgage was disregarded, and the rights of the parties under the settlement enforced.

It is ordered that the bill be dismissed as against the defendant Seaborn; in all other respects the decree is affirmed and the appeal dismissed.

DARGAN and WARDLAW, CC., concurred.

DUNKIN, Ch., dissenting. I have been unable to concur in this judgment.

The plaintiff is the trustee in a post-nuptial settlement of A. C. Campbell and wife, executed in 1835. It is unnecessary to notice the deed of 1838. Neither of them was recorded according to law. The trustee resides in Beaufort, Campbell and wife, in Pendleton. By the terms of the instrument, the property was to be held for the joint use of husband and wife, during their joint lives, &c., with a power to the trustee to sell any part of the property and re-invest to the same uses. The trustee, residing in Beaufort, had at one time appointed George Seaborn as his agent; but for three or four years prior to 1st January, 1853, John T. Sloan was the agent of the trustee. He stated in his evidence that at the latter period his agency ceased.

On 29th January, 1853, A. C. Campbell and his wife joined in a bill of sale of four of the negroes included in the settlement to Jesse Cobb, for the sum of two thousand six hundred dollars. The whole amount was applied to the payment of the debts of A. C. Campbell, the sum of eighteen hundred dollars being received by John T. Sloan, who had been the agent of the trustee until the first of that month.

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\*The decree discharged Jesse Cobb for want of notice. But the Chancellor held, from the evidence, that E. M. Cobb was concerned in the purchase, and decreed him to account for the real value of the four slaves, with interest from 29th January, 1853. The answer of E. M. Cobb denied that he was a purchaser of the negroes; but he also averred that, although he had heard that the negroes, or some of them, in Campbell's possession, was "a trust estate," yet, "that he had no definite knowledge of any settlement of them by deed or otherwise." The Chancellor infers, however, from the whole answer, that the defendant, E. M. Cobb, "admits notice of the settlement, or, which is the same thing, notice of such facts as were sufficient to put the respondent upon the inquiry as to the settlement." I agree entirely with the Chancellor, that E. M. Cobb is affected with notice of such facts as might have put him on further inquiry, which, diligently prosecuted, would have resulted in actual knowledge of the settlement and all the provisions of it. But this is the utmost extent of the evidence, or of the admissions of the answer, and no more weight is, or can justly be ascribed to either.

The defendant has appealed from the decree, upon the following, among other grounds, viz.:

1. Because the deed of trust is a marriage settlement, and is void and of no effect for

want of registry in the offices of the Secretary of State and of Mesne Conveyance within three months from the execution thereof.

2. Because defendant was neither party nor privy to said deed, but is a stranger; and it is insisted that, under a proper construction of the Act of 1823, the deed is, as to him, an absolute nullity, and that even notice to him of its existence would not give it validity.

3. That if notice can be made to supply the place of recording, as to strangers, it must be direct and express notice of the deed itself, and not a vague indefinite impression derived from hearsay, or other unauthentic sources—and neither the plead-

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ings nor the proof, bring home to the defendant such notice as dispenses with registry.

It was further insisted that, in any event, the interest of A. C. Campbell in the settlement, should be made available to the defendant for his debts which had been paid from the purchase-money.

In *Steele v. Mansell*, 6 Rich. 437, it was held by a majority of the Court of Errors, that an absolute conveyance of land, though not recorded until four years after its execution, had priority over a subsequent conveyance of the premises recorded within six months from the date, but after the prior deed. The Court declared that such had been the current of decisions upon the Acts of 1698 and 1785, but they expressly state, that the decisions had been otherwise in relation to marriage settlements, and that with regard to those instruments, recording is of no avail, if done after the time prescribed by law. "We pretend not," say the Court, "to assail those decisions. They well consist with what we hold of ordinary conveyances under the joint action of the Acts of 1785 and 1698. In 1785 the provisions concerning marriage settlements were peculiar, and, thence onward, they have been stringent and progressively exacting." "A marriage settlement is also peculiar, and has been looked on with jealousy. It is a restraint upon the marital rights—a modification of results, which, without it, would have ensued from the marriage; and usually it is contradictory of the evidence which possession and other visible signs give of ownership. Marriage is a conveyance, open and notorious—equivalent to a written instrument duly recorded, and generally extensive in its operation. Strong reasons of policy have been thought to justify the imposition, and stern enforcement of severe terms before priority over it is conceded to a deed of the parties, making for their special case a change of its legal effect, which, if not cautiously guarded, might easily become the means of defrauding innocent third persons." These remarks strikingly illustrate the distinction which

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has always prevailed between marriage settlements and other conveyances in reference to the registry law, and they also point out the reasons for the distinction. Many jurists have expressed their deep regret that, even in respect to ordinary conveyances, express notice had been held to dispense with registration as between strangers to the instrument—that the salutary provisions of the Act had been frittered away, and the policy of the law defeated in the vain attempt to prevent particular, or occasional injustice. The evil is not so much in the principle which recognizes such exception, as in the difficulty of applying it with safety in any case, and without the hazard of introducing more extensive mischief. But, for the reasons so clearly stated in the judgment of the Court of Errors, the Legislature have always manifested particular jealousy in relation to marriage settlements, and, for the protection of the community, have prescribed, in strong and unambiguous terms, the character of notice which shall affect those who are dealing with the ostensible owners of property. The course of legislation upon the subject is instructive. By the Acts 1785 and 1792, (4 Stat. 656; 5 Ib., 203), marriage settlements not recorded within three months from the execution thereof, in the office of the Secretary of State, were declared null and void with respect to creditors and bona fide purchasers and mortgagees. These terms are sufficiently plain; and for thirty years after the enactment of these laws, the judicial history of the country affords no instance of any exception engrafted on the statute. *Givens v. Branford* [2 McCord, 152, 13 Am. Dec. 702] was decided in 1822, by a divided Court, upon a special verdict. It is there stated to have been "the first time that the question has arisen under the Act of 1785," and that "there was some difference of opinion" in the Court. It was ruled, however, by a majority of the Court, that "the actual notice of the marriage contract received by the plaintiff was sufficient to bar his claim to the settled estate." This decision was not published until the following year (1823); and, in December of that year, the Legisla-

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ture passed an Act \*which declared that "no marriage settlement shall be valid until recorded in the office of the Secretary of State, and in the office of the Register of Mesne Conveyances of the district where the parties reside; provided, that the parties shall have three months to record the same, and if not recorded within three months, the same shall be null and void." It was for some time supposed by many, that the general terms of this Act applied as well between the parties as to strangers. And in *Baskins v. Giles*, Rice Eq. 324, Judge Johnson, who had concurred with the majority of the Court in *Givens v. Branford*, intimates



the opinion, that the act of 1823, so construed, was "a wise regulation." "The numerous evils, and many vexatious law suits, which have grown out of the neglect to record deeds," says he, "are familiar to every one." He adverts to the doctrine, that notice to subsequent purchasers and creditors should supply the want of recording, and says, that "the titles to many of the largest estates, both real and personal, have depended often on questionable proof of notice." But in *Fowke v. Woodward*, Speers Eq. 233, it was ruled that recording was no part of the instrument itself, and that, therefore, the contract was binding between the parties, though not recorded according to law. This decision is in strict conformity with the provisions of the Acts of 1785 and of 1792, and with the general policy of the registry law. But, considering the time at which the Act of 1823 was passed, immediately after the first decision of the Courts that actual notice of a marriage settlement, as of any other deed, dispensed with the necessity of recording as to creditors and purchasers, and the acknowledged mischief which had frequently resulted from the doctrine, as applicable to ordinary conveyances, it is not too much to suppose—it is due to the clear and emphatic language of the Legislature to affirm—that the object was to cut up by the roots this fruitful source of litigation and uncertainty in relation to marriage settlements, and by declaring the deed ineffectual "until record-

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ed in the offices of Secretary of State and of Mesne Conveyances," to protect purchasers and creditors, not only from the false signs of apparent ownership, but from having their titles depend upon "what Judge Johnson styles "questionable proof of notice." It is justly remarked by the Court of Errors, in *Steele v. Mansell*, that "marriage settlements have always been looked upon with jealousy"—that "the legislative provisions concerning them have been peculiar—have been stringent and progressively exacting." But this jealousy has arisen from the peculiar nature of the contract and the danger to the community from the condition of things which it creates. The "progressively exacting" legislation to which the Court adverts, has been principally directed to the requirements of recording, and recording promptly. "Marriage itself," says the Judge, "is a conveyance, open and notorious," and, in order to give priority to a deed of the parties making for their special case a change of the legal effect of marriage, has been thought to justify the imposition and stern enforcement of severe terms, in order to protect the rights of third persons. Besides, in the common transfers of property, the ordinary instinct of self-interest would prompt the parties in possession to place on record their muniments of title. But a marriage settlement is a restraint upon the marital rights of the

husband's dominion over property of which he is the possessor and apparent owner. Practically he may be, at least, indifferent upon the subject. With much reason then has the law jealously provided against the supineness, or neglect, or fraud of those interested under the instrument, by requiring this character of notice in order to sustain their rights under it.

Although, in reference to ordinary conveyances, our Courts have adopted the exception introduced by the English Courts to the registry laws, yet, as remarked by Chancellor De Saussure, "we have followed them with rather more guarded steps. We require the notice of the deed to be brought home clearly and positively." It is impossible, from any part of the testimony, to infer any such notice on the part of the defendant,

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\**E. M. Cobb*. Nor is the decree placed on this ground. The Chancellor says, "I think this answer admits notice of the settlement, or which is the same thing, notice of such facts as were sufficient to put the defendant upon the inquiry as to the settlement." No case has, I believe, carried the doctrine to this extent, in reference to marriage settlements, either before or since the Act of 1823. It appears to me inconsistent not only with good policy, but with the plain provisions of that law. Being about to purchase, or having purchased, from one in possession of slaves, and with all the apparent marks of ownership, an idle by-stander, or sincere friend, suggests that it is a trust estate. This is certainly enough to put the party on the enquiry. He searches the office of Secretary of State, finds no deed on record, concludes that the suggestion was an unfounded rumor, or, at least, feels himself safe under the protection of the statute, and completes his bargain. Is he not only to lose his money, but to pay for any extra value that may be fixed on the slaves, because he did not further prosecute his searches, ascertain who was the trustee, and go to Beaufort to enquire of the trustee as to the provisions of the deed, and the authority of the cestui que trust to sell? If the doctrine affirmed be applicable to marriage settlements, it appears to me practically to abrogate the salutary provisions of the statutes, and to substitute for the certainty of law, the vague remembrance of witnesses, or the doubtful inference of magistrates. Marriage settlements are wholly unobjectionable in themselves. They are regarded with jealousy by the community, only because of the danger to which they subject those who may deal with the parties. The Legislature have, therefore, declared that no marriage settlement shall be valid until recorded in the proper offices, and if not recorded within three months, shall be null and void. And (as is elsewhere said) who will undertake to prescribe for the Legislature what provisions they shall im-

pose for the purpose of protecting the community? Yet, by the construction which is given, the law is rendered rather a snare

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\*than a shield. Persons relying upon the law, relax or limit their vigilance, and suffer the penalty of their confidence. In *Steele v. Mansell*, the case of *McCartney & Gordon v. Ferguson*, 2 Hill Eq. 180, is cited, as illustrating the distinction between marriage settlements and ordinary conveyances. The settlement was recorded in the Register's office, (by misapprehension as the law then stood,) within the period prescribed by law, and in the office of the Secretary of State, but after the period. Nearly twenty years after the recording of the deed in both offices, a debt was contracted by the husband with a merchant of Charleston, where the instrument was on record. The deed was declared null and void as to creditors, because not recorded in the office of the Secretary of State within three months. Some general remarks of the Court may be well applied to the Act of 1823. "There is no room in the construction of the Act, to say (observes the Judge) that it has been substantially complied with, and its ends answered." "The Legislature have excluded all construction of a supposed intention by the use of plain words," &c. "In the construction of a statute, I know no rule more safe than to adhere to the sense of the Legislature, as manifested by the plain and literal meaning of the words used. To adopt any other rule would be to legislate, not to construe." But if a deed for twenty years spread upon the proper records in the city where the parties resided, be not regarded as notice, or rather cannot be construed to dispense with the positive requisitions of the statute as to the time of recording, how can the "plain words" of a more recent and "more exacting law" be construed to have "its ends answered," by notice of such facts as might put the party on the enquiry? When, too, the first stage of such enquiry would assure him that, if any such deed existed, it was as to him void in law? The Acts of 1785 and 1792, already required settlements to be recorded in the office of the Secretary of State. If, in that part of the Act of 1823, declaring them to be invalid until recorded in the office of the Secretary of

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\*State, the Legislature had any meaning, it was to preclude construction, and to prevent any substitution of notice for that prescribed by the statute. I am, for these reasons, of opinion that the defendant's third ground of appeal is well taken.

But the defendant has paid the purchase-money, (two thousand six hundred dollars,) which has been applied to the payment of creditors of A. C. Campbell, and he holds the bill of sale of himself and his wife. In any event, I think, that in the accounting, he is

entitled to all the interest of A. C. Campbell in the premises, and that he is also entitled to be subrogated to the rights of the creditors, whose claims he has extinguished, to the interest of A. C. Campbell in the trust estate under the provisions of the deed.

Decree modified.

## 7 Rich. Eq. \*77

\*JAMES R. BROCK v. WILLIAM LEWIS.

(Columbia. Nov. and Dec. Term, 1854.)

[*Principal and Agent*  $\hookrightarrow$  78.]

W. had been the agent for several years of his mother, and continued so until her death. Some two years before his death she gave him a mortgage to secure two thousand two hundred dollars, recited to be due him for supplies, advances, &c. This bill, by her administrator, was to set aside the mortgage for fraud, and consequently to exact an account of W.'s transactions as agent. The Circuit Court dismissed the bill, and plaintiff appealed on the grounds: 1. That the mortgage was void for fraud, and 2. That an account should have been ordered. The Court of Appeals ordered an issue upon the first ground; and after the issue was decided in conformity with the Circuit decree, which held that there was no fraud, took up, at another term, the second ground, and held, that plaintiff was entitled to an account from the date of the mortgage until the death of W.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 176; Dec. Dig.  $\hookrightarrow$  78.]

Before Dunkin, Ch., at Sumter, June, 1854.

The plaintiff was the administrator of the goods and credits of Mary Wells, who died intestate in the Fall of 1851, and the defendant is Ordinary of Sumter district and administrator of the derelict estate of Charles W. Wells, (a son of Mary,) who died intestate in the Spring of 1851. This bill was filed April 9, 1852, and its principal object was to set aside, for fraud, a mortgage of slaves, executed by Mary Wells to C. W. Wells, and consequently to exact an account of the transactions of C. W. Wells, as agent and manager for his mother.

The mortgage in question, bearing date Feb. 5, 1849, reciting by way of consideration the indebtedness of the mother to her son in the sum of twenty-two hundred dollars, for advances made by him in supplying provisions for her family, such as sugar, coffee and salt, and his liability for such advances, pledged the slaves January, Amelia, Kelsey, Julia, Molly, Louisa, and their increase, for the payment of said sum of money with interest from the date of the mortgage, whenever required by the said C. W. Wells.

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\*Upon the mortgage was endorsed an acknowledgement under seal, by the mortgagor, attested by her son Robert F. Wells, dated July 16, 1850, that C. W. Wells had that day demanded payment of the money mentioned as secured by the mortgage, and that she had refused to pay the same. At the same time



she gave her note, attested by the same witness, her son, Robert F., promising to pay to C. W. Wells or bearer twenty-two hundred dollars, with interest from the date of the mortgage, February 5, 1849, six months after the date of the note.

The defendant in his answer denied the fraud alleged, admitted that C. W. Wells acted as agent and manager of his mother, and submitted that complainant could claim for no account prior to the date of the note, and he denied that since the date of the note C. W. Wells became indebted to his mother.

The case was heard at June sittings, 1852, by Chancellor Wardlaw, who dismissed the bill.

An appeal was taken on the following grounds:

1. Because all the facts and circumstances proved at the trial show that the mortgage, though purporting to secure a debt, was without consideration.

2. Because the paper was without consideration and executed by an infirm old lady, who could neither read nor write, at the suggestion of a son who had great influence and control over her.

3. Because the character and circumstances of the whole transaction prove that it was a fraud and deceit practised on the mother by the son.

4. Because, connecting the act with the business relation in which the parties stood, it exhibited an abuse of confidence by the agent for his own advantage, which is against equity and good conscience.

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\*5. Because in any event the Chancellor should have directed an account between the parties.

6. Because the decree is in other regards against the evidence and the principles administered by this Court.

At May sittings, 1853, of the Equity Court of Appeals, the following order was made:

"It is ordered that an issue be made up between the parties, in which the present plaintiff shall be actor, for trial in the Court of Common Pleas for Sumter district, to determine the question whether the mortgage of February 5, 1849, is a fraud upon Mary Wells. Upon the trial of this issue, any of the testimony taken in the Circuit Court of Equity may be read at the instance of either party. The Judge who may preside on the trial is respectfully requested to certify the verdict to the Circuit Court of Equity, with his opinion of its propriety.

"It is further ordered that this cause be remanded to the Circuit Court of Equity."

At Fall Term of the Common Pleas for Sumter the issue was tried and a verdict rendered sustaining the validity of the mortgage.

Upon which complainant served defendant with the following notice:

The defendant and his solicitors are notified that complainant will ask of the Circuit Court of Equity a trial of the case, it having been remanded to the Circuit Court, and failing in that, he will move for a new trial of the issue on the following grounds:

1. Because the testimony proved that the mortgage was signed by the said Mary Wells who was not able to read, without having been read to her—without any knowledge on her part of its contents, and without ability by her to understand the nature of the instrument she executed.

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\*2. Because the proof was clear that it was procured of her by her son, who was her agent, and who had unlimited control over her; and that it was without consideration and fraudulent.

3. That the testimony proved that the only claim towards the payment of which she expressed her willingness to aid her son, the said Charles W. Wells, was the demand which was due to Mr. W. C. Dukes: whereas the amount for which the mortgage was taken was one far exceeding it, and the whole transaction was a fraud upon her.

4. That the circumstances proved in the transaction in which the parties bore the relation of principal and agent, disclosed an abuse of confidence amounting to fraud.

5. Because the verdict is against the testimony, and also the opinion of the presiding Judge.

The appeal was heard before his Honor, Chancellor Dunkin, at June sittings, 1854, who made the following decree:

Dunkin, Ch. This cause was heard at June sittings, 1852, by Chancellor Wardlaw, who dismissed the bill. The plaintiff appealed on various grounds, which will appear from the brief.

The third ground of appeal was "because the character and circumstances of the whole transaction prove that it was a fraud and deceit practised on the mother by the son." The appeal being heard by the Court of Appeals, May, 1853, the following order was entered, viz: "Towards the formation of its judgment in this case, this Court desires the verdict of a jury upon the question whether in taking the mortgage of February 5, 1849, Charles W. Wells practised a fraud upon Mary Wells, that is, a fraud in which she did not participate, and for which she herself in her life time might have set aside the deed. To avoid prejudice to either party on the trial of the issue, it is prudent to abstain here from all comment on the case. It is

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\*ordered that an issue be made up between the parties, &c." It was further ordered "that the cause be remanded to the Circuit Court of Equity."

The Court of Appeals thus studiously avoided any intimation of opinion upon the third ground of appeal, in reference to which

the issue was ordered, and withheld any judgment upon the fourth, fifth and other grounds of appeal, as the determination of the issue might aid in forming a judgment on those points, or might supersede the necessity of considering them.

The cause was remanded to the Circuit Court to enable either party to move for a new trial, which could not properly be made in the Court of Appeals in the first instance.

Upon the motion for a new trial I have only to echo what is said by the Judge who presided at the trial of the issue, that whatever doubts are presented by the evidence are more satisfactorily solved by the response of the jurors of the vicinage than by the opinion of a magistrate with less ample means of estimating the weight of evidence.

The motion for a new trial is dismissed.

The complainant appealed on the grounds:

1. Because the terms of the order remanded the cause to the Circuit Court.

2. Because the Court of Appeals, by its order at May term, 1853, passed no judgment on the 5th ground of appeal from the circuit degree of Chancellor Wardlaw, which ground was as follows: "Because in any event the Chancellor should have directed an account between the parties," and the complainant has therefore not had the benefit of the judgment of the appellate court on that ground of appeal.

Moses, for appellant.

Mayrant and Richardson, contra.

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\*The opinion of the Court was delivered by

DUNKIN, Ch. The plaintiff's fifth ground of appeal was not considered or determined, at the former hearing in this Court. The Chancellor, remarking that "the principal object of the bill was to set aside for fraud the mortgage of slaves, and, consequently, to exact an account of the transactions of C. W. Wells, as agent and manager for his mother," dismissed the bill when he arrived at the conclusion that the transaction was valid, and bona fide. It was true that, for several years, C. W. Wells had been the general agent of his mother, but, on February 5, 1849, she had executed to him a mortgage of slaves, reciting, by way of consideration, her indebtedness to him in the sum of twenty-two hundred dollars for advances made by him in supplying provisions for her family, such as sugar, coffee and salt, and his liability for cash advances; and on July 16, 1850, she gave him a note for that amount bearing interest from the date of the mortgage (February 5, 1849).—Commenting on these transactions, the Chancellor remarks "this is a bill filed on behalf of volunteers claiming under Mary Wells, and not of creditors. If she were competent to contract it follows that, as against volunteers, she might account

with her son upon any principles of adjustment she pleased.—Nothing hindered her, if it seemed right to her, to remit all charges on her side, and to pay her son twice over for his advances and liabilities on her account. It is more safe and reasonable to suppose that, by some reckoning with her son, she became satisfied to secure to him a debt of twenty-two hundred dollars, than to conclude that she was basely betrayed and cheated by her son," &c. Upon this question of fraud an issue was directed to the jury, whose verdict concurs in the judgment of the Chancellor, and it is not sought in this appeal to disturb that verdict. The Chancellor had assumed that, in the transaction of February 5, 1849, "some reckoning" had taken place between the parties upon such principles of accounting as the mother thought

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proper, or that she had remitted all \*charges on her side as she had a right to do and agreed to pay her son twice over for his advances, &c., on her account. All fraud in the transaction being negatived by the concurrent judgment of the Chancellor and the jury, we think the view presented by the Circuit decree of June, 1852, may be well sustained. But the agency of Charles W. Wells continued after these transactions, and until his decease in July, 1851.—From the time of executing the mortgage, February 5, 1849, until the decease of C. W. Wells, the plaintiff is entitled to an account of his transactions as agent of Mary Wells, deceased.

It is ordered and decreed that the Circuit decree of June, 1852, be in this respect reformed, and that it be referred to the Commissioner to take an account as herein before indicated.—In all other respects the decrees of the Circuit Court are affirmed and the appeal dismissed.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Decree reformed.

7 Rich. Eq. \*84

\*WILLIAM B. DORN v. WILLIAM BEASLEY and Wife.

(Columbia. Nov. and Dec. Term, 1854.)

[*Partition* ⇨13.]

Where plaintiff in trespass to try title has a verdict for "one undivided fourth part of the land," defendant may sustain a bill against him for partition of the land.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 36, 81; Dec. Dig. ⇨13.]

[*Judgment* ⇨707.]

A decree in partition does not bind parties not before the Court.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1230; Dec. Dig. ⇨707.]

[*Judgment* ⇨665.]

[A judgment or record in a former action is not admissible in evidence as affecting the



rights of any person not a party or privy thereto.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1177; Dec. Dig. ☞665.]

[Partition ☞39.]

[Courts of equity have jurisdiction to effect partition between tenants in common, or other tenants having joint interests.]

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 93; Dec. Dig. ☞39.]

[Tenancy in Common ☞3.]

[Where a defendant, in trespass to try title, was adjudged to have right of possession to three-fourths, and the plaintiff to one-fourth, of the land, and their possession was not divided, they were tenants in common.]

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 13; Dec. Dig. ☞3.]

[Judgment ☞668.]

[Cited in *Stern v. Epstein*, 14 Rich. Eq. 9, to the point that partition proceedings cannot be questioned in subsequent actions by the original parties.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1181-1183, 1188; Dec. Dig. ☞668.]

Before Wardlaw, Ch., at Abbeville, June, 1854.

Wardlaw, Ch. The points undetermined in this case, upon which it was remanded to the Circuit Court for hearing, relate to the partition which the plaintiff claims by his bill.

The bill alleges, that although plaintiff supposed himself to be exclusively entitled by grant from the State and adverse possession, to the Teulon land of one hundred and sixty-three acres, the effect of the recovery, in the suit at law against him by the present defendants, of one undivided fourth part of said land, is to give him title as against defendants to the remaining three-fourths, and to make him tenant in common with them of the whole tract; and that he has so treated the rights of the parties since the verdict. The answer insists that defendants are not tenants in common with plaintiff, and have no joint interest with him, but that they are in fact tenants in common of the whole land with the heirs at law of Christiana Teulon, who died seized of the land. The amended answer of defendants alleges that Christiana Teulon left four daughters as her heirs at law, viz.: Mary, one of the defendants; Rebecca, who has been dead for many years, leaving a son, William T. Stillman; Elizabeth Brown, who left the State about thirty years ago, and died soon after, perhaps leaving a son, of whom nothing certain is known; and Anna, of whom nothing has been heard for sixteen years, and of whom there was a previous rumor that she had gone through the

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ceremony of marriage \*with one Sheppard, who was said to have a wife then living. The defendants do not claim title to the whole land in themselves adversely to the plaintiff, but they do claim, by descent, shares in the portions of the sisters of the wife of

defendant, where such sisters and any issue of them are presumed to be dead.

No proof was offered before me of the title of Christiana Teulon to the land in question, probably because it was supposed such proof was not proper in this tribunal. Where on a bill for partition, adverse claim is pleaded in defence, the bill is sometimes dismissed, (*Martin v. Smith*, Harp. Eq. 106,) but the more usual and better course is, to retain the bill and direct an issue to be tried by a jury. But here the defendants do not claim for themselves more than one undivided fourth of the land, unless they may be entitled to some accretion to their share by the death of the wife's sisters and all issue of them. No proof was offered concerning the descendants of Christiana Teulon, except that she left three daughters, Mary, Rebecca, and Anna; and that William M. Stillman, son of Rebecca, had commenced an action of trespass to try titles for this land against the present plaintiff. There was no attempt to show by evidence, by what title the defendants recovered one-fourth of the land; and I supposed that parol testimony as to the facts which formed the basis of the verdict would be incompetent. (*Henderson v. Kenner*, 1 Rich. 478; 2 *Smith's L. C.* 441.) Still the defendants themselves are committed by the statement of their title in the answer; and upon that statement, I am of opinion that they are estopped from claiming more than one-fourth against defendant. If they be now entitled to more than one-fourth, they were equally so entitled when they obtained their verdict in 1852, and when they commenced their action in 1849, for the presumption of the death of two of the sisters of Mrs. Beasley without issue, was complete at the earliest period mentioned, and the neglect of Beasley and wife to prove the facts on the

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trial at law upon \*which the presumption rests, gives them no claim to renew the litigation. (*Davis v. Murphy*, 2 Rich. 560 [45 Am. Dec. 749].) It was decided in *Caston v. Perry*, 1 Bail. 533 [21 Am. Dec. 482], that a recovery by a plaintiff in trespass to try titles is conclusive between the parties as to all titles which the defendant had at the time of trial; and as estoppels are reciprocal, the plaintiff suing for the whole, and recovering a part only, is equally concluded as to all his existing titles. In *Dyson v. Leek*, 5 Strob. 143, the Court says: "If the verdict finds for the plaintiff a part of his claim, the defendant is concluded to that extent and the plaintiff is concluded as to the remainder; and the judgment for the plaintiff for the part recovered, is a judgment for the defendant, in other words, a judgment against the plaintiff for the part not recovered; so that to a second suit founded on the same cause of action, the defendant may plead the former recovery in bar." This doctrine is re-

affirmed in *Farmer v. Miller*, 5 Rich. 483. It may be said that as a defendant in trespass to try titles may defeat a plaintiff in whole or in part, by showing a paramount title in a third person; the title of the defendant in such suit is not directly in issue. This may be true, but it can have no effect in limiting the estoppel upon the plaintiff, between the parties, as to the extent of his title; however it may tend to rebut the conclusion that the parties are tenants in common by joint title.

In the action of ejectment the formal issue is as to the right of possession only; and our action of trespass to try titles, pursued in the names of the actual claimants and possessors, includes merely the substance of the action of ejectment purged of fictions and unending litigation, with the addition of the action of trespass for mesne profits. The right of possession, not the title, is the gist of the form of action prescribed in this State. As title, however, is in fact tried in the contest about the right of possession, I suppose that where a plaintiff in trespass to try titles suing for an entire tract, recovers an undivided portion only, the presumption in the

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absence of contrary proof \*and claim, would be, that the defendant has title as well as possession joint with the plaintiff. In the present case, however, both parties agree that their title is not joint, one claiming by grant from the State and adverse possession, and the other by descent from Christiana Teulon. Still the verdict certainly shows that as between themselves the parties are entitled to a common possession. The defendant in the suit at law by the verdict was adjudged to have right of possession to three-fourths, and the plaintiff to one-fourth; and as their right of possession was not divided, it must be in common. Such was the conclusion of the Court of dernier resort in this very case. It might be that Dorn's possession was in right of another, but the ordinary presumption is, that it was in his own right. It is conceded that he has a grant from the State covering the land in question, and this is sufficient prima facie proof of his seisin of three undivided fourths to entitle him to partition. Whether some descendants of C. Teulon not before the Court may not have a better title than the plaintiff, it is not important to inquire. No party in that interest has intervened in this controversy by pleading or proof, and none such will be bound by the decree. Courts have sufficient employment in protecting the interests of the parties before them, without looking to the possible interests of those not represented in the litigation, nor bound by the judgments. If a party by injudicious attempts to defeat his adversary, commit himself injuriously to some third person unrepresented, it is his fault, and not that of the tribunal. Perhaps Beasley and wife, by their course of pleading, may have yielded any right to claim this

land by possession adversely from the other distributees of C. Teulon; but if these distributees prove their title, I suppose that they will also be protected against Dorn's possession by the common possession of Beasley and wife. A judgment of a Court concludes only the rights of the parties represented in the suit in which the judgment is rendered. For example, any partition decreed by the Court of Equity may be dis-

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turbed or annulled on regular \*application of third persons proving paramount title to some or all of the parties to partition.

If, then, the effect of the verdict at law, be to establish a common right of possession in the plaintiff and defendants, and if Dorn's grant sufficiently exhibit his seisin of the land—and I adopt the affirmative in both instances—it is entirely immaterial whether the parties claim by joint title or not. Tenants in common are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously. (Litt. 292.) In this State, and generally in the United States, this tenancy in common may arise by descent; but it may happen when there is unity of possession merely, and an entire disunion of interest, of title, and of time. Of two tenants in common of lands, one may hold his part in fee simple, the other in tail or for life; so that there is no necessary unity of interest; one may hold by descent, the other by purchase; or one by purchase from A., the other by purchase from B.; so that there is no unity of title: one's estate may have been vested fifty years, the others yesterday: so that there is no unity of time. The only unity is of possession. (2 Bl. Com. 191; 2 Cruise, 525).

The jurisdiction of the Court of Equity to effect partition between tenants in common or other tenants having joint interests, is well settled and eminently salutary. Common possession so frequently leads to strife, that every legitimate facility should be afforded to severance. It constitutes no objection in equity to a partition, that it may not finally conclude the interests of all persons; as where partition is sought only by or against a tenant for life, or where there are contingent interests to vest in persons not in esse. (*Gaskell v. Gaskell*, 6 Sim. 643.) For the Court will still proceed to make partition between the parties before the Court, who possess competent present interests, as tenants for life or for years, although it may not be binding on third persons not virtually represented. (*Stor. Eq.* 656.) In *Steedman v.*

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*Weeks*, 2 \*Strob. Eq. 145 [49 Am. Dec. 660], the Court granted partition of growing trees suitable for sawing, between parties having a common interest in these trees, although one of the parties was exclusively entitled to



the soil. I think the plaintiff as against defendants is entitled to partition.

It is ordered and decreed, that a writ be issued, directed to five commissioners, to be appointed by the Commissioner of the Court on the nomination of the parties, to make partition of the land described in the pleadings, so as to allot three-fourths to the plaintiff and one-fourth to the defendants in right of the wife.

It is also ordered, that the injunction heretofore granted be made perpetual.

The defendants appealed upon the grounds:

1. That there is not such community of interest between complainant and defendants as will authorize a partition.

2. That upon a total denial by defendants of a right to partition in complainant, together with a statement of the parties who are entitled to partition, this Court will not order partition until the rights of the parties are settled by an issue.

3. Because, under the circumstances, a partition would be unjust to the defendants who are in no default, and that a partition should not have been ordered.

Thomson, for defendant.

McGowen, contra.

The opinion of the Court was delivered by

DARGAN, Ch. William Beasley and wife brought an action of trespass to try the title

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of a certain tract of land against the plaintiff in this case. At October Term, 1852, the action at law was tried, and the plaintiff in said action had a verdict for "an undivided fourth part of the land" described in the pleadings.

Mary Beasley was one of the heirs at law of Christiana Teulon, and there were three others. It was upon this title, that the action at law prevailed. Judgment was entered up upon the verdict in conformity therewith, and a writ of habere facias possessionem, in form following the verdict and judgment, was issued; under the authority of which, and by direction of the plaintiffs in that action, the sheriff was about to eject William B. Dorn, and put Beasley and wife in possession of the whole tract.

Whereupon, William B. Dorn filed this bill for an injunction to stay the execution of the writ of hab. fac. poss., and also for a partition of the premises in question. He alleges in his bill, that he has been in possession of the premises for fourteen years; regarding and using it as his own property. He says, that the effect of the verdict and judgment is, to make William Beasley and wife tenants in common with him,—he interested to the extent of three-fourths, and they to the extent of one-fourth. The prayer of the bill is, that the land by a decree of the Court may be divided between him, and the said Beasley and wife in that proportion.

The complainant Dorn, obtained from one of the Chancellors at Chambers, an order for an injunction to restrain the execution of the writ of hab. fac. poss. until the trial of the cause. The case came on for trial at June Term of the Court of Equity, for Abbeville District, 1853. The presiding Chancellor, on the authority of the case of Dupont v. Ervin, 2 Brev. 400, and in conformity to what he considered to have been the practice established by the decision in that case, dismissed the bill.

From this decree, an appeal was taken, and heard by this Court at May Term, 1854. At

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this hearing, besides the various grounds of appeal on the part of the complainant Dorn, which were discussed, the defendants, Beasley and wife, brought into question the jurisdiction of the Court. After sustaining the jurisdiction of the Court, this Court in its decree ordered as follows: "In relation to the operation of the verdict at law, the proper form of the writ of hab. fac. poss., and the mode in which it should be executed as between the parties to the action at law, this Court prefers to take the advice and judgment of the Law Judges,—these latter questions relating to doctrine and practice exclusively legal."

"It is therefore ordered, that this case be set down upon the docket of the Court of Errors for the argument of the questions just mentioned; and that a message be sent to the Law Court of Appeals," &c.

The case was heard by the Court of Errors at the same term on the questions submitted to it by this Court in the order above recited. On the 15th May, (1854,) the opinion of the Court of Errors was delivered, in which three of the Chancellors, and five of the Law Judges concurred.

That Court was of the opinion, that in this case the proper form of the writ of hab. fac. poss. had been adopted; namely, that the sheriff should be required to cause the plaintiff, (in the action at law,) "to have possession of the one undivided fourth part of the premises," &c. As to the mode of executing the writ, the Court of Errors through its organ, says: "Upon the second question referred to it, this Court is of opinion, that the proper mode of executing the writ of hab. fac. poss., is for the sheriff to cause the said plaintiffs to have possession of one undivided fourth part of the tract of land, and appurtenances, described in said writ, and to leave the defendant in possession of the remaining three-fourths undivided."

This judgment of the Court of Errors having been certified to the Equity Court of Appeals, that Court, on the 15th May, made a decree, setting aside the Circuit decree of June Term, 1853, and remanded the case "to

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the Circuit Court for a hearing upon the points yet to be determined." The case came

on for another hearing at the regular Term for Abbeville District, in June, 1854, when the decree was delivered, from which this appeal has been taken. By this decree, the Chancellor ordered a writ to issue, to be directed to five commissioners, "to make partition of the land described in the pleadings, so as to allot three-fourths to the plaintiff, and one-fourth to the defendants in right of the wife." The grounds of appeal in various forms, deny the right of the plaintiff to a partition.

It is difficult to take any other view of this question, than that adopted by the Chancellor who tried the cause on the Circuit. The Court of Errors having declared, that the proper mode of executing the writ of hab. fac. poss., "is for the sheriff to cause the plaintiffs to have the possession of the undivided fourth part of the land, and to leave the defendant in the possession of the remaining three-fourths undivided," the unavoidable conclusion is, that Dorn, (the defendant in the action at law,) is in possession as to three-fourths, by some right or title valid as against Beasley and wife, and that he is a tenant in common with the latter. I take it as undeniable law, that all tenants in common who are sui juris, and where there is no restriction as to the time when severance is to take place, are entitled to partition. The Stat. 32, Henry VIII., made of force in this State, (2 Stat. 474,) provides, that tenants for life, or years, seized and possessed in common with others who have estates of inheritance in the same lands, shall be compellable to make severance and partition by writ of partition suable out of the Court of Chancery. The Act of 1799, (7 Stat. 784,) declares that writs of partition shall be demandable as of common right. In *Steedman v. Weeks*, 2 Strob. Eq. 145 [49 Am. Dec. 660], this Court decided, that timber trees growing on the defendant's land, and to a moiety of which trees the plaintiff was entitled, were subject to partition, and ordered a writ of partition to issue to effect

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a division thereof between the plain\*tiff and defendant. *Parker v. Gerard, Ambler*, 236. In *Warner v. Baynes, Ambler*, 589, the Court held that certain water privileges, consisting of a spout and springs, used for the purpose of a bath, to which the plaintiff and defendant were entitled in common, should be divided, and ordered a writ to issue.

Thus it would seem, that partition is favored of the law. There must of necessity exist joint and common interests and estates in both real and personal property. But wherever partition is practicable, and there is no impediment, the Court will afford facilities for effecting it, whatever may be the rights or estates of the parties, and the proportions in which they are entitled. The compulsory

possession of a common estate by parties who are hostile, or who do not harmonize, or whose objects and interests are diverse, is like the enforced continuance of the conjugal relations, productive of much mischief and evil. It suspends all improvements, for neither party can safely improve under such circumstances, and thus the prosperity of the community is affected; it leads to endless contests and litigation, by which the peace of society must be disturbed, and the Courts must be harassed. To sever the common estate when it is desired, is to remove every cause of contention, and leaves each party in the exclusive and peaceable possession and enjoyment of his own share, to do with it as he pleases. These are some of the views which induce courts of justice to lend a ready hearing to applications for partition.

In the case before the Court, Beasley and wife are unquestionably entitled by the verdict of a jury, to one undivided fourth of the land in question; while Dorn, by the judgment of the Court of Errors in this case, has been adjudged to be entitled to the undisturbed possession of three undivided fourths. Are these hostile parties, who have been waging a protracted legal warfare against each other, to be yoked in the common possession of this property, by ties which cannot be severed? How long is this state of things

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to endure? What is the \*relief? Who has suggested a remedy other than that which may be afforded by a partition?

It is needless to say, that other persons not before the Court, and who may have a paramount title, cannot be prejudiced by any judgment in these proceedings. But as against Beasley and wife, by the judgment of the Court of Errors, Dorn must be presumed to have a title to three-fourths. His possession is *prima facie* sufficient to raise this presumption. There is no proof as to his title but his long continued possession. But in the absence of all proof this is sufficient, and the possessor must be considered the true owner. Dorn must be taken as in possession by a title; and that title must be regarded good and sufficient until the contrary is shown. But Beasley and wife, by the verdict of a jury, are entitled as against Dorn to an undivided fourth part. Predicating my judgment upon the opinion of the Court of Errors, (from which I dissented,) I can see no obstacle to a partition, and am constrained to the conclusion that a writ of partition was properly awarded by the Circuit Court.

It is ordered and decreed, that the Circuit decree be affirmed, and the appeal be dismissed.

DUNKIN and WARDLAW, CC., concurred.  
Decree affirmed.



## 7 Rich. Eq. \*95

\*JOHN FRIERSON and Wife v. JOHN F. GRAHAM, Adm'r.

SAME v. JOHN F. GRAHAM, Ex'r.

(Columbia. Nov. and Dec. Term, 1854.)

[*Executors and Administrators* ⇨313.]

An administrator who kept on hand the share of a deceased distributee waiting for the appointment of an administrator, and who notified those interested in the share that he was ready to pay it over, and who tendered it to the administrator as soon as he was appointed, held excused from the payment of interest.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1271½; Dec. Dig. ⇨313.]

Before Dunkin, Ch., at Williamsburg, March, 1854.

Dunkin, Ch. A. W. J. Graham died intestate about the year 1847. His distributees were his mother Susannah Graham, (since deceased) and his nine brothers and sisters. The defendant became his administrator. Shortly afterwards, Susannah Graham died, having previously made her will of which the defendant was appointed executor, who after her decease proved the will and qualified thereon. It appears that early in the year 1850, the defendant had closed both estates—had ascertained the amount due to the parties severally entitled, and he settled with all except Mary T. Frierson (who had removed to the West, but whom he has since paid,) and Janet M. Cockfield, the wife of Washington Cockfield, who had survived her brother, A. W. J. Graham, and his mother, Susannah Graham, but had died before the estates were ready for settlement. The defendant, in his answer, states, that since 19th March, 1850, he had been ready to pay over the share of Janet M. Cockfield, deceased, but that being advised that he could only safely pay it to her administrator duly appointed, he had applied to her husband, Washington Cockfield, requesting him to administer, and receive the amount, but that he had declined to do so. It appears to the Court that this statement is substantially confirmed by the

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\*evidence of N. G. Rich, Esq., the plaintiff's solicitor, which is incorporated in the Commissioner's report. Mr. Rich applied to the defendant before the bills were filed, and the application, he says, was on the behalf of Washington Cockfield. It seems he desired the defendant to pay over to his client, one-third of his deceased wife's share, and retain the surplus to pay to the guardian of her children when appointed. This the defendant declined to do, and, as he stated, upon the advice of Mr. Coleman. These bills were then filed on behalf of the children of Janet M. Cockfield, deceased, against the defendant, requiring an account of each estate; William R. Nelson, Ordinary of the district,

was made a party, but he had never taken charge of the estate and so stated.

At the hearing in 1852, it was insisted that the bills could be only sustained by the legal representatives of Janet M. Cockfield, deceased. The Court was of opinion that an administration should be made, and that two bills were unnecessary. The causes were ordered to be consolidated, and leave was given to amend the pleading by making the administrator of Janet M. Cockfield a party. Josiah Cockfield then took out letters of administration on the estate of Janet M. Cockfield, deceased, and on that day the defendant made a tender to him of the amount due to his intestate. He replied that he had a lawyer, and declined to act. The causes having been consolidated, the Commissioner took an account of the defendant's transactions as administrator of A. W. J. Graham, deceased, and as executor of Susannah Graham, deceased, and the cause was heard on his report filed 2nd March, 1854, and exceptions thereto. The first exception on the part of the plaintiffs was withdrawn, as the Solicitor stated he had waived his objection before the Commissioner. The second exception was proved by the evidence to be wholly untenable and is overruled. The exceptions of the defendant relate entirely to the charge of interest since January, 1850. The share of Janet M. Cockfield, deceased, in the two es-

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tates, was at that time, according \*to the Commissioner's statement, between five and six hundred dollars. The defendant settled with all the other parties as before mentioned, during that year, and he notified Washington Cockfield (the person entitled to administer on his wife's estate,) of his readiness and desire to settle for her share. So far as such matter is susceptible of proof, the defendant has made a satisfactory showing that he kept the funds in hand to meet the demands which might have been made on him at any moment, and that it would have been, in fact, impracticable to put the money at interest under the circumstances.

Mr. Justice Williams says, "There are two grounds on which an executor or administrator may be charged with interest. 1st. That he has been guilty of negligence in omitting to lay out the money for the benefit of the estate. 2d. That he has himself made use of the money to his own profit and advantage, or has committed some other misfeasance." 2 Williams' Ex'rs. 1567; and in an American note, the case of Merrick's Estate, 1 Ash, 305, is cited, where it was held that "Trustees of any description were chargeable with interest who neglected to apprise those interested in the fund of the amount due to them, and to offer payment in a reasonable time." Judged by either of these principles, the Court cannot perceive from the evidence

that the defendant is chargeable with interest. So soon as the estates were ready for settlement the parties interested were all notified by him, and in 1850 he settled with all except as above stated. He very properly refused to pay the share of Janet M. Cockfield until her estate was represented. When bills were filed against him in 1851, he stated in his answers the amount due, which he had always been ready, and was then ready and desirous to pay in any manner the Court might direct. So soon as an administration was made in February, 1852, he forthwith waited upon Josiah Cockfield, who had that day received letters of administration, and tendered him in money the amount due. The accounts of the defendant have been fully

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verified by proper vouchers, and have been approved by the Commissioner. No evidence was offered, indeed no intimation was made, that the defendant had made any interest on the fund. On the contrary, the evidence leads to an opposite conclusion. Under these circumstances the Court is of opinion that the exceptions of the defendant are well taken. It would discourage prudent and discreet persons from the acceptance of such trusts, if they are subjected to loss when they have done all in their power to discharge their duty both faithfully and promptly. It is ordered and decreed that the exceptions of the defendant be sustained, and that the Commissioner re-state the account accordingly. The question of costs was submitted. The narrative of the transaction shows clearly that no proceedings in this Court were necessary. The administrator of Janet M. Cockfield was alone entitled, and can alone be recognized. To him the defendant was always more than ready to account and pay. But especially was it unnecessary to harass the defendant with two suits in Chancery for the settlement of these estates. The general rule, however, in cases of this character has been more than once stated. "If an executor refuses to account, or his account is falsified, he is charged with costs, or they will be disallowed to him; but if he has kept an account regularly, and furnished it correctly, although a balance may be against him, he may be entitled to costs out of the fund. *Flanagan v. Noland*, 12 Eng. Ch. Rep. 47. See also 1 Rep. Temp. Hardwicke, 28." In any view that may be taken, the Court is of opinion that the costs are properly chargeable upon the fund, and it is so ordered and decreed.

The complainant appealed on the ground:

That the decree sustains the exception of the defendant, John F. Graham, on the question of interest, on the fund due the complainant.

Rich, Miller, for appellant.

Dargan, Porter, contra.

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\*The opinion of the Court was delivered by

WARDLAW, Ch. In this case (the two bills mentioned in the caption were consolidated into one,) we approve of the Chancellor's disallowance of interest for a time against the representative of the estates: which is the only point of appeal. Under the special circumstances of the case, the conclusion of the chancellor is legitimate, and well justified by his reasoning; and we add a word only to guard against the misapprehension that the decree contains the doctrine that interest is not payable by a trustee where there is no person authorized to receive the principal for the beneficiary. The case of *Davis v. Wright*, 2 Hill, 560, is frequently quoted as asserting this principle, by those who overlook the distinction between a debt of one to another without disability of either, and a liability of a trustee to beneficiaries who may not be respectively sui juris. It would be palpably unjust to infants, married women, lunatics, and others incapable of acting for themselves, to lay down as general doctrine, that they were not entitled to interest wherever their trustees could not pay over the principal.

It is ordered and decreed that the appeal be dismissed, and that the Circuit decree be affirmed.

JOHNSTON, DUNKIN, and DARGAN, CC., concurred.

Decree affirmed.

### 7 Rich. Eq. \*100

\*WM. D. KERSH, Adm'r, v. JOHN L. YONGUE, et al.

(Columbia. Nov. and Dec. Term, 1854.)

[Wills  $\S$  634.]

Property, real and personal, was conveyed to a trustee, in trust to apply the profits to the support of H. for life, and at her death to, "re-lease and confirm unto the four present children of H., or the survivor or survivors of them, in equal shares, as tenants in common," the absolute right and title to the property. The four children all died in the lifetime of H.;—*Held*, that each one of the four children took a vested, transmissible interest, liable to be divested in the event that he or she died in the lifetime of H. and that one or more of the others survived H.; and as they all died in the lifetime of H. no contingency had happened upon which their rights were defeated.

[Ed. Note.—Cited in *Haynsworth v. Haynsworth*, 12 Rich. Eq. 122; *Walker v. Alverson*, 87 S. C. 55, 63, 68 S. E. 966, 969, 30 L. R. A. (N. S.) 115; *Dillard v. Dillard*, 95 S. C. 88, 78 S. E. 1037; *Id.*, 80 S. E. 849.

For other cases, see Wills, Cent. Dig. § 1500; Dec. Dig.  $\S$  634.]

Before Johnston, Ch., at Fairfield, July, 1854.

Johnston, Ch. This cause was heard upon the single question made by the amended bill,



as to the construction of a deed executed by Henry Moore on 19th December, 1839, conveying certain property, real and personal, to William Moore, "in trust, however, that the said William Moore shall apply the uses, issues and profits of the above mentioned property, both real and personal, to the support and maintenance of my daughter, Harriet Watson, together with her household, for and during the term of her natural life; and upon the further trust, that at and after the death of my said daughter, the said William Moore, his heir or assigns, shall convey, release and confirm unto the four present children of my said daughter, or the survivor or survivors of them, in equal shares, as tenants in common, the absolute right and title in and to all the above mentioned property, both real and personal, together with the increase thereof, and to their heirs forever."

At the date of the execution of this deed, Mrs. Harriet Watson, for whom a life interest was thus provided, had four children, to wit: John H. Watson, James L. Watson,

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Eliza A. Kennedy, wife of Joseph Kennedy, and Sarah S. Watson, who subsequently intermarried with the defendant, Thos. Stitt. These four children all died in the life-time of Mrs. Watson, the life-tenant, the two sons unmarried and without issue, the two daughters leaving their husbands and children surviving them. Mrs. Watson died in June, 1852.

The question submitted for the judgment of the Court is, whether the interest of these four children, thus dying before the life-tenant, reverts to the estate of the grantor, or is transmissible to their distributees.

There can be no dispute as to the general principle, that in case of doubt, instruments of this character are to be construed most strongly against the grantor, and, therefore, interests taken under, or by virtue of such instruments, are to be the largest of which the words are susceptible. The Court will not hold there is a reverter, in any case where any other reasonable construction can be given.

Here, the legal interest is in the trustee, but the principle of construction in this Court is the same as regards legal and equitable interests, and the interest of Harriet Watson may therefore properly be regarded as a life-estate. Then, what interest do her "four present children" take in remainder. The trustee, at and after the death of the life-tenant, is to convey unto the four present children of the said daughter, or the survivor or survivors of them, in equal shares, as tenants in common, the property, real and personal.

As above stated, we must conclude that the object of the grantor was to convey to them the largest interest possible, not merely an interest at the death of the life-tenant,

but the interest passed immediately out of him to these four children, or to the survivor of them at the expiration of the life-estate; that is a vested interest, to be enjoyed thereafter, unless one or more of them should be surviving the life-tenant, in which event, such survivor or survivors would have taken, to the exclusion of such of them as may have died during the continuance of

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\*the life-estate. No such event having happened, the original gift is not divested. Whenever the grant, in the first instance, is perfect, it is only to be diminished upon the happening of the contingency which is to defeat it. But here the contingency has not happened; there are no survivors of the description intended by the grantor (i. e. survivors of the life-tenant), to take to the exclusion of those who have predeceased them, and the remainder-men take under the terms of the original grant, without reference to the defeating contingency.

It is adjudged and declared, that there is no reversion to the estate of the grantor, Henry Moore, but that the interest taken by the four children remained in them, and is transmissible to their distributees.

The whole case has not been sufficiently brought to the attention of the Court to enable it to express an opinion as to the costs, and this question is reserved.

The complainants appealed and now moved this Court for a reversal of the decree, on the ground:

That inasmuch as the four children of Harriet Watson all died before their mother, the Chancellor should have decreed the property, consisting of land and negroes, to revert to the representatives of the donor or his heirs.

Buchanan, for complainants.

Boylston, McCants, contra.

The opinion of the Court was delivered by

DARGAN, Ch. This Court concurs in the construction which the Chancellor, in his circuit decree, has given to the deed of Henry Moore, dated the 19th December, 1839.

It seems to me that nothing more is neces-

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sary or proper to \*be said upon this occasion, than to show that the views of the Chancellor who tried the cause on the circuit, as expressed in his decree, are fully sustained by authority.

In *Perry v. Wood*, 3 Ves. 204, the testator gave a legacy to A. for life, and after her death to her children; if she should leave none, to B. and C., share and share alike, or to the survivor. A. died without children. It was held to be a vested interest in B. and C., upon the death of the testator, as tenants in common.

In *Sturges v. Pearson*, 4 Madd. 411, the testator bequeathed as follows: "I give the

interest and dividends of one other fifth part thereof, to be paid to my daughter, Anne Tatnall, during her natural life; and after her decease, I give the same to be equally divided among her three children, or such of them as shall be living at her decease, the same to be paid to them at their age of twenty-one years."

The children all died in the lifetime of the tenant for life. It was held, that they took vested interests, transmissible to their representatives; for the vested interests first given by the will were by the form of the expression only defeated, in case there should be some, or one, and not all, of the children living at the death of the tenant for life. That event did not happen: consequently, the vested interest was not defeated.

In *Browne v. Lord Kenyon*, 3 Madd. 410, the testatrix gave £1000 in trust for several persons successively for life, and after the death of the survivor upon trust, to pay the principal to C. But if he was then dead (which event happened), then to his two brothers in equal shares, or the whole to the survivor. Both the brothers were living at the death of the testatrix, but died during the continuance of the life estates. It was decided, that they both took vested interests at the death of the testatrix, subject to be divested, if only one of them should survive the tenants for life.

In *Harrison v. Foreman*, 5 Ves. 207, the testator bequeathed a certain fund to A.,

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for life, and after her decease to \*two other persons, in equal moieties, and in the event of either of them dying in the lifetime of A., then the whole to the survivor living at the decease of A. It was held, that they both took vested interests at the death of the testator, transmissible to their representatives. The vested estate given to the remaindermen, was only to be defeated on the condition that one should survive the other on the death of the tenant for life; an event that did not happen.

In *Belk v. Slack*, 1 Keen, 218, the testator, William Belk, gave the residue of his real and personal estate to trustees, upon trust, to pay the interest and produce thereof to his mother, during her life; and after the death of his mother and daughter, he gave the same to his brother, George Belk, and his sister, Hannah Belk, to be equally divided between them, or to the survivor of them. George and Hannah Belk both died during the lifetime of the testator's mother and daughter. And it was held, that the representatives of George and Hannah Belk were respectively entitled to the several moieties of the residue.

In *Wagstaff v. Crosby*, 2 Colyer, 746, the testator bequeathed £1500 stock to trustees, in trust, for his daughter, for life, and after

her decease for her children, but if she should leave no children, he directed his executors to stand possessed of the fund, in trust, to pay or transfer the same equally unto and between his three nephews and his niece, and the survivors or survivor of them, share and share alike. The nephews and niece survived the testator, but died in the lifetime of the daughter, who died without ever having had a child. It was adjudged, that the representatives of the nephews and niece were entitled in equal shares.

This case, *mutatis mutandis*, is the case now before this Court for adjudication. See also *Maberly v. Strode*, 3 Ves. 455; *Russell v. Long*, 4 Ves. 551.

It seems to this Court that the Chancellor

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has not only given \*a rational and benignant construction to the deed in question, but one that is well sustained by authority.

It is ordered and decreed that the Circuit decree be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, and WARDLAW, CC., concurred.

Decree affirmed.

#### 7 Rich. Eq. 105

JAMES H. PRESLEY, et al., v. PETER DAVIS, Adm'r.

(Columbia, Nov. and Dec. Term, 1854.)

[*Wills*  $\hookrightarrow$  545.]

Testator directed his estate to be equally divided among his six children; and "if any should die or make their exit without lawful issue, then their portions are to be equally divided among the remainder of the aforesaid children." — *Held*, that testator meant if any should die without issue in his lifetime, then, &c.

[*Ed. Note*.—Cited in *Bowman v. Lobe*, 14 Rich. Eq. 278; *Marshall v. Marshall*, 42 S. C. 441, 20 S. E. 298; *Selman v. Robertson*, 46 S. C. 273, 24 S. E. 187; *Robert v. Ellis*, 59 S. C. 158, 37 S. E. 250.

For other cases, see *Wills*, Cent. Dig. § 1172; Dec. Dig.  $\hookrightarrow$  545.]

[*Perpetuities*  $\hookrightarrow$  4.]

*Held*, further, that, if the death of the children severally, was the date to which the terms of the will related, the limitation over was void for remoteness.

[*Ed. Note*.—For other cases, see *Perpetuities*, Cent. Dig. § 14; Dec. Dig.  $\hookrightarrow$  4.]

[*Parent and Child*  $\hookrightarrow$  3.]

A father will not be allowed for past maintenance, out of the separate estate of his children.

[*Ed. Note*.—Cited in *Exchange Banking & Trust Co. v. Finley*, 73 S. C. 429, 53 S. E. 649.

For other cases, see *Parent and Child*, Cent. Dig. §§ 34, 52; Dec. Dig.  $\hookrightarrow$  3.]

[*Limitation of Actions*  $\hookrightarrow$  102.]

The statute of limitations is inapplicable to technical and continuing trusts, as, for instance, between administrator and distributees.

[*Ed. Note*.—For other cases, see *Limitation of Actions*, Cent. Dig. § 498; Dec. Dig.  $\hookrightarrow$  102.]

[This case is also cited in *Marshall v. Marshall*, 42 S. C. 437, 20 S. E. 298, and distinguished therefrom.]



Before Johnston, Ch., at Union, June, 1854.

The facts of this case are fully stated in the opinion, delivered in the Court of Appeals.

Thomson, for appellant.

Arthur, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. Thomas E. Davis died

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intestate in February, \*1835, possessed at his death of some estate, and leaving as the distributees of this estate four brothers, one sister, and four children of a sister, Martha Presley, who pre-deceased him.—Three of these children, on March 30, 1853, cited Peter Davis, administrator of the intestate, to account before the Ordinary for his administration of the estate; and afterwards they obtained from the Ordinary a decree in their behalf for a specific sum of money. From this decree the administrator appealed to the Court of Equity; and the Chancellor on Circuit after a hearing ordered, that "the appeal be dismissed, and that the decree of the Ordinary be confirmed and become the decree of this Court." The administrator now brings his case before the Court of Appeals on the grounds presented to the Circuit Court, with an additional ground.

In the first of these grounds it is assumed that the estate of Thomas E. Davis was acquired under the will of his father, James Davis; and it is insisted that, under the ninth clause of this will, the legacy to the intestate was limited over, on the contingency which has happened of his dying without issue, to the children of testator surviving that event in exclusion of grandchildren. No proof is reported to us that the estate of the intestate was thus acquired; but as the Chancellor thinks he may have decided the case on concession of the appellant's statement in this particular, we too will admit the hypothesis for the purposes of this appeal.

James Davis in the first clause of his will directs that his debts be paid; in the seven following clauses gives to his six children (including Martha Presley, who was living at the execution of the will and at the death of the testator), and to a grandchild, each one shilling in addition to advancements of specified values; and in the ninth clause makes this further disposition: "My will is that the residue, if any, be equally divided among all the aforesaid children, and those who have received a greater portion than others of my children must pay back unto those that lack till their portions are made

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equal.—\*Also if any of the aforesaid children should die or make their exit without lawful issue, then their portions are to be equally divided among the remainder of the aforesaid children."

The appellant argues that the limitation over here is equivalent to a bequest to the children of testator surviving any child who died without issue; and that grandchildren cannot take as children where there are persons exactly fulfilling the description of children. The latter proposition is sustained by authority, (*Ruff v. Rutherford*, Bail. Eq. 7; *Mathis v. Hammond*, 6 Rich. Eq. 121, 399); the former cannot be conceded.

The first obstacle to the construction of this clause for which appellant contends, is, that the epoch to which the supposed words of survivorship refer may not be the death of the first takers of the estate. It is the established doctrine that, wherever the gift takes effect in possession immediately on testator's death, words of survivorship refer to the date of testator's death and are intended to provide for the contingency of the death of the objects of his bounty in his lifetime; unless some other point of time be indicated by the will. If the enjoyment be postponed by the interposition of a particular interest such as a life estate, or by fixing a future period for division such as the attainment of the legatee to full age, then words of survivorship more naturally relate to the period of division and enjoyment. 2 Jarm. Wills, 450 (632); *Schoepert v. Gillam*, 6 Rich. Eq. 83; *Home v. Pillaus*, 8 C. E. C. In the present case the whole estate of testator, except seven shillings, is disposed of by the clause in question, with manifest purpose of immediate enjoyment by the legatees, and without any intimation in the context that the testator meant to provide against the death of his legatees occurring after his own. We adjudicate that the death of the testator is the period to which this clause of the will relates.

Granted that the death of the children severally is the date to which the terms of this clause relate, the appellant next encounters difficulty in maintaining that there are any

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terms in "the clause equivalent to survivors, and sufficient to avoid the rule against perpetuities. A limitation over after the death of the first taker without issue is void for remoteness, as the extinction of issue may occur in a remote generation; and there must be something in the bequest or context to restrict the phrase of death without issue to lives in being and twenty-one years afterwards. It is settled after much controversy that the term survivors has this restrictive operation, where benefit to persons in life not transmissible to heirs and representatives is plainly intended. The vice of remoteness is not escaped where the gift over is to persons in being by name or to survivors and their heirs and representatives; for in these cases the heirs and representatives would be entitled to take at whatever time the issue of the first taker might fail. *Massey v. Hudson*, 2 Mer. 130; *Stevens v. Patterson*, Bail.

Eq. 42.—In many cases where the very term of survivors has been used, it has been interpreted as synonymous with others, and consequently insufficient to tie up the generality of the phrase of death without issue. Here the words are “the remainder of the aforesaid children” which are not equivalent to the survivors of my children, but naturally mean the rest, the others of my children. In *Buck v. Cox*, 5 Rich. 604, where a testator bequeathed certain personal estate to be equally divided between his sons Harmon and Peter, and further provided “if either of my two sons should die without lawful issue, that my other son shall have his part of my property,” the Court of Errors unanimously decided that the limitation over was void for remoteness. This case affirmed the previous case of *Shephard v. Shephard*, 2 Rich. Eq. 142 [46 Am. Dec. 41], where there was a bequest to three children of testator by name, but in case of the death of either his share to go to the others, to be equally divided between them; and the gift over was held to be void for remoteness, and identical with the case of a limitation over to B if A should die without issue. Again, to adopt the construction which the appellant urges would be

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attended with the consequence \*of disinheriting the issue of testator's daughter, Martha Presley; and Courts in the interpretation of instruments of gift seek to avoid such a consequence, and adopt a construction attended with it only when compelled by established rules and principles. *Packham v. Gregory*, 30 E. C. R. 396; *Evans v. Godbold*, (6 Rich. Eq. 26). In the present instance, there is no authority which authorizes, much less compels, us to hold “remainder of the aforesaid children” as synonymous with survivors of the said children. *Shaw v. Monefeldt*, (6 Rich. Eq. 240).

The second ground of appeal is that the Ordinary should have allowed credit to the administrator for the sums expended by the father of the complaining distributees in their maintenance, because their father, Lewis Presley, was not of ability to maintain them without the employment of their shares for this end. There is no proof of any fact upon which this proposition could be plausibly rested. It does not appear that Lewis Presley was not of ability to maintain his children, nor that he sets up any claim for their maintenance; nor that he received their shares or made any settlement with the administrator in their behalf. The whole sum of the evidence is, that he was a purchaser at the administrator's sale probably to the extent of his children's share, and that like other purchasers he gave his note with sureties for his purchases, and that this note has not been paid. But if the father were now claiming for the past maintenance of his children his claim would be rejected. A father is bound to maintain his infant chil-

dren from his own estate, however ample may be their separate resources, and no allowance for this purpose will be made to him out of their estate. If he be unable to maintain them, the Court may order maintenance out of their own property, upon his petition for this purpose; the first point of inquiry being his ability to maintain them suitably from his own estate. But his past maintenance of them creates no debt from them to him. The doctrine and practice of the Court

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on this point were first explicitly declared by Lord Thurlow, and although somewhat discredited by Lord Eldon on a mistaken supposition of change of procedure, have been firmly re-established by recent decisions. Lord Cottenham, in a recent case, (ex parte Bond, 2 Myl. & K. 439, 8 C. E. C. R. 75.), says: “To allow for past maintenance, and to treat as a debt the expenditure which the law imposed upon the father as a duty, would be to act against a settled rule of the Court. The Court might if a special case were made direct an inquiry, &c.” *Simon v. Barber*, Tam. 22, 5 C. E. C. R. 264; *Hughes v. Hughes*, 1 Bro. C. C. 387; *Hill v. Chapman*, 2 Bro. C. C. 231; *Andrews v. Partington*, 3 Bro. C. C. 60; *McPhers. on Inf.* 145, 219. Here it is not the father but an administrator without privity with him, who sets up this untenable claim.

The third ground of appeal is, that the applicants to the Ordinary for account were barred by the statute of limitations. The eldest of them was near thirty years of age, the second about twenty-five and the third about twenty-three when the proceedings for account were instituted. The statute is inapplicable to technical and continuing trusts, as in this case between an administrator and distributees; and there is no proof here of any act, such as a settlement of his accounts, by which the administrator purported to execute his trust, throw off his fiduciary character, and place himself in the position of a stranger to the beneficiaries. *Brockington v. Camlin*, 4 Strob. Eq. 189. This ground is not sustained.

In addition to these grounds which were presented to the Circuit Court, the appellant further insists here, that the Court of Equity has no authority under the Act of 1839, to enforce by its process of execution the decree of the Ordinary. Whatever may be the proper procedure for executing the judgment of the Ordinary, and without meaning to disparage the right of the distributees to the processes of this Court against the administrator, it is a sufficient reply to this ground of appeal, that the Circuit decree

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does not prescribe any particular mode \*of execution, and leaves the distributees to proceed as they may be advised.

The only error in the Ordinary's decree as presented to us, which I perceive, is one in



favor of appellant in allowing in his behalf one-third of the share of the children of Martha Presley to their father Lewis Presley; whereas as their mother predeceased her intestate brother, the children were the distributees under the statute in exclusion of the father.

It is ordered and decreed that the Circuit decree be affirmed, and that the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Decree affirmed.

7 Rich. Eq. \*112

\*JOEL SMITH, et al., v. WILLIAM R. SWAIN, et al.

(Columbia, Nov. and Dec. Term, 1854.)

[*Equity* ⚡405.]

Where an order of the Court fixes a time for creditors to present and prove their demands, the Commissioner has no power to extend the time.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 885; Dec. Dig. ⚡405.]

[*Limitation of Actions* ⚡22; *Subrogation* ⚡7.]

Where the surety on a sealed note pays it, he is entitled to be subrogated to the rights of the creditor, and will not be barred by the statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 100; Dec. Dig. ⚡22; *Subrogation*, Cent. Dig. § 26; Dec. Dig. ⚡7.]

[*Limitation of Actions* ⚡94.]

A surety who pays the note after the principal has left the State, will not be barred by the statute of limitations during the absence of the principal.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 472; Dec. Dig. ⚡94.]

William R. Swain left the State considerably indebted, and this bill was filed to subject a fund to which he was entitled in the hands of the executor of his father, to the claims of his creditors. In June, 1853, his Honor Chancellor Dargan made an order for the creditors to present and prove their demands; and that the commissioner report thereon on the first day of October.

John Williams presented and proved a demand of the following character. He was surety for the absent debtor on a sealed note to John Smith for three hundred dollars, with interest from January 29, 1841. On this note Williams was sued, and judgment was recovered against him in March, 1844. The amount of the judgment with interest and costs he paid more than four years before the bill was filed. The other creditors objected to this demand on the ground that it was barred by the statute of limitations; and the Commissioner sustained the objection.

On the 29th October, the solicitor of John Williams produced a paper before the Commissioner, dated in September, 1853, where-

by Swain formally acknowledged the justice of the demand of Williams. This paper was received by mail after the time fixed for closing the reference. The Commissioner opened the reference and received the additional testimony; and he amended his report allowing the claim of Williams.

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\*Exceptions were taken to the report which were heard in June, 1854, before his Honor, Chancellor Wardlaw, who made the following decree:

Wardlaw, Ch. This case was heard on exceptions to the Commissioner's report made up under an order of Chancellor Dargan, made at the last term of this Court, calling in the creditors of the defendant, William R. Swain, who is a debtor absent from the State.

Among the claims presented was one of John Williams who had paid a sealed note as surety for the absent debtor. If his demand stands no higher than a mere chose in action for money paid for the use of the said William R. Swain, then it is already barred by the statute of limitations. It seems to the Court that the admissions and acknowledgments of the absent debtor, William R. Swain, are not sufficient, especially when offered after the expiration of the three months' notice, to take the claim out of the statute of limitations. But it is the opinion of this Court that John Williams is entitled to have all the rights which John Smith, the holder of the note, had before the same was paid by the surety; and that being subrogated to the rights of the original creditor, the claim is not barred by the statute of limitations. The complainant, John Williams, is entitled to receive his pro rata share upon the said note, and interest thereon from the time of payment, but he is not entitled to his cost and interest thereon. It is therefore ordered and decreed, that the report of the Commissioner be recommitted and that he make his report in conformity with the principles of this decree.

The other creditors appealed.

McGowen, for appellants,

Wilson, contra.

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\*The opinion of the Court was delivered by

DARGAN, Ch. In this case, it will be unnecessary to recapitulate the facts, that have been so fully stated in the circuit decree. Nor will it be necessary to consider, serialim, the various grounds of appeal which have been discussed before this Court.

When a Chancellor has by an order prescribed a particular time for creditors or claimants to present and establish their demands upon a fund, which is in the course of being administered or marshalled by the Court, it is competent for the same authority

at its discretion to extend the time, and to let in claimants to the privilege of presenting and proving their claims after the expiration of the prescribed period, so long as the fund remains undistributed, and under the control of the Court. But I do not think the Commissioner in equity has this power, and his order in this case, extending the time, so as to enable the defendant, John Williams, to furnish additional evidence in support of his claim, was unauthorized. I shall, therefore, consider the case, as if such additional evidence had not been received. I incline to the opinion, that the evidence irregularly taken in support of John Williams' claim after the expiration of the time prescribed by the Court for the creditors of Swain to come in, affords no additional strength to the said claim.

The only remaining controversy in the case, relates to the right of John Williams to be admitted as a creditor of William Swain in the distribution of the fund in question. The uncontroverted facts are as follows: Williams was the surety of William Swain on a single bill, payable to John Smith for three hundred dollars with interest from the 29 January, 1841. Swain the principal, left South Carolina, and became a resident in another State. After his departure, the surety, John Williams was sued upon the sealed note, and judgment was recovered against him. He subsequently paid the debt, and this constitutes the basis of

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his claim. To this claim, the other \*creditors of William Swain (the absent debtor,) have set up the plea of the statute of limitations. This they have a right to do, as they now are alone interested in the fund, if the facts are sufficient to support that plea. The claim is certainly barred, unless it falls within some of the exceptions of the statute, or the evidence makes it a case to which the statute does not apply.

As the original debt was secured by a sealed instrument constituting it a specialty, the Chancellor who tried the cause, considered that the surety who paid it, had a right in equity to be so far subrogated to the rights of the original creditor, as to set it up as a specialty against his principal—thus making a case to which the statute has no application. In this view of the case I concur with the Chancellor.

It appears to this Court, that the plea of the statute of limitations may be avoided upon another ground. At the time when the surety, who is the present claimant, paid the debt, and a right of action accrued to him, the principal was absent from and without the limits of the State. It does not appear from the brief, or from any evidence before the Court, that the said principal has since that time been within the jurisdiction of the Court. The creditor, in this instance,

has had no opportunity of instituting suit. This brings the case within an exception of the statute, which is suspended under these circumstances, until the return of the absent debtor. In this point of view, regarding this claim as a simple contract, it is not subject to the bar of the statute of limitations.

The circuit decree is affirmed and the appeal is dismissed.

JOHNSTON and WARDLAW, CC., concurred.

DUNKIN, Ch. John Williams was the surety of William R. Swain on a sealed note which he had given to John Smith and which became due in 1841. In 1844, John Williams,

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the \*surety, having been sued to judgment, paid the note. No suit had been instituted by the holder of the note against the principal. So soon as the surety paid the money he had a right of action in assumpsit against the principal; and from that time the statute of limitations began to run. It was suggested that the principal was then out of the jurisdiction but I perceive no evidence of that fact, and the party relying on such obstruction is bound to establish it. The Commissioner had no authority to extend the time for creditors to present their demands. But so long as the fund was within the control of the Court it was perfectly competent for the Chancellor to admit the claim of any creditor. The proof of Williams' demand was before him and abundant evidence of such acknowledgment as prevented the bar of the statute. For these reasons I am of opinion that the demand was properly sustained by the Chancellor.

Decree affirmed.

### 7 Rich. Eq. \*117

\*ISAAC H. STRONG v. SAMUEL J. N. STRONG, Ex'or of Robert Strong.

(Columbia. Nov. and Dec. Term, 1854.)

[*Executors and Administrators* 91.]

Testator after specific bequests of negroes to his nine children, all of whom except the eldest son were under age, and some of whom were helpless infants, and a devise of a tract of land to his eldest son, directed the rest of his lands to be divided among his other four sons, and the remainder of his personal estate (which included twenty-seven negroes besides other personalty) "to remain on the plantation until the youngest child arrives at the age of twenty-one years, then to be equally divided between eight of his children" (naming them). He further directed "that his plantation be kept up as in his lifetime by his executors," and that "his executors should not be accountable to his children for anything made by the negroes on the plantation:"—*Held*, that the executor, who delivered to a son when he arrived at age the negroes specifically bequeathed to him, was not



bound to account to him for their hire before he arrived at age.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 400; Dec. Dig. § 91.]

Before Dunkin, Ch., at Williamsburg, March, 1854.

Robert Strong died September 19th, 1845. He left nine children, all of whom were minors except his eldest son, the defendant—the youngest being a helpless infant. The plaintiff was at that time about thirteen years of age. His last will and testament bore date, August 27th, 1845, and is as follows: "First, I will and bequeath to my son Samuel J. N. Strong, four negroes, viz.: Lize, Nancy, Becky, Harvy, and the future increase of the females. I will and bequeath, I also give and bequeath, to my son, Samuel J. N. Strong, seven hundred and eighty acres of land, known by the name of the McKey tract. I give and bequeath to my son, Robert P. Strong, four negroes, viz.: Ben, Mettz, Candis and Minder, and the future increase of the females. I will and bequeath to my son, Thomas J. Strong, four negroes, viz.: Rebecca, little Sophey, Daniel and Rinter, with the future increase of the females. I give and bequeath to my son, Isaac H.

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Strong, three negroes, viz.: \*Sarah, London and Eliza. I give and bequeath to my son, John C. Strong, three negroes, viz.: Hannah, Titus and Susannah. I give and bequeath to my daughter, Mary M. S. Strong, three negroes, viz.: Rachel, Cyrus and Robert. I give and bequeath to my daughter, Margaret M. O. Strong, three negroes, viz.: Anney, Jim and Phillis. I will and bequeath to my daughter, Eleanor J. Strong, three negroes, viz.: Eleanor, Rhodus and Hetty. I give and bequeath to my daughter, Susan A. Knox, four negroes, viz.: Yellow Sophey and her daughter Hannah, Adam and Jane; and it is my will that the four named negroes which I have bequeathed to my daughter, Susan A. Knox, be her portion in full of my estate, both real and personal; and it is my will that if either of my children should die before they marry, their portion above named, shall be equally divided among my then surviving children, Susan A. Knox to have no part of the said property. It is my will that my children have the future increase of the property above named to each of them. And it is my will that all my land not hereinbefore named to my son Samuel J. N. Strong, be equally divided between my four sons, Robert P. Strong, Thomas J. Strong, Isaac H. Strong and John C. Strong, share and share alike. Should either of my four sons, Robert P. Strong, Thomas J. Strong, Isaac H. Strong and John C. Strong, die before they marry or arrive at the age of twenty-one, their portion of the land to be equally divided between the survivors; and if one or more of my four sons above named

die before they marry or come of age, their portion or portions of land to go to the survivor or survivors. It is my will and desire that my daughters have no share of my land; and it is my will and desire that all the rest, residue and remainder of my personal estate, goods and chattels, of what kind and nature soever, to remain on the plantation until the youngest child arrives at the age of twenty-one years, then to be equally divided between my eight children, Samuel J. N. Strong, Robert P. Strong, Thom-

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as J. Strong, Isaac H. Strong, \*John C. Strong, Mary M. S. Strong, Margaret M. O. Strong and Eleanor J. Strong. Should either of my eight children before named die, leaving lawful issue before my youngest child comes of age, their issue to have their portion. It is my will that the plantation be kept up as in my lifetime by my executors. It is my will and desire that my executors are not to be accountable to the children for anything made by the negroes on the plantation. Lastly, I hereby appoint my sons, Samuel J. N. Strong and Robert P. Strong, executors to this my last will and testament, hereby revoking all former wills by me made."

The plaintiff, alleging in his bill that he arrived at age in April, 1853, that for three years previous thereto, he had lived from home and boarded and supported himself, and that the negroes, Sarah, London and Eliza, specifically bequeathed to him, were not delivered to him, but were kept on the plantation, until he arrived at age, prayed that the defendant, Samuel J. N. Strong, executor of said will, might account to plaintiff for the hire of said negroes, and also pay him the value of his board and support for the three years he had boarded and supported himself.

The defendant in his answer stated that the residuary personal estate of the testator, consisted, besides mules, horses, cattle, furniture, plantation tools, &c., of twenty-seven negroes; that he delivered to the plaintiff his specific legacy of negroes in January, 1853; and that until some time in the year 1852, the plaintiff was supported from the proceeds of the plantation, which was kept up as the will directed. And "this defendant, further answering, says that he cannot adopt the construction to the said will by the said complainant in his said bill. He submits that the said last will and testament was made by the said testator upon his death-bed and not many days before he died; that most of his children being young and helpless, it was his intention that they should be maintained and educated out of the estate

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which he left them. He knew that as each child arrived at the age of twenty-one years or married, such child may desire to move off, and enter into business, and for this pur-

pose he devised certain negroes to each child respectively, evidently intending that as each child came of age or married, he or she may take the negroes devised, with their increase, in order that they may not be without means to support themselves during the time that must necessarily intervene between their arrival to the age of twenty-one and the time when the youngest child of the testator shall arrive to that age. This defendant cannot admit that the said testator intended or contemplated a withdrawal of any of the negroes from the plantation in any other manner or at any other time, except as each child came to the age of twenty-one years, to which period he unquestionably intended that the delivery, by the executors, of the negroes bequeathed to each child should be postponed; for he enjoined upon his executors that his plantation should be kept up as in his lifetime, desiring that by this means his children who were to live together may derive a common benefit from the joint working of all the negroes, as well those bequeathed to each child respectively as those constituting the residue of the estate. This defendant submits that this construction of the will of the said testator has governed him in the whole management of the said estate, inasmuch as he has conceived that he was carrying out fully the intention of the said testator thereby. He charges that the expenses of the negroes bequeathed to each child respectively, such as medical attention and other expenses, were paid out of the common fund arising from the labor of all the negroes, as well those bequeathed to each child as those constituting the residue of said estate. This defendant insists that any other construction of the will would give to this defendant and his co-executor the use of the residue until the youngest child of the testator shall arrive to the age of twenty-one years, for the very words of the will are as follows: "It is my will and desire that my executors are not to be accountable to the children for

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anything \*made by the negroes on the plantation;" and the said testator had no other source of revenue except what was made by the negroes on the plantation; and this defendant submits that if any interpretation at all be given to the said words, it cannot be any other than such as would carry the income arising from the work and labor of the negroes constituting the residue of the said estate to this defendant and his co-executor during the minority of the youngest child of the said testator. This defendant further answering, says, that inasmuch as no time had been appointed by the testator for the delivery of the negroes mentioned in each bequest, and as his family was not only large, but consisted principally of young children, and the residue of the negro property not sufficient to support, maintain, and educate

them without the work and labor of the said slaves bequeathed to each of them respectively, he is naturally forced to the conclusion that he has adopted the construction of the will of his testator most consistent with reason, and at the same time most liberal for such of the children of the said testator as were at his death, and even those who still are, under the age of twenty-one years, and cannot look upon the construction of the said will, as given by the complainant, in any other light than as entirely erroneous and unreasonable. This defendant farther says, that if he be in error as to the meaning of the said testator in thus construing the said last will and testament, he would respectfully submit the question involved to the consideration of the Court, and pray that the same may be considered and a proper construction be had in the decree to be pronounced in this cause, and a correct interpretation given to the meaning of the said testator. This defendant, further answering, says that several of the specific legacies contained in the said will, contained, if set apart to the legatees at the time of the death of the said testator, would be expensive to them instead of being profitable, inasmuch as the same consisted of women and small children, and unprofitable as workers, and that it would be difficult to find persons

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\*willing to hire such negroes, and that the hire thereof would not pay for feeding and clothing, much less being able to support the legatees," &c.

His Honor, the presiding Chancellor, decreed as follows:

Dunkin, Ch. This cause was heard on the pleadings. The object of the bill is, first, to obtain from the defendant an account of the hire of three negroes specifically bequeathed to the plaintiff; and secondly, for the value of the board of the plaintiff, while, as he alleges, he supported himself. The bill states that the plaintiff attained his majority in April, 1853. The answer avers that the plaintiff was supported until some time in 1852, and that on the 1st day of January, 1853, rather before he became of age, his negroes were delivered to him.

The Court is satisfied with the construction of the testator's will adopted by the executor, and for the reasons stated in his answer.

It is ordered and decreed that the bill be dismissed, but that the costs be paid out of the assets of the estate of the testator in the hands of the defendant.

The complainant appealed, and now moved this Court to reverse the decree, on the ground that the executor is accountable for the hire of the negroes from the death of testator.

Rich, Miller, for appellant.  
Dargan, contra.

The opinion of the Court was delivered by



JOINSTON, Ch. It appears to me, that the construction of the will adopted by the Chancellor, is well sustained by its terms, and recognized principles of interpretation.

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\*It is true that specific devises or legacies, made without condition, are not to be abridged by the context of the will, nor by subsequent clauses, when these are doubtful, or can be reconciled with them. But, it is equally true that the construction is to be made from the whole instrument: and, in the case of wills, when there is a conflict between prior and subsequent clauses, so that the latter cannot be executed without infringing on the former, the latter must prevail.

In this case the testator, in the first part of his will apportions specifically among his children by name, thirty-one slaves, and devises a tract of seven hundred and eighty acres of land to his son Samuel: and then declares that "it is my will that all my land, not hereinbefore named to my son Samuel, be equally divided between my four sons, share and share alike." It is very clear that if there were nothing further in the will, the legatees and devisees of these negroes and lands would have been entitled to the immediate possession of the property.

But when the testator subsequently directs

that "all the rest," &c., "of my personal estate, goods and chattels," "remain on the plantation until the youngest child arrives at the age of twenty-one," and be then divided; and "that the plantation be kept up, as in my lifetime, by my executors," "the executors not to be accountable to the children for anything made, by the negroes, on the plantation;" it is pretty clear that he has said enough to disturb the right of immediate enjoyment arising to the specific legatees and devisees under the prior parts of the will.

The property is to be kept on the plantation, and the plantation is to be kept up as it was in his lifetime. But all the land had been devised away, and if the devisees were to take immediate possession of it, how could the property be kept on it, and the plantation kept up as the testator had kept it?

There are several other minor parts of the context which might be observed upon, all

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tending to the construction adopted \*by the Chancellor: but it seems unnecessary to comment on them.

It is ordered that the decree be affirmed, and the appeal dismissed.

DUNKIN and DARGAN, CC., concurred.  
Decree affirmed.

# CASES IN EQUITY

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

CHARLESTON—JANUARY TERM, 1855.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,  
" BENJAMIN F. DUNKIN,  
" GEORGE W. DARGAN,  
" F. H. WARDLAW.

### 7 Rich. Eq. \*125

\*SARINA M. BARKSDALE, Adminis'tx, v.  
JAMES MACBETH and Wife et al.

(Charleston, Jan. Term, 1855.)

[Wills  $\S$  531.]

Testator bequeathed property to be, after the death of S., the life-tenant, "the absolute property of such of my children as may be then living, and the issue of such as may be dead, to be equally divided between them, and their heirs, administrators and assigns:"—*Held*, that the child and issue of predeceased children of testator, living at the death of S., took equally and per capita.

[*Ed. Note*.—Cited in *Risher v. Adams*, 9 Rich. Eq. 249; *Dupont v. Hutchinson*, 10 Rich. Eq. 3; *Robinson v. Harris*, 73 S. C. 477, 53 S. E. 755, 6 L. R. A. (N. S.) 330.

For other cases, see *Wills*, Cent. Dig.  $\S$  1150; Dec. Dig.  $\S$  531.]

Before Dargan, Ch., at Charleston, June, 1854.

Dargan, Ch. Thomas Barksdale, senior, by his last will and testament bearing date the 22d May, A. D. 1800, inter alia, devised and bequeathed as follows:

"I give, devise, and bequeath to my friends, Joseph Legare, Thomas Jones, Dr. Thomas H. McCalla, Dr. William S. Stephens, and Nathan Legare, and the survivor or

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survivors \*of them, and to the heirs, executors, or administrators of such survivor of them, a house and lot in Charleston, on Tradd street, purchased of Henry Collins Flagg and William Hazel Gibbs; also the following negroes," (twenty-four in number, who are named;) "together with four hundred pounds, to be taken from the first crop that is made on my plantation after my decease, upon the special trust and confidence hereinafter mentioned, that is to say: In trust that the said Joseph Legare, Thomas

Jones, Dr. Thomas H. McCalla, Dr. William S. Stephens, Nathan Legare, and the survivor or survivors of them, shall and will permit and suffer my daughter Sarina to have, take, and receive to her sole, separate, and peculiar use, profit, and emolument, the yearly rent of the aforesaid house, and the use, work, profit, and labor of the said negroes, (who are named,) together with the four hundred pounds, during the term of her life, free from the control of her present husband, and not liable in any way to his, her, or their debts, or incumbrances; and in case my daughter Sarina should depart this life, then upon trust for the only proper use and behoof of such child or children of my said daughter, as shall be living at the time of her death. But in case my said daughter Sarina should die without leaving any child or children, then and in such case in trust that all and singular the premises so bequeathed shall be the absolute property of such of my children as may be then living, and the issue of such as may be dead; to be equally divided between them, and their heirs, administrators, and assigns, to be forever discharged from all future uses and trusts."

Sarina, at the date of this will, was the wife of a Mr. Bonneau, after whose decease, and after the decease of the testator, she contracted a marriage with John W. Payne, now deceased. On her intermarriage with Payne, the parties executed a deed of marriage settlement, of which Thomas Barksdale, junior, was the trustee. All the property which Sarina derived under her father's will, was embraced in the marriage settle-

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ment: the \*dispositions of which are of no



importance in the decision of this case. It is only adverted to for the purpose of showing the relations of the plaintiff to the other parties. It does not appear that the property given to Sarina by the will of Thomas Barksdale, senior, or any part of it, was ever in the possession of the trustees named in the said will. But on the intermarriage of Mr. and Mrs. Payne, it went into the possession of Thomas Barksdale, junior, as trustee of the marriage settlement. On his death, his wife, Sarina Barksdale, became the administratrix of his estate, and thus succeeded to the possession of the trust estate. She continued in possession of, and managed the same, during the life of Mrs. Sarina Payne. The latter has recently departed this life, without children, or issue, and the estate is now to be distributed, or disposed of among the children and issue of the testator, Thomas Barksdale, senior, according to the limitations of his will. The house and lot in Tradd street has been converted into cash, and stands in securities equivalent to cash, having been sold by an order of the Court of Equity under proper proceedings. There is no controversy about that.

The issue of Thomas Barksdale, senior, at the death of Sarina Payne, are as follows: Mary Barksdale, a daughter of said testator, his only surviving child. 2d. The issue of the testator's deceased son, Thomas Barksdale, junior, namely, Mary Macbeth, wife of James Macbeth, Adelaide Huguenin, wife of C. C. Huguenin, and Emma Julia Edwards, wife of George Edwards. 3d. The issue of the testator's daughter Elizabeth Edwards, namely, the above-mentioned George Edwards; and also Elizabeth Hammond, and Charles L. O. Hammond, who are the children of a deceased daughter of the said Elizabeth Edwards, and consequently, the great grand-children of the testator, Thomas Barksdale, senior. All these persons are parties to the cause, and are confessedly entitled, each to some portion of the limited es-

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tate. The only question that is \*made is, in what proportion do the several parties in interest take? Do they take per capita, or per stirpes?

The plaintiff, who is in possession as administratrix of Thomas Barksdale, junior, desirous of being relieved of her responsibilities, and incapable of having a legal discharge amid the conflicting claims of the different parties entitled to the property, has filed this bill: in which she has brought all the claimants before the Court, and invokes its aid to discharge her of these responsibilities in a secure and proper manner. All the parties entitled are defendants, and they have all answered. On the part of Mary Barksdale, who is the only child of Thomas Barksdale surviving at the death of Sarina Payne, it is contended, that the division is

to be made per stirpes: that the estate is to be divided into three parts: and that she is entitled to one third part; the issue of Thomas Barksdale is entitled to one third part; and the issue of Elizabeth Edwards to the remaining third. All the other claimants contend, that the estate is to be divided per capita; and all the issue of the testator, including his great grand-children, the Hammonds, are each entitled to an equal share.

For a proper understanding of the case, I have thus stated in a brief, and, I trust, intelligible, manner, the parties, the pleadings, and the issue. The only part of the will bearing on the question are these words: "But in case my daughter Sarina should die without leaving any child, or children, then, and in such case, in trust that all and singular the premises so bequeathed shall be the absolute property of such of my children as may be then living, and the issue of such as may be dead; to be equally divided between them, and their heirs, executors, administrators, and assigns," &c.

I do not feel free from embarrassment in the decision of this case, nor is the range of discussion very wide. The case of *Campbell v. Wiggins*, Rice, Eq. 10; that of *Lemacks v. Glover*, 1 Rich. Eq. 141; and that of *Keitt v. Houser*, May Term, 1846, (unreported,) cer-

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tainly support the per capita construction. But the authority of these cases was disregarded in *Templeton v. Walker*, (3 Rich. Eq. 543 [55 Am. Dec. 646],) and *Collier v. Collier*, (3 Id. 555 [55 Am. Dec. 653],) and is overruled, so far as the question was involved in the latter cases. I did not yield my assent to the judgment of the Court of Errors in those cases, (which were heard together,) principally on the ground, that it violated established principles. For I thought then, as I do now, that in such cases, it is not of so much importance what the rule should be, as that it should be stable. I consider the whole doctrine on this subject as set afloat by the decision. So far as the decision in the cases last cited, goes, it is authoritative upon me; and perhaps it would be safest to be governed by the analogies of those cases: for it is important, that the rule should not only be stable, but uniform and consistent.

The cases of *Templeton v. Walker*, and *Collier v. Collier*, are not precisely parallel to this. For here, the words describing the persons who are to take, are not such as are to be found in the statute of distributions; so that it is not necessary to resort to the language of that statute to ascertain who are meant by the description. Yet I think there is an analogy. And the decision in those cases so far destroys the authority of the prior cases, as to leave me at liberty to decide as if there existed no other precedents than *Collier v. Collier*, and *Templeton v. Walker*.

Equality in the distribution of estates among immediate descendants, and among those in the same degree of propinquity, is a natural impulse or principle of the human heart, when not disturbed or influenced by extraneous causes. It will hardly be denied, that a parent loves his children better than his grand-children, and these better than his remoter descendants. One loves his brother better than his brother's children, and these better than his more distant collateral kindred. Thus, as the circle widens, or the distance lengthens, the tie is weakened. All the statutes of distributions are based upon this philosophy of the human heart. For

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in cases of intestacy, the law makes such a disposition of the intestate's estate, as it presumes he would have done himself, if he had exercised his right of making his last will and testament.

If the testator, Thomas Barksdale, had said in his will, in unequivocal language, that his grand-children and great grand-children should share equally in the distribution of the estate that he was disposing of, with the issue of his own loins, he had the unquestionable right to do so, and the law would give effect to his intentions. But if he has not so declared; if he has left it doubtful whether his grand-children and great grand-children shall come in equally with his own children, I think the more natural interpretation should prevail.

Adverting to the clause in question, it can scarcely be said, that the testator has unequivocally expressed himself in favor of a per capita distribution. On the contrary, without travelling out of the terms employed, it is in my judgment very uncertain whether he meant to give to his children, and the issue of deceased children, equally as individuals, or equally in classes. In this uncertainty, arising from the ambiguity of the language, it is only by reference to principles founded in nature, that I am able to arrive at a conclusion satisfactory to my own mind. In my judgment, the testator intended that his children should take equally, if they all were living at the death of Sarina Payne: but if some should then be dead, leaving issue, such issue should take the share which their parent or parents would have been entitled to take, if they had been living at that period. And if the tomb could be made to "open its marble and ponderous jaws," and the testator be heard thence to speak, such, I feel assured, would be his own construction: if, indeed, the affections which belong to us in this life, are retained in "the spirit land."

In the brief argument before me at the trial, some stress was laid on the words "equally to be divided," as favoring the per capita construction. These words afford no aid in the interpretation. For it is obvious,

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that they may as well import equality of division among the classes, as equality among the children and issue, considered individually; as was the case in *Collier v. Collier*, (3 Rich. Eq. 555 [55 Am. Dec. 653],) and also in the case of *Felder v. Felder* [5 Rich. Eq. 509]. The latter case arose on the construction of the fifth clause of the first section of the Act of 1791.

It is ordered and decreed, that the property in question be divided into three equal parts: that one third part be assigned to the testator's daughter, Mary Barksdale; that one third part be assigned to the children of Thomas Barksdale, junior, namely, Mary Macbeth, Adelaide Huguenin, and Emma Julia Edwards, equally to be divided between them; and one third be assigned to the issue of Elizabeth Edwards, namely, George Edwards, Elizabeth Hammond, and Charles L. O. Hammond: the one-half of the said last-mentioned third to the said George Edwards, and one-half thereof to the said Elizabeth Hammond and Charles L. O. Hammond, equally to be divided between them. Each party interested, may move at the foot of this decree for a writ of partition to carry into effect its provisions.

It is further ordered and decreed, that the accounts of the plaintiff be referred to the master, and that he report thereon.

It is further ordered and decreed, that the costs of the suit be paid out of the funds of the estate.

The defendants appealed on the grounds

1. That by the terms of the will, the property mentioned in the pleadings should have been decreed to be divided amongst the surviving children of the testator and the issue of such as were dead, per capita, and not per stirpes.

2. That the decree is in other respects contrary to equity.

Treville, McBeth, for appellants.

Dukes, contra.

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\*The opinion of the Court was delivered by

DUNKIN, Ch. If this will were for adjudication in Westminster Hall it may be conceded that the construction would not be regarded as doubtful. The testator declares that, on the decease of the life tenant without leaving a child, "the premises bequeathed shall be the absolute property of such of my children as may be then living, and the issue of such as may be dead, to be equally divided between them, and their heirs, executors, administrators and assigns." The rule in England as stated by the elementary writers, is this: "Where a bequest is made to a person described as standing in a certain relation to the testator, and the children of another person standing in the same relation, as to my brother (A) and the children of my



brother (B), the distribution is made per capita, and not per stirpes, in which case A takes only a share equal to that of one of the children of B." Of course it is immaterial, and the distribution is the same where the objects of the testator's bounty are his own children and grand-children. See 2 Jarm. on Wills, 111, whose positions are fully sustained by the authorities cited. Well settled as the rule seems to be, it has not been regarded as quite satisfactory, or as giving effect to the probable intention of the testator. It has accordingly been held that this mode of construction will yield to a very faint glimpse of a different intention in the context. Jarm. *ut supra*.

With some qualifications the rule has been recognized in this State. *Cole v. Creyon*, 1 Hill, Eq. 311 [26 Am. Dec. 208], was a case in which the balance of the testator's estate, after the determination of a life estate therein in his widow, was directed to be "equally divided between Henry and Elizabeth Cole's children and Alexander Creyon, viz., the offspring of Elizabeth Cole's body, and no other, to be retained in the hands of my executors, until the age of twenty-one years, or days of marriage." The widow being dead, the chil-

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dren of Henry and Elizabeth \*Cole filed a bill for partition against Alexander Creyon, claiming that each of them was entitled to an equal share with the defendant—and so it was decreed by the Chancellor, in conformity with the general principle which has been announced. In reforming this judgment the Court of Appeals (per Harper, Ch.) say, "The cases sufficiently settle that if there be a bequest to the children of A, and the children of B, they take per capita. This rule, however, is entirely arbitrary, and I am not sure that if a different rule had been adopted, the intention of testators would not have been more frequently effected. The rule being settled must be adhered to," &c.—The Chancellor then proceeds to show that the rule is inapplicable where the title of the devisees is to accrue at different times, as, if there be a bequest to an ascertained individual, and to a class of unascertained individuals (to be ascertained at any future time after the death of the testator,) it vests one-half in the said individual, and the other half in the individuals collectively when they are ascertained. In conformity with this exception it was ruled, that upon the death of the testator his nephew, Alexander Creyon, who was then in esse, took an immediate vested interest in a moiety of the estate, and that the other moiety was to be equally distributed among the children of Elizabeth Creyon alive at the death of the life-tenant, when the eldest should attain twenty-one years of age.

In *Templeton v. Walker*, 3 Rich. Eq. 543 [55 Am. Dec. 646], and *Collier v. Collier*, 3 Rich. Eq. 555 [55 Am. Dec. 653], while the general rule was recognized, a modification

or exception was adopted. It was held by the Court of Errors that "wherever the Court is compelled, by the terms of description in a devise or grant, to resort to our Statute of Distributions for the purpose of ascertaining the objects of a gift, we must also resort to the statute to ascertain the proportions in which the donees shall take, unless the instrument making the gift indicates the intention of the donor that a different rule of distribution should be pursued."

It remains only to inquire whether this

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case falls within the \*general rule, or can be properly classed within either of the modifications which have been thus adopted and approved.—The bequest is to such of the children of the testator as may be alive at the decease of the life-tenant, and the issue of such as may be dead, to be equally divided between them. The death of the life-tenant was the period at which the title of all the legatees accrued, and the title of none was ascertained until that time. It is not like *Cole v. Creyon*, a gift to an ascertained person and a class of persons to be afterwards ascertained. No child of the testator took an immediate vested interest on his father's decease, but could only take in the event that such child survived testator's daughter Sanna; and at that time the rights of all the issue of any deceased child were also ascertained and fixed.

Nor do the terms of description of the objects of testator's bounty require the Court, as in *Templeton v. Walker*, to resort to the Statute of Distributions to ascertain those objects. The terms are to "such of my children as may be then living and the issue of such as may be dead." This description demands no reference to the statute, nor would the statute shed any light upon the subject if the terms of the gift were of doubtful interpretation. See *Perdriau v. Wells*, 5 Rich. Eq. 20.

It was not contended that the context of the will afforded any evidence of a different intention in the mind of the testator from that which the terms of the bequest itself, technically, or legally, import. Of course the Court is not at liberty to travel out of the will and speculate upon the probable intention of the testator as deduced from the ordinary motives or feelings, which would influence mankind in the case presented. The testator has spoken, and the Court has no other province than to interpret his language. If the testator had contemplated the contingency which has occurred, and had intended a different distribution, he might have declared that in such event the issue of any deceased child should represent their parent, and take among them the parent's

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share; but if, on the other hand, he \*had in-

tended that, in such event, all the objects of his bounty should be placed upon an equal footing, he could scarcely have employed more appropriate words to manifest such intention than those here adopted; that it should, in such event, be the absolute property of such of his children as might be then living and the issue of such as might be dead, to be equally divided between them, and their heirs, executors, administrators and assigns. This is the language of the bequest, and the Court is not authorized to infer from it any intention that the distribution should be otherwise than per capita, so that each object of his bounty may share equally.

In reciting the names of the parties in the Circuit decree some inaccuracy occurred, not important in the discussion of the principle, but which it is proper to correct.

It is ordered and decreed that the Circuit decree be reformed so that, in the partition therein directed, the property be equally divided between Mary Barksdale, Mary V. Macbeth, James R. Macbeth, William L. Macbeth, Catharine Macbeth, Mary Lee Macbeth, Sabina Macbeth, Edward Macbeth, Alexander Macbeth, Adelaide Huguenin, Anna Huguenin, Thomas Huguenin, Ella Huguenin, Cornelius Huguenin, Emma, Julia Edwards, George Edwards, George Edwards, Jr., Charles L. O. Hammond and Elizabeth Hammond, so that each one of the said parties shall take an equal share of the said estate, according to the principles of this decree. In all other respects the decree of the Circuit Court is affirmed.

JOHNSTON and WARDLAW, CC., concurred.

Decree modified.

## 7 Rich. Eq. \*136

\*JOHN E. RIVERS v. THOMAS HEYWARD THAYER, and Others.

(Charleston. Jan. Term, 1855.)

[*Fraudulent Conveyances* ⇨94.]

A covenant before marriage to settle the husband's property, or property to be purchased by him, to the use of the intended wife, is supported by the valuable consideration of marriage, and, in the absence of actual fraud, is valid against his creditors.

[Ed. Note.—Cited in *Creighton v. Clifford*, 6 S. C. 199; *McNair v. Craig*, 36 S. C. 110, 15 S. E. 135; *Brooks v. McMeekin*, 37 S. C. 303, 15 S. E. 1019; *McCreery v. Davis*, 44 S. C. 226, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794; *Moore v. Scott*, 66 S. C. 298, 44 S. E. 737; *McAulay v. McAulay*, 96 S. C. 90, 79 S. E. 785.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 236, 241; Dec. Dig. ⇨94.]

[*Husband and Wife* ⇨29.]

If the property be sufficiently described in the body of the marriage articles, no schedule is necessary.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 158-163, 205, 882; Dec. Dig. ⇨29.]

[*Husband and Wife* ⇨29.]

In marriage articles, the husband covenanted to settle a house and lot which he had contracted to buy, "together with each and every parcel of kitchen and household furniture, wherewith the same shall, and ought to be completely and suitably furnished;"—*Held*, that the description was sufficient.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 160; Dec. Dig. ⇨29.]

[*Husband and Wife* ⇨29.]

Description in schedule to marriage settlement, "closets containing glass, china, and silver plate," *held* sufficient.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 160; Dec. Dig. ⇨29.]

[*Husband and Wife* ⇨29.]

Bills of sale of negroes to trustee under a marriage settlement, substituted for property included in the settlement, need not be recorded in order to make them valid as against the creditors of the husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 167; Dec. Dig. ⇨29.]

[*Husband and Wife* ⇨31.]

The creditors of a husband have the right to subject his interest under a marriage settlement to their claims, whether such interest be separate, joint, or contingent, and whatever difficulties there may be in defining and reaching it. (a)

[Ed. Note.—Cited in *Chaplin v. Roux*, 7 Rich. Eq. 390; *Culleton v. Garrity*, 11 Rich. Eq. 328.

For other cases, see *Husband and Wife*, Cent. Dig. § 194; Dec. Dig. ⇨31.]

Before Dargan, Ch., at Charleston, June, 1854.

Dargan, Ch. The plaintiff, who sues for himself, and the other creditors of Thomas Heyward Thayer, who may make themselves parties in this cause, some time in the early part of the year of our Lord 1851, by verbal

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contract, entered into a \*copartnership with the said Thomas Heyward Thayer, for the purchase and sale of stocks, with a view to

(a) In *BRANCH v. GLOVER*, decided at Colleton, January, 1830, the following is the Circuit decree of

[This case is also cited in *Moore v. Scott*, 66 S. C. 28, 44 S. E. 737, as to the power of courts of equity to reach property for benefit of creditors.]

HARPER, Ch. The complainant is a judgment creditor of the defendant, Peter S. Glover, and the object of the suit is to set aside, as fraudulent, a settlement executed by the defendant, Peter S. Glover, on the nineteenth day of February, 1818. By that settlement, Peter S. Glover conveyed to Henry C. Glover certain slaves in trust, for the joint use of Peter S. Glover and his wife, during life; to the use of the survivor for life; at the death of the survivor, to the child or children of Peter S. Glover.

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er, or if none, to the grantor's \*brothers and sisters, of whom the trustee, Henry C. Glover, was one. Complainant's judgment was obtained



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the speculative \*profits to be derived from such business. In pursuance of his engagement, the plaintiff, at different times, ad-

in 1827. The settlement is charged to have been fraudulent as to existing creditors, and to have been made with a view to contracting debts in future. The complainant also seeks to be satisfied the sum of one hundred and forty dollars for the rent of land, rented to Peter S. Glover, in 1823 and 1824, which is charged to have been for the benefit of the trust estate. If the settlement should not be declared fraudulent, complainant claims to be satisfied his demand out of the interest which Peter S. Glover has in the estate. The defendant, Peter S. Glover, by his answer, admits the facts charged in the bill, and consents that the deed should be set aside. The trustee, Henry C. Glover, denies the fraud by his answer. The answer of Peter S. Glover is, of course, conclusive against himself, to the extent of any interest that he may have in the property. I do not consider it, however, as any evidence against the other parties in interest. The answer of one defendant is no evidence against another. Nor is it evidence as the admission of a party against his own interest, or charging himself; for by setting aside the settlement, Peter S. Glover would have the benefit of the property in discharging his debts. I therefore leave that answer out of the question in considering the case against the other defendants.

The evidence is, that at the time of the conveyance, Peter S. Glover was indebted to one Bayol, in the sum of one hundred dollars, for which judgment was soon after recovered. This judgment was paid off by the trustee, Henry C. Glover, on the 29th March, 1819. The next judgment against Peter S. Glover was entered on the 21st April, 1821, on a note of hand, dated 22d March, 1820. This was Isham Lowry's judgment for fifty-eight dollars and fifty cents. E. L. Miller's judgment was recovered in April, 1822, on an account commencing 15th November, 1820. Other judgments were recovered against Peter S. Glover, and he is now indebted to a very considerable extent.

The first question is, whether the conveyance was void, in respect of the existing debt to Bayol. I agree with the complainant's counsel, that where an expression is used, like that in *Lush v. Wilkinson*, 5 Ves. 387, that, for the purpose of vitiating a conveyance, "a single debt will not do," "it must depend upon this, whether he was in solvent circumstances at the time;" or in *Taylor v. Heriot*, 4 Desaus' Eq. R. 232, "the person so indebted must be insolvent, or at least in very doubtful circumstances," these expressions must be taken to relate to the situation in which the party leaves himself, after the execution of the conveyance. If a person of the largest fortune, owing but a single debt, makes a conveyance of his whole property, so as to leave himself without the means of paying that debt, the presumption of fraud with regard

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to that \*creditor is irresistible. The party is insolvent with respect to the debt. The evidence was not very clear on this point; but one witness stated that the conveyance included the whole of Peter S. Glover's property. But it is to be recollected that he did not leave himself without the means of paying the debt. The property was conveyed to the joint use of himself and wife. He had the disposal of the whole income, which was sufficient for the purpose. The present proceeding makes the principal of the property liable so far as his interest extends. In the case of *Estwick v. Cailland*, 5 T. R. 424, where a party indebted had conveyed his property to trustees, in trust to apply one half the income to the payment of a portion of his creditors, and to pay the other half to him-

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vanced considerable sums of money, to be applied to the objects of the copartnership. The allegations of the bill, as to the sums

self, this was held in a suit with other creditors, not to be fraudulent. It was not fraudulent to prefer some creditors to others, and as to the portion of the property, of which the profits were to be paid to himself, that remained liable to debts, and Lord Kenyon intimates that a Court of Equity would direct it to that purpose. I think the amount of this debt to Bayol, considered with reference to Glover's means of paying it after the conveyance, was not sufficient to show a fraudulent intention. I am more confirmed in this conclusion, as the debt was afterwards in fact paid.

In considering the cases in which subsequent creditors have come to impeach settlements on the ground of existing debts, I have been at some loss to conclude from them whether it is competent for the creditors to do so, when the existing debts have been in fact all subsequently paid off. If, after a voluntary settlement, a party pays off all his debts, this seems to be conclusive evidence of his solvency in respect to those debts. It seems to repel the fraudulent intention, as effectually as when provision is made in the settlement itself for the payment of debts. Yet cases might arise in which the parties were enabled to pay off the existing debts, by means of contracting new ones. Here the fraudulent intention would not be repelled. It might be used as a means to render the fraud more effectual, and equity would seem to require that the subsequent creditors should be put in the place of those creditors whose debts they had furnished the means of extinguishing. At present I am inclined to conclude, that when the existing debts have been paid off previous to the contracting of any of the subsequent ones, there is no ground to impeach the settlement on the score of existing debts. In the present case, the debt to Bayol was paid in March, 1819, and no other debt appears to have been contracted by Peter S. Glover until March, 1820, a year afterwards. It is true, the payment was made by the trustee, and his intentions might be honest, while the grantor's were fraudulent. But the transaction was concerted between them,

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and I must conclude they had the same \*views. If Peter S. Glover was aware that his trustee was ready to pay off this debt to Bayol, he could not intend to defeat it by means of the conveyance.

Then as to the alleged ground of the settlement having been executed with a fraudulent intention of contracting debts in future. There is no other evidence than that the grantor did contract some debts two years subsequent to its execution; that he afterwards contracted others, until they have gradually swelled to their present amount. But this is not enough. The conveyance was not left a secret; it was recorded in the Secretary of State's office, and in the office of Mesne Conveyance for the district. Stress was laid in the argument on the circumstance that Peter S. Glover had executed a similar settlement before he came of age, which he revoked, by a formal instrument, on the day of executing that now in question. But I do not perceive how this shows a fraudulent intention as to creditors. The obvious effect of it (as it was recorded) would be to deprive him of credit. As to the possession retained by the defendant, Peter S. Glover, after the settlement, that cannot be considered fraudulent, because it was in pursuance of the trust expressed on the face of the deed. See *Edwards v. Harben*, 2 T. R. 587, the leading authority on the subject of fraudulent possession; and *Lady Arundell v. Phepps*, 10 Ves. 145.

As to the lands having been rented for the

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\*advanced, have been fully verified. The business has proved disastrous to the plaintiff. The defendant, Thayer, has committed a breach of trust. Instead of employing the funds of the plaintiff in the objects of the partnership, he applied them, for a good part at least, as he admits in his answer, to his own use; and as to the stocks purchased, he rendered false statements to the plaintiff.

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The plaintiff has recovered from the \*said Thayer a judgment by confession for the amount due; under which, he has levied upon the goods of the said Thayer. In this way, he has collected a portion of his debt; but a considerable balance now remains due. The said defendant is at the present time confessedly insolvent, and nothing more can be collected from a levy and sale under execution.

The said Thos. Heyward Thayer, being about to enter into matrimony with Catharine Barnwell Livingston, on the 6th day of February, A. D., 1843, executed a certain indenture by way of marriage articles, between him, the said Thayer of the first part, the said Catharine Barnwell Livingston of the second part, and Eliza Barnwell Livingston, trustee, of the third part; by which articles, in consideration of the marriage intended to be had and solemnized between the said Thos. Heyward Thayer and the said Catha-

rine Barnwell Livingston, he, the said Thos. Heyward Thayer, covenanted and agreed to settle and convey to certain uses therein set forth, a certain house specifically described, situate in Broad Street, in the city of Charleston, then contracted to be purchased by the said Thos. Heyward Thayer, but not then conveyed to him—and such “household and kitchen furniture, plate, linen, and so forth,” as would correspond with the style of the house; also four negroes, Anthony, Cora, William, and Jacob; also all the estate, real and personal, to which the said Catharine B. Livingston was then entitled, or to which she might become entitled during the intended coverture. The trusts declared are as follows: “for the joint use, support, and maintenance of the said Thomas Heyward Thayer and his said intended wife, during their joint lives, not subject to the separate control, debts, contracts, or engagements of the said Thomas Heyward Thayer: and from and after the decease of either of them, that should first depart this life, in trust for the survivor of them for life: and after the decease of the survivor of them, then in trust for all and every the child and children of the said Thomas Hey-

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ward Thayer, whether the issue of the \*intended, or any subsequent or future marriage, share and share alike, as tenants in common, and not as joint tenants, and his,

benefit of the trust estate, that is to say, for the support of his wife and family, as well as himself, it is sufficient, without entering into that doctrine, to say that the answer of the trustee denies that the crops were so applied, and there is no evidence that they were. It seems to have been a credit to the husband personally. I have already said that I think the whole of his interest in the property is liable to creditors. It remains to enquire what the interest is. The property was conveyed to the joint use of husband and wife for life. This would seem to give them equal interests. At law, when husband and wife are joint tenants of land they hold by entirety. There can be no partition, nor can either charge or convey the property without the other. But a difference obtains in equity. In the case of *Ball v. Montgomery*, 3 Br. C. C. 339, the stock of the wife, before marriage, was conveyed to trustees, but the uses were not declared during the joint lives of husband and wife. On a bill filled by the husband to have the dividend paid over to him, the Court decreed that he should receive a part only, and that the residue should be paid into Court for the future use of the wife. The husband and wife were separated, she living with an adulterer. The Court would not, therefore, order anything to be paid to her at present, nor was she considered entitled to a separate maintenance; but on the

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ground \*of the intention, that the fund should be for the mutual support of both, the husband was held to be entitled only to a part. In an anonymous case, 4 Eq. Rep. 102, the wife living apart from the husband was held not to be entitled to a separate maintenance: but as a trust estate, which belonged to her before the marriage, had been conveyed to trustees, to their joint use, half the profits of that estate were directed to be paid to her. It is true, the defend-

ant in that case had made an offer of such provision by his answer, which he afterwards retracted, but the Court recognized the moral and equitable right of the wife to a maintenance out of the property. In the present case, unless the claims of creditors interfered, the husband would be entitled to receive the whole income of the property; but he would be bound to support his wife out of it, and if he refused to do so, the Court would compel him. But he is not entitled even to maintenance independent of the rights of the creditors. It seems to me, therefore, that the only decree that I can properly make, will be to direct his interest in the property to be sold for the satisfaction of creditors, and that the profits of the residue be paid by the trustee to the separate use of the wife. The answer of the trustee prays, that the slaves which constitute the trust estate, may be sold, and the proceeds invested in public stock. This was not urged at the hearing, but a reference may be had, if desired, to determine on its expediency.

It is, therefore, ordered and decreed, that the right and interest of the defendant, Peter S. Glover, in the trust property in question, (being an undivided moiety thereof, for the joint lives of himself and wife, and the entire property for the term of his life, from and after the death of his said wife, in the event of his surviving her,) be sold by the Commissioner for cash. That out of the proceeds the costs of this suit be first paid, and the residue, or so much thereof as may be necessary, be paid to the petitioner in satisfaction of his demand, and the surplus, if any, be held subject to the further order of this Court. And it is further ordered, that the trustee pay over the issues and profits of the other moiety of the said trust property, for the support and maintenance of the defendant, Eliza R. Glover, and to her sole and separate use, for the joint lives of herself and her husband.



her, or their heirs and assigns, or respective heirs and assigns forever." Then follows certain contingent limitations, in the event of any of the children dying "under twenty-one years, or unmarried, or without leaving lawfully begotten issue," &c. Next is a declaration that the furniture, linen, and plate, shall go to the survivor of them, the said Thomas Heyward Thayer, and Catharine his intended wife.

The negroes are referred to by their names. The house and lot are particularly described. But the other articles are only described, or alluded to in the following language: "together with each and every parcel of kitchen and household furniture, plate, linen, and so forth, wherewith the same (meaning the house) shall, and ought to be completely and suitably furnished." Nor was there any schedule annexed.

These articles were duly registered, (9th Feb. 1843.) The marriage was shortly after solemnized. On the 1st July, A. D., 1843, a deed of marriage settlement was duly executed by the same parties, in pursuance of the articles, and for the same uses. To this deed, a schedule of the furniture, plate, linen, and negroes, is appended: which was duly executed according to the form prescribed by law. The deed and schedule were recorded on 29th Sept., 1843. In the schedule, the glass, china and silver plate, are thus mentioned: "closets containing glass, china, and silver plate," without further description or specification. When J. D. Yates, the Sheriff, went to the house of the defendant to levy under the plaintiff's execution, sundry articles of glass, china, and plate, were claimed by Mrs. Thayer as belonging to the trust estate. They were not taken in execution. But Mr. Yates, in his testimony, has furnished a list of these articles.

It is further to be remarked, that in the last mentioned deed, the same negroes mentioned in the articles are conveyed; but in the schedule, two more are mentioned, name-

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ly, a maid servant and a seamstress, without further description. Their names are not given. This, however, is unimportant, as these two additional negroes, the maid servant and seamstress, were never purchased.

The plaintiff has filed this bill to subject the trust estate to the payment and satisfaction of the balance of his demand. The balance due on the execution of *Rivers v. Thayer*, is five thousand eight hundred and ninety-nine dollars and fifteen cents, with interest from 23d February, 1853. He charges that a fraud was committed upon him by the defendant, Thomas Heyward Thayer, in the manner in which the debt due him was contracted. He further contends, that the deed of marriage articles was tainted with fraud; and that the whole scheme of a settlement was, in its inception, conceived in

fraud of creditors, and that therefore it is null and void in toto.

I am constrained to say, that I think the plaintiff has successfully shown, that a fraud was committed upon him by the defendant, in the partnership transactions between them. Indeed, the defendant makes but a faint denial of this. He "admits, that his necessities obliged him to sell the stocks which he held on joint account, and that the proceeds were applied to pressing demands against him, till he was unable to meet his engagements." Independent of this, the evidence fully establishes a case of breach of trust and confidence against him. But as to the claim of subjecting the trust estate to the payment of his debt, I am unable to perceive that the plaintiff's case gains any strength from the fact, that the defendant, Thayer, committed a fraud against him eight years after the date of the execution of the deed of marriage settlement. He stands upon the same footing, and no higher, than if he was a creditor of Thayer, whose claim had originated in the most perfect fair dealing. In the observations which will follow, I will therefore leave out of view all that part of the evidence which relates to that fraud.

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\*The evidence relied upon to prove that the marriage settlement was tainted with fraud in its inception, consists mainly of the facts, that the amount of the estate settled was equal in value to nearly the whole, if not the whole of the estate owned by the settlor at the time: that the greater portion of the property settled was not then owned by him: that he was then largely in debt, if not insolvent: that he has been in debt ever since: and is now totally insolvent. If the plaintiff's right of recovery depended upon the truth of the foregoing propositions, he would be entitled to the relief which he seeks: for I think he has fully established them all. But admitting them to be true, though calculated to create suspicion, they would be consistent with the supposition, that the defendant, in his intentions, committed no fraud. He might have hoped, and expected to pay all his debts, without infringing upon the settled property. The facts mentioned might have made an irresistible case against a voluntary settlement, in favor of creditors whose claims existed at the time. But this branch of the plaintiff's case must rest upon a different state of facts.

Marriage is a valuable consideration. Some have considered it the highest consideration known in law. None would say, it was a lower consideration than money. There is nothing unreasonable in this. The great value of the consideration consists in this: that the wife surrenders her person and her self dominion to the husband, and enters into an indissoluble engagement with him,

foregoing all other prospects in life; and if the consideration for which she stipulates fails, she cannot be restored to the status in quo. She can have no remedy or relief.

Mrs. Thayer, and the issue, (for the issue are within the marriage consideration,) are the purchasers of the settled estate for valuable consideration. If the transaction was bona fide on her part, although it might be fraudulent on the part of the husband, it would not affect her title. If an insolvent debtor, with the view of evading the pay-

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ment of his debts, \*sells his property to a bona fide purchaser, receives the money, and absconds, the creditors could not claim the property from the honest purchaser. It would be otherwise, if the purchaser concurred in, or was aware of the intended fraud. In that case, he would be liable, though he had paid more than the value of the property. The same principle must prevail in the case of an ante-nuptial settlement. The wife is a purchaser for valuable consideration. She cannot occupy a worse position than the purchaser who pays his money in good faith. Though the husband contemplated a fraud, her title is good, unless she concurred in, or was privy to the fraud. The evidence in this case, as to the question of fraud, does not touch Mrs. Thayer. I do not doubt, but that she believed him to have been in the most prosperous circumstances—as others did, who had, perhaps, better opportunities of knowing. Indeed, it would be a great fraud on her, for which the defendant, Thomas Heyward Thayer, would be responsible, if the property should be taken from the wife. *Campion v. Cotton*, 17 Ves. 262. This was a case, where the settlement was sustained against existing creditors.

The plaintiff's counsel candidly admitted, that if the decision in *Campion v. Cotton* was to prevail, he could not hope to recover on this branch of his case. But he cited, and insisted upon *Simpson & Davidson v. Graves*, *Riley's Eq. Cases*, 232, as furnishing the proper rule upon this part of the case.

But I do not think, that the circumstances of the case before me come up to those in *Simpson & Davidson v. Graves*. In the latter, the property settled was of immense value, and the wife had a large estate of her own, which was also settled. In the present case, the property settled was comparatively small—and though large for the settlor's means, was not more than was sufficient for the comfortable maintenance of the family. In the case cited, the settlor was hopelessly insolvent at the time: while here, Thayer, though in debt at the time, continued to do an apparently prosperous business for eight

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or \*nine years afterwards. It is only recently, that he has become insolvent. The most important distinction is this: that in the

case of *Graves*, the debts were of a prior date to the settlement; while in this case, the debt which is claimed to be satisfied out of the trust property, was contracted about eight years after the date of the marriage settlement; there being no debt of that date, now in existence, so far as appears. I will further remark, that though this deed of marriage settlement purports to settle the property of the wife in possession, or contingency, it does not appear that the wife ever has had any property whatever, to become subject to the provisions of the settlement.

It would be far from the truth to say, that in no case, would the Court vacate ante-nuptial settlements in favor of existing or even subsequent creditors. If the settlement was fraudulent in its intention, and the wife privy to the fraud, the Court would interpose as a matter of course. Or if the property settled was immensely large, out of all reasonable proportion, and the wife had an ample estate of her own, which was also settled, though the marriage consideration is not measured by a pecuniary standard, the Court would give relief to prior creditors, as in *Simpson v. Graves*. But it seems to me, that in a case untainted with fraud in its inception, though the settlement embraces all or nearly all of the settlor's property, that circumstance is entitled to no weight in favor of subsequent creditors, who give credit to the husband with the knowledge that all his property is settled. In such case, the credit is not given upon the faith that he has property. Even voluntary gifts are sustained against subsequent creditors, where there is no fraud.

Voluntary gifts are vacated at the instance of prior creditors in all cases, whether fraud be intended or not. Subsequent creditors cannot be relieved, unless there be fraud in intention, using that term in contradistinction to fraud arising by presumption of law, in

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which there may be no corrupt \*motives. Subsequent creditors can only come in on the ground of actual fraud. *Iley v. Niswanger*, 1 McC. Eq. 518. A voluntary settlement, when there are no existing creditors, can not be impeached by a subsequent creditor, unless it was made with reference to future indebtedness, or attended with some other fraudulent circumstances besides its being voluntary. *Iley v. Niswanger*, 1 McC. Eq. 518; *Russell v. Hammond*, 1 Atk. 15; *Stileman v. Ashdown*, 2 Atk. 477; 3 John. Ch. 507. Where there are both prior and subsequent creditors, and the voluntary gift, or settlement, is set aside in behalf of the prior creditors, the subsequent creditors are let in. But this principle cannot operate in support of the plaintiff's claim for two good reasons. First: the settlement here is not voluntary, but for valuable consideration, and the analogy is not good. Second'y, if it were, there are no prior creditors to make the breach,



by which the subsequent creditors are let in.

Failing in his effort to subject the settled estate generally to the payment of his claims, the plaintiff claims to make liable Thayer's interest in the same. It will be remembered, that by the trusts of the marriage settlement, the estate is to be held for the joint use of Thayer and wife during their joint lives. The particular question here raised, is not free from practical difficulties. True it is, that as a general proposition of almost universal application, property implies, on the part of the owner, (if under no disability,) the *jus disponendi*; and is liable for the payment of debts. These proprietary rights enter into the very nature of the institution of property; and it matters not whether it be a legal or an equitable estate. It is also true, as a general rule, that where the debtor's property cannot be reached in a Court of Law, the creditor is entitled to relief in this Court. In general, a tenant in common, or a joint tenant, has the right to demand partition of the common property. Yet Thayer, whether living with, or separated from his wife, would have no right, (applying in his own behalf,) to demand a partition of the

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joint interest of himself and wife. \*He could not by a sale, or transfer of his share of the joint interest, induct a stranger into the joint use of the settled estate with his wife. How could a third person have the joint use with Mrs. Thayer of the house and lot which, by the terms of the settlement, she is to occupy? or of a negro, or an article of furniture, which she is to possess and occupy? These questions present the difficulties in a strong point of view, and show, that the Court cannot interfere in cases like the present, without inflicting injury upon other and innocent parties: in other words, without breaking up and defeating the scheme of the settlement. If the Court were to order the trustee to rent the house, and to hire the negroes, and to pay over to Thayer's creditors the one-half of the nett proceeds thereof, this would be to give to Thayer, or which is the same thing, to those representing him, one-half of the income to his separate use, which would be contrary to the trust. Or if the Court were to order the property sold, and the proceeds invested, and one-half to be paid to the wife, and the other half to the creditors, this would be liable to the same objection, and would deprive the wife of the particular house, and the particular negroes, &c., the use and enjoyment of which, were secured to her by the trust. She would, in that case, be driven to the shift of seeking out for another habitation, and of hiring other servants, with diminished and inadequate means of so doing.

The Court of Appeals in Equity has recently had this subject under mature consideration. In *Brown v. Postell*, 4 Rich. Eq. 71, the trust was, that the estate, which con-

sisted of ten slaves, should be held for the support and maintenance of the husband and wife during their natural lives, and for the support of his present, or of any other children, during their natural lives: and that after the death of the husband and wife, the estate should be equally divided among such children as should be living, share and share alike. James Postell (the husband) retained possession of the negroes until his death; and his widow, Mary Postell, and her chil-

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dren, had had possession of them ever since. Mary Postell contracted a debt with the plaintiff, John A. Brown, for necessaries supplied for the family. He obtained a judgment at law against her, execution was issued, and the Sheriff had returned nulla bona on the *fi. fa.*: and the bill was filed to subject the trust estate to the payment of the demand. The counsel for the appellant contended, that if the Court did not recognize an equity in the complainant's claim against the trust estate, he should be allowed to enforce his demands out of the individual shares of such of the beneficiaries as had contracted the debt that he was seeking to recover. He claimed the right to enforce his demands against the equitable estate of his debtor individually. In opposition to this claim, this was the language of the Court: "There are two insurmountable impediments to the Court's adopting this latter view of the case. In the first place, he has not framed his bill with this aspect. That is not the case he has called on the defendant to answer, or this Court to adjudge. The second difficulty arises from the nature of the trusts declared in the deed. The Court could not subject the share of one of the beneficiaries of the trust, to his or her debts, without breaking in upon the whole scheme of the trust. The interest of one could not be separated, without injury to the other *cestui que trusts*. There is no present right of enjoyment in severalty. The Court would not decree a partition. The scheme of the trust, according to the provisions of the deed is, that the estate is to remain as a whole until the death of the survivor of John and Mary Postell. The latter still survives," &c.

In *Heath v. Bishop*, 4 Rich. Eq. 46 [55 Am. Dec. 654], two negroes were conveyed to Burrell Bishop, in trust, to pay over to John G. Bishop yearly, and from year to year, or as much oftener as necessary or convenient, the net profits, or income from the labor, and hire of the said negroes. The plaintiff was a judgment creditor of John G. Bishop, who was absent from the State, and without property in the State, upon

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which an execution could be levied. The plaintiff sought to recover by a decree of this Court, satisfaction of his debt out of the equitable estate of John G. Bishop, in

the said negroes. The Court of Appeals affirmed the circuit decree allowing the claim, and decreed that the plaintiff should have satisfaction of his claim out of the equitable claim of John G. Bishop, in the said negroes. But the decision was put expressly upon the ground, that John G. Bishop had a present vested right of enjoyment in severalty of the said equitable estate. And it was there said: "If in the scheme of the trust, the rights of a debtor are so mingled with those of other beneficiaries, that they cannot be separated without injury to his co-cestui que trusts; in as much as there is no present right of enjoyment in severalty, and the Court would refuse a partition, the interest of an indebted beneficiary of such a trust could not be made subject to the payment of his debts." This, I apprehend to be the true rule upon this subject, and must govern the decision in this case; and the rule, as thus expressed, embodies the reason on which it is founded.

When a disappointed creditor comes into this Court with a claim like the present, he is apt to lose sight of one very important consideration. He is apt to forget, while calling upon the Court to administer an equity in his favor, that there are countervailing equities of other, and innocent parties, equal in justice to his own, founded upon valuable consideration, prior as to time; and which would be superseded, defeated, or disturbed, by granting the relief which the plaintiff seeks. Nor is the Court in any way responsible for this result. It takes away none of the rights of the plaintiff. Without denying the entire justice of his claim, or his right to recover by any of those usual and established forms of proceeding, by which a creditor enforces payment against his debtor, the Court simply refuses to interpose: because, by so doing, existing and vested rights would be disturbed, of equal equity, to say the least, to that of the plaintiff. Prior in tempore, potior est in

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\*jure. The claim of the plaintiff to subject the joint estate of Thomas Heyward Thayer in the trust estate, can not be entertained.

I come now to consider that part of the plaintiff's bill, in which he claims to be subrogated to the rights of Clarence Thayer, as a prior creditor of Thomas Heyward Thayer. To be intelligible in what follows, I must make a preliminary statement of facts. The defendant, Thomas Heyward Thayer, had two sons by a former marriage, of whom Clarence was one. He became the guardian of his two sons, as to an estate, which they had derived from their deceased mother. At the time of the execution of the marriage articles, the defendant, Thayer, owed his two wards collectively, the sum of six thousand dollars, or thereabouts. This debt was extinguished by payments from time to time.

The whole debt is now satisfied. The plaintiff contends, that the last payment, of about one thousand four hundred dollars to Clarence Thayer, was made out of his funds in the hands of the defendant, Thayer; and he claims to be subrogated as a creditor of Thomas Heyward Thayer prior to the execution of the marriage articles. There are many difficulties in the way of entertaining this view of the case. In the first place, if the plaintiff had been successful in proving the facts upon which the legal proposition is predicated, I am not aware of such an instance of subrogation. Nor was any precedent cited. Again: if Clarence Thayer's debt still existed, and he was plaintiff in this cause, could his claim prevail against an ante-nuptial settlement, founded upon the valuable consideration of marriage? On this subject I refer to my remarks in the first part of this opinion. In the third place, the proof does not satisfy me, that the payment to Clarence Thayer was made out of the funds of the plaintiff; though there is strong ground for a suspicion, that the possession of those funds contributed to his ability to make the payment. I must state the evidence on this part of the case, referring to my notes for a fuller statement, if necessary.

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\*On the 8th February, 1851, plaintiff put into Thayer's hands two thousand six hundred dollars, for the purchase of stock on joint account. On the 19th February, 1851, Thomas Heyward Thayer paid his son, Clarence Thayer, the sum of one thousand four hundred and fifty dollars, which was in full satisfaction of the latter's claim. The shortness of the interval between the receipt of this money from the plaintiff, and the payment to Clarence Thayer, and the embarrassed circumstances of Thomas Heyward Thayer at that time, are, so far as I am able to perceive, the only facts, on which the plaintiff can rest his assumption, that the money paid to Clarence Thayer was actually his identical money. I do not think this is sufficient to establish the identity. The suspicion that it was the same money, is weakened by the fact proved by an entry to this effect in defendant's book, (introduced by the plaintiff,) "1851, Feb. 11, to cash paid for one hundred State Bank shares, ten thousand seven hundred dollars;" and by the further fact, that on the 13th February, 1851, the defendant negotiated a discount with the Bank of the State of South Carolina for two thousand seven hundred and thirteen dollars, at thirty days, secured by a pledge of one hundred and thirteen shares of the stock of the Planters' and Mechanics' Bank. On the 11th February, 1851, he negotiated a loan or discount with the Union Bank for four thousand five hundred dollars, at thirty days, secured by a pledge of fifty shares of the capital stock of the State Bank. On the



5th January, 1851, he got from the Bank of the State four thousand seven hundred and fifty dollars, on his note, with a pledge of two hundred shares of the Planters' and Mechanics' Bank. On the 20th February, 1851, he gave his note to the Union Bank for five hundred and ninety-five dollars, with a pledge of seven shares of the Bank of the State. On the 13th February, 1851, he gave his note to the Bank of the State for four thousand one hundred and eighty dollars secured by a pledge of forty-four shares of State Bank stock.

All these transactions show conclusively

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that though at the \*time of the payment to Clarence Thayer of one thousand four hundred and fifty dollars, on the 19th of Feb. 1851, Thos. Heyward Thayer was in an embarrassed, and failing condition, he was nevertheless, at that time, in the possession and control of funds to considerable amount. Under these circumstances, it would be a very unwarrantable inference to hold, that the payment to Clarence Thayer was made out of the identical money of the plaintiff.

I pass on to the consideration of other matters. The plaintiff claims to subject to the payment of his debt, certain negroes, the title to which stands in the name of Elizabeth B. Livingston, the trustee of the marriage settlement of Thayer and wife, namely: a negro named Eliza, conveyed by deed dated 14th of March, 1845, to Elizabeth B. Livingston, as such trustee; a negro conveyed to the same by Geo. C. Mackey, by deed dated 5th August, 1848; a negro named Billy Williams. These three bills of sale are to Mrs. Eliza B. Livingston, in trust, or as trustee of Thos. H. Thayer, and his wife C. B. Thayer. They were all recorded in the office of the Secretary of State, Aug. 5, 1852. These negroes are in the possession of T. H. Thayer and wife. How they were acquired by Mrs. Livingston does not appear. There is a power given to the trustee by the deed of marriage settlement, to sell the negroes belonging to the trust estate, and to reinvest the proceeds in other negroes, to the same uses. Whether Mrs. Livingston has exercised this power, has sold all or any of the negroes originally belonging to the trust estate, and has re-invested the proceeds in the negroes above named, does not appear except in the defendant's answer, where it is stated that such was the fact. There is not a particle of evidence adduced on the part of the plaintiff, impugning the bona fides of these bills of sale. They must be presumed to be fair, corroborated as they are by the defendant's answer.

The plaintiff contends that these negroes should be subject to his claim, because the

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bills of sale were not recorded. I \*am aware of no provision of law, rendering it imperative upon the purchaser of a negro to record

his bill of sale. The Act of 1698 does indeed declare, that where there are two or more sales of the same property, the bill of sale first recorded shall prevail. That statute is inapplicable, for the plaintiff is not claiming as a second purchaser without notice. The Act does not declare that the non-registry of the bill of sale, shall render it void as against the creditors of the vendor. In this case, the possession was consistent with the title. The bills of sale purport to convey the title to Mrs. Livingston, as trustee, &c. There is nothing in the evidence to rebut the prima facie presumption arising upon the face of the title.

There is one other negro claimed by the plaintiff to be subject to the payment of his debt, in regard to which the circumstances are somewhat different, but the conclusion is the same. This is a negro boy named September, conveyed by Thos. Heyward Thayer himself to "Mrs. Eliza B. Livingston, in trust for Julia Matilda and Philip L. Thayer," (who are children of Thos. Heyward Thayer by his present wife.) There is nothing in the evidence that tends to impeach the fairness of this bill of sale. If it be fraudulent it was not shown. One of the witnesses testifies, that on one occasion, Thos. Heyward Thayer said to the plaintiff, that September was his property; and that the bill of sale though unconditional on its face, was only a mortgage to the trustee for the sum of four hundred dollars of his children's money which he had borrowed. But Mrs. Livingston, the trustee, to whom the absolute title was executed, was not present, and I do not perceive how such admissions can affect her title. The claim of the plaintiff, to subject the negroes, must also fail.

I come now to the consideration of the last ground made in the pleadings on the part of the plaintiff. He claims, on good and sufficient reasons, I think, that all the articles not mentioned in the schedule of the deed of marriage settlement are liable to his claim.

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\*There is no schedule attached to the marriage articles, nor any specification or description of the property intended to be embraced in the deed of settlement; except the house and lot in Broad street, which is very particularly described, and the negroes who are described by name; which is sufficiently explicit. The furniture is described in general terms, as I have already explained. The furnishing of the house is referred to in language as follows. After a description of the lot and house to be settled, the articles proceed thus: "together with each and every parcel of kitchen and household furniture, plate, linen, and so forth, wherewith the same shall and ought to be completely and suitably furnished." Now this, although binding as between the parties, and capable of being enforced by the wife or trustee,

against the husband, is certainly void as to creditors and purchasers. 5 Stat. 203.

The Act provides that all marriage contracts made after the 1st of June 1793, shall specify and describe the real and personal property intended to be included therein, or have a schedule thereto annexed containing a description of said real and personal estate, which schedule shall be signed and executed by the parties at the time of the settlement, and be subscribed by the same witnesses, and be recorded with the marriage contract; and in default of which the contract, as to the property not so described, is null and void. No one would be found to say that the description of the furniture, linen, and plate mentioned in the articles, is specific in pursuance of the requirements of this Act. The deed of marriage settlement of 1st July, 1843, contains a schedule of these household articles, which, for the most part sufficiently describes them; and hence arises the question, The articles not containing a description of the furniture, &c., is the settlement null as to creditors? Having been introduced into the deed of settlement, the said deed, as to them, can not stand on the valuable consideration of marriage: I mean of course as to creditors. The settlement, as to these articles, must be con-

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sidered as post nuptial, and \*the consideration voluntary. I do not think that the void agreement of the 6th February, (void as to furniture, &c.) can be made the basis of a valuable consideration to support the conveyance and settlement of property, (not described in the articles,) by the deed of 1st July, 1843.

The case of the Bank v. Mitchell, Rice's Eq. 389, is an authority for holding that articles of marriage settlement, void as to creditors, (though binding as between the parties,) can not be made the basis for a future settlement after marriage, to be considered as founded upon a valuable consideration. In that case, the articles were duly executed on the 27th February, 1809. They were not recorded until ten days after the time prescribed by law, and therefore void as to creditors. After a long lapse of time, on the 1st March, 1829, in pursuance of the articles, the husband executed a deed of marriage settlement of slaves, and this deed was duly recorded. In the interval between the execution of the articles, and the deed of settlement, the husband had become largely indebted; and it was at the instance, and on behalf of some of these intermediate creditors, that the deed of settlement was vacated. Upon the authority of this case, and upon the construction of the Act, I hold, that the deed of 1st July 1843, as to the scheduled articles, must be regarded as post nuptial and voluntary.

Considering the settlement as to the scheduled articles, post nuptial and voluntary,

are these articles liable for the plaintiff's debt contracted about eight years afterwards? Under ordinary circumstances they certainly would not. But the evidence sufficiently proves, that Thayer, at the date of the settlement was largely in debt; that he settled, to say the least, a very large portion of his estate upon his wife; that he has continued in debt from that day, getting more and more deeply involved, until his final and utter insolvency. Under these circumstances, a voluntary gift may be consid-

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ered as fraudulent \*even against a subsequent creditor. The conclusion is supported by both reason and authority.

McElwee v. Sutton, 2 Bail. 130, was a case of trover for a slave. The plaintiff claimed as purchaser at sheriff's sale, under an execution dated in 1825, of Nash v. James J. Sutton, the donor. The defendant, James E. Sutton, who was the son of the donor, claimed by a deed of gift from his father, dated in 1819, some years before the existence of the debt. The question was, whether the gift was valid against the donor's subsequent creditors. At the time of the gift, Sutton was indebted to the amount of one-half of the value of his estate. The debts subsisting at the date of the gift were all paid, but this appeared to have been chiefly done by contracting new ones; and the amount due by the donor, at the date of the gift, never diminished, but progressively increased, until he died utterly insolvent. The jury were charged by the presiding Judge, that there was no fraud in the case, and the verdict was for the defendant. The verdict was set aside, and a new trial granted, on the ground of misdirection. [Hudnal v. Teasdall] 1 McC. 228 [10 Am. Dec. 671]. The Law Court of Appeals gives the reasons for its decision as follows: "If the donor, at the time of the gift, is indebted, but subsequently pays his debts, and is entirely free from debt, then such precedent indebtedness can not vitiate his gift. But if the old debts are paid off by contracting new ones, or they remain until, out of the general wreck of the donor's estate, they are paid off, on account of their priority, then the gift is equally as fraudulent, as if to insure their payment, it was to be set aside: for in the first part of the proposition, the original indebtedness was the cause of the subsequent: and in the second, the antecedent debts, by being paid out of the fund common to both, deprives the subsequent, or junior creditors, of all chance of being paid, unless the antecedent indebtedness, as to which the gift is bad, makes it void also as to the subsequent."

This reasoning to my mind is satisfactory;

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and the circumstances of the present case, as proved by the evidence, come precisely up to those of the case cited. The facts of the two cases agree in every important par-



ticular. I have therefore come to the conclusion, that the plaintiff ought to have the articles, mentioned in the schedule of the deed of 1st July, 1843, made subject by a decree of this Court to the satisfaction of his claim: and it is so ordered and decreed.

I will make one further remark about the scheduled property. I have heretofore said, that in the main, the articles mentioned in the schedule were sufficiently described. There is one exception. Some portion of it, and perhaps the most valuable, is thus described: "closets containing glass, china, and silver plate." It is obvious, that this is not a sufficient description, coming up to the requirements of the law. The quantity of the silver plate might be increased tenfold, or a hundred fold, and yet the additions not be detected by the description of the schedule.

It is ordered and decreed, that the defendants, Thos. Heyward Thayer, Catherine B. Thayer, and the trustee of the marriage settlement, do forthwith deliver into the hands of one of the Masters of this Court, all the articles of furniture, linen, and silver plate, enumerated and described in the schedule annexed to the said deed of marriage settlement of the 1st July, 1843; and that the said Master, after due notice, proceed to sell the same on such day as he may deem convenient and advisable; and that he apply the proceeds to the satisfaction of the plaintiff's claim.

The defendants appealed on the grounds:

1. That the furniture settled on Catherine B. Thayer is declared liable to the plaintiff's execution, and directed to be sold in satisfaction of his judgment: whereas the trustee and cestui que trusts insist that they are purchasers for valuable consideration of the said furniture, before the plaintiff's debt was contracted.

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\*2. That the settlement is free from fraud, and the schedule sufficient: that the settlement and schedule are duly recorded.

The complainants also appealed on the grounds:

1. Because the marriage contract of the 6th day of February, 1843, does not "describe, specify, and particularize the real and personal estate thereby intended to be included, comprehended, conveyed, and passed;" nor has it ever had "a schedule annexed containing a description, and the particulars and articles, of the real and personal estate intended to be conveyed and passed by such marriage contract;" wherefore, it is submitted, that by the Act of 1792, the said marriage contract is fraudulent, and wholly and entirely null and void, even as to subsequent creditors; and being fraudulent and void, the post-nuptial settlement of the first day of July, 1843, between the same parties, is without any consideration to support it, and therefore his Honor ought to have decreed that the said settlement is insufficient to pro-

tect any part of the property intended to be settled by it, from either the prior or subsequent creditors of the said T. Heyward Thayer.

2. Because the post-nuptial settlement is entirely void, not only for being without any consideration to support it, but for the reasons upon which it is insisted by the first or foregoing ground of appeal, that the marriage contract is void, viz., that it has no such description or schedule of the property intended to be settled, as is required by the Act of 1792.

3. That at the time the marriage articles and settlement were executed, the settlor, T. Heyward Thayer, was indebted in an amount greater than the value of all the property owned by him; that the property conveyed in the settlement was not only his whole estate, but the greater part of it was not then owned by him, and not paid for; that he

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could not by a settle\*ment convey his future earnings, and for these reasons the settlement ought to have been set aside as fraudulent.

4. That the interest of T. Heyward Thayer, under the settlement, ought to have been defined, and made liable to the payment of complainant's debt.

5. That the complainant should have been subrogated to the rights of Clarence Cordes Thayer, (a creditor previous to the settlement,) whose debt was paid by T. Heyward Thayer, out of the funds of complainant.

6. That the four negroes purchased since the marriage settlement was made, and conveyed by bills of sale to the trustee, Mrs. Livingston, cannot be regarded as property substituted under the deed of settlement, and protected thereby, there being no record of any such substitution, agreeably to the requirements of law.

7. That the continued possession by T. Heyward Thayer of the negro September, after the sale to Mrs. Livingston, attaches to the transaction the character and penalty of fraud.

8. That the decree is in other respects contrary to Law and Equity.

Yeadon, De Treville, for complainant.  
Petigru, Petigrew, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The first and second grounds of appeal taken by the plaintiff will be considered together. By the marriage articles, T. Heyward Thayer covenanted to set-

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tle the house and \*lot in Broad street particularly described, four negroes, Anthony, Cora, William and Jacob, "as also each and every parcel of kitchen and household furniture, plate, linen, and so forth, wherewith the same (meaning the house) shall and ought to be completely and suitably furnished." No schedule was annexed to the articles.

For the reasons stated in the decree, the Chancellor held this ante-nuptial contract to be null and void as to creditors and purchasers; and that the subsequent settlement, made in conformity with the articles, "could not stand on the valuable consideration of marriage, but must be regarded as post-nuptial, and the consideration voluntary."

The Act of 1792, like all other remedial laws, must receive a reasonable construction in reference to the objects to be accomplished. It was not intended to declare a forfeiture in consequence of the violation of a prohibitory law, but to protect creditors and others, who might be misled by appearances, and defeated by latent titles. It is admitted by all that, anterior to the marriage, the intended wife stands, at least, on an equal footing with a creditor or purchaser. The transaction of a creditor or purchaser may be vitiated for fraud, and so may that of the intended wife. But if the transactions are bona fide, they are equally entitled to the protection of the Court. It is scarcely necessary to say that no schedule is necessary if the property to be settled is sufficiently described in the body of the instrument. A schedule is only required in the alternative; such are the terms of the enactment, and this construction is recognized in repeated decisions. The descriptions must necessarily be according to the character of the property to be settled. All must be done that can reasonably be required in order to give information, and place persons on their guard. But, as has been said, the contracting parties have rights which are to be regarded as well as those of creditors. It was not denied that the want of such description as the Act required, rendered the whole instrument inval-

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id, and it was then strenuously contended, that, if the contents of a china closet or wine cellar, (although so described,) were not specifically enumerated, it would invalidate the settlement of a large estate. If the Act requires such minuteness of description, it appears to me difficult to resist the conclusion of the argument. But, if a defective enumeration of this character vitiates a settlement, a misdescription would be equally fatal; and few settlements which attempted a description would be proof against such a scrutiny. Our decisions afford no support to the extreme position assumed by the plaintiff. *Heriot v. Higham & Fife*, Bail. Eq. 222, was decided more than a quarter of a century ago. Emily Wakefield was entitled to a portion of a residuary fund in the hands of the executor of her grandfather, Daniel Cannon, and in 1804, in contemplation of her marriage with E. G. Thomas, her property was settled, with no other description than a legacy under the will of her grandfather, Daniel Cannon, deceased. In 1830 the validity of this settlement was questioned in a suit

between Higham and Fife, creditors of E. G. Thomas, and the trustees of the settlement.

The instrument was sustained by Chancellor De Saussure, who held the description in the body of the settlement to be sufficient, and that no schedule was necessary. "New statutes" (says he) are always construed according to the subject matter, "and to give them a fair and full effect and no more." The first ground of appeal was because the settlement was void for want of a schedule, and of all specifications, subsequently, of the precise property secured by the deed. The Court of Appeals concurred with the Chancellor, and affirmed his judgment. "It was impossible (they say) to have described the thing settled, a legacy, otherwise than as it is described in the settlement. A schedule, therefore, would have been useless."

It is not an unusual covenant in articles that any property subsequently accruing to the wife, by inheritance, or otherwise, should be settled to the same uses. Upon the authority above cited, it would be difficult to deny

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that a settlement of such \*subsequently acquired property, in conformity with the covenant, was sustained by a valuable consideration.

Then it was supposed that *Allen v. Rumph*, 2 Hill Eq. 1, sustained the views of the plaintiff. But in that case Janet Allen had been for eight years in possession of slaves and other personalty, in which she had an absolute interest with her son Benjamin, under the will of her deceased husband. Being thus in possession of the property, a settlement was executed with no other description than "the said legacy so bequeathed by the said Josiah Allen, and all and singular any other species of property belonging to the estate of the said Josiah Allen to which she may be entitled, with the increase of slaves, stock, &c." This description was held to be insufficient. She was in possession of the whole of the property under the bequest, and had been for eight years. The negroes could have been enumerated or named and set forth in the instrument, or in a schedule annexed. Judge Johnson who had delivered the opinion in *Higham & Fife* ads. *Heriot*, pronounced the judgment, also, in this case, and says: "Certainly this description does not correspond with the particularity intended by the Act, nor is there any schedule connected with it, containing a more certain description." But, if the deed had described the plantation by metes and bounds, sixty negroes, (by name) together with the stock of cattle, hogs, &c., on, and belonging to said plantation, the description would hardly have been held defective, or that the whole settlement was void, because the stock of cattle were not more particularly described or enumerated.

In the case before us, the articles are prospective. The house was to be paid for and



furnished, and the covenantor stipulates to settle the house, "together with each and every parcel of kitchen and household furniture, plate, linen, and so forth, wherewith the same shall, and ought to be, completely and suitably furnished." This was all the description which could be then given, and it

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was all that was necessary. \*If the wife's property had been large, and had been included and fully described in the settlement, and the husband had covenanted that, within thirty days after the solemnization of the marriage, he would lay out two thousand pounds in the purchase of a house, completely furnished, could it be contended that this settlement was void for want of specifications, and that the rights of the husband attached not only to the property afterwards purchased and duly settled, but also to the property of the wife which was also included in it? Such construction would render the statute an instrument of fraud and spoliation instead of a protection to the unwary. This Court is of opinion that the description in the articles is sufficient, and that the subsequent deed of July, 1843, was sustained by a valuable consideration. This virtually decides the defendants' ground of appeal. In compliance with his previous undertaking, the husband executed the settlement, to which a schedule is annexed, describing the furniture with great particularity, and also, "closets containing glass, china and silver plate." Assuming that these fall within the character of articles covenanted to be procured and settled, the trustee is a purchaser for valuable consideration, and stands on the purchase. The description is sufficiently definite for any such or the like purpose. A legacy of that character would pass all the glass, china and silver plate found in the closets, and such is the effect of the deed.

The plaintiff's sixth and seventh grounds of appeal relate to certain negroes purchased since the date of the settlement. The bills of sale were taken in the name of the trustee. On this subject the Chancellor remarks: "There is not a particle of evidence adduced on the part of the plaintiff, impugning the bona fides of these bills of sale. They must be presumed to be fair, corroborated as they are by the defendants' answer.—The plaintiff contends that these negroes should be subject to his claim, because the bills of sale were not recorded." The Chancellor then proceeds to show, (very satisfactorily in the judgment of this Court,) that recording is not necessary in

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\*order to give validity to such deed. It is here insisted that the deeds are void there being no record that the property had been substituted for property included in the settlement agreeably to the requirements of law. This Court expresses no opinion as to the sufficiency or insufficiency of the evidence,

showing that the property purchased was in substitution of that included in the settlement, as no such question is presented by the ground of appeal. But assuming that the property was purchased with trust funds, and that "the deeds," as the Chancellor concludes, "were fair," we concur with him that recording was unnecessary. And so, in regard to the slave September. If purchased with trust funds, (as the Chancellor concludes and the plaintiff does not hear question), the subsequent possession was in accordance with the trusts declared.

The observations made in relation to the first and second grounds of appeal substantially dispose of the third. The trustee is regarded as a purchaser for valuable consideration. If the circumstances disclose actual fraud in the parties this consideration would not protect the settlement. But fraud is a matter of evidence and we are satisfied with the views presented by the Chancellor upon this subject.

The fourth ground of appeal insists that the interest of T. Heyward Thayer, under the settlement, ought to have been defined and declared subject to the satisfaction of his debts.—By the terms of the settlement the trustee is to permit the husband and wife, during their joint lives, to hold, use, occupy and enjoy the premises with the furniture, &c., and also the negro slaves, "to and for the joint maintenance and support of the said T. Heyward Thayer and Catharine B., or, as the case may be, to and for the purpose aforesaid, quarter yearly to take, collect and receive the rents, issues, hire and profits of the said messuage, furniture and negro slaves, and during the joint lives of the said T. Heyward Thayer and Catharine B. Thayer, to pay over and apply the same unto such purposes, or unto such person or persons only as the said T. Heyward

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\*Thayer and Catharine B. Thayer, by any writing or writings signed jointly with their hands, shall direct or appoint, (but not so as to deprive themselves of the benefit thereof by any sale, mortgage, charge, or otherwise in the way of anticipation,) and, in default of such direction and appointment, to pay the same into their proper hands for the joint use of the said T. Heyward Thayer, and Catharine B. Thayer, and without being in anywise subject to the separate control, debts, contracts or engagements of the said T. Heyward Thayer."

It is to be remarked that this is not a settlement to the sole and separate use of the wife; but to the joint use of husband and wife. To say that the husband has no interest, or no more interest than if the settlement had been to her sole and separate use would be to disregard the language of the deed and the plain meaning of the terms used by the parties. It is said the interest is declared not to be subject to the separate

control, debts, &c., of the husband. But it is impossible to give a man property and take from it the incidents of property. This was ruled by Lord Eldon, in *Brandon v. Robinson*, 18 Ves. 429, and has been repeatedly recognized in our own Courts. Whatever interest the husband has, whether legal or equitable, must be subject, as an incident of property, to the payment of his debts. The only inquiry has been in what forum these rights of the creditors should be enforced. In the case of *Ford v. Caldwell*, 3 Hill, 248, the settlement was to the joint use of husband and wife, not subject to the debts, contracts or engagements of the husband or his wife. The law Court of Appeals held, nevertheless, that the husband had the power of alienation for the term of his life as the trust was said to be executed. Acting perhaps, on this authority, the sheriff, in *Rice v. Burnett* and *Ioor v. Hodges*, Sp. Eq. 579, [42 Am. Dec. 336]; Sp. Eq. 593, levied upon slaves in possession of the husband under a settlement. It was determined by the Court of Errors (overruling *Ford v. Caldwell*,) that the legal estate was in the trustee, and the

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interest of the \*husband could only be reached in this Court where the claims of the creditors could be met by the equities of the wife, and their respective rights be properly adjusted. *Jones v. Fort*, 1 Rich. Eq. 50, recognizes the authority of these cases as deciding that "although the legal title was in a third person as trustee, creditors may come into this Court, after exhausting their remedy at law, to make the husband's interest in it liable to their demands."

The general principle was elaborately discussed and approved in *Heath v. Bishop*, 4 Rich. Eq. 46 [55 Am. Dec. 654]. In that case the circuit Chancellor sustained the claim of the creditors, although with some hesitation, and his decree was affirmed by the Court of Appeals. In announcing the judgment of the Court, the Chancellor (who also heard this case) expressed the opinion, that the interest of the creditor must be several. This was not a point in issue in the cause. No party had any interest in the estate in common with the debtor, whose interest was subjected to the payment of his debts, and therefore no such question arose or was adjudicated. So, in *Brown v. Postell*, 4 Rich. Eq. 71, the bill was filed to subject a trust estate to the payment of debts, on the ground that, being contracted for necessities supplied for the use of the family, they were a charge as well upon the corpus as the income of the estate; and so it was at first held upon the construction given to a very obscure and informal deed. The case was subsequently heard by Chancellor Wardlaw, who dismissed the bill on the ground that there was no proof that the debts were contracted for the preservation of the trust estate, and the execution

of the trusts. In the argument before the Court of Appeals, it was, for the first time, suggested, that the plaintiff might be allowed his demand out of the individual shares of certain of the beneficiaries. No such ground of appeal had been taken; and, in affirming the judgment of the Circuit Court, which dismissed the bill, Chancellor Dargan, in his brief observations upon this

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point, says, that the bill was not \*framed with that aspect; and that that was not the case which the plaintiff had called on the defendants to answer, or the Court to adjudge, and that this presented an insurmountable impediment. This was quite enough to vindicate the judgment of the Court. He adds, however, as another difficulty, that there was no present right of enjoyment in severalty in the beneficiaries. It cannot be necessary to repeat what has been so often declared, that the Court is responsible only for the judgment rendered, and not for the variety of reasons which may be offered as leading to that conclusion. In neither of these cases was the question as to the joint or several interests of the beneficiaries involved in the pleadings, or necessary for the adjudication of the Court.

It is very true, as urged at the bar, that the enforcement of these rights of creditors may interfere with the scheme of the settlement, and sometimes be attended with embarrassment and difficulty. But the same may be said of a will where the manifest and declared purpose of the testator is to secure to his son the enjoyment of property, without subjecting it to the consequences of his misfortunes or profligacy. He places it in the hands of trustees to hold for his use, but not subject to his debts. The effort is fruitless. The interest of the son must have the necessary incidents of property, and may be instantly appropriated to the payment of his debts. So, too, difficulties may arise in adjusting the relative equities of the wife and of the creditors. The Court must deal with such difficulties as they present themselves, and according to the means at their disposal. In the recent case of *Lazarus v. Fuller* [7 Rich. Eq. 170]. (Charleston, 1855,) all these difficulties were strongly urged upon the consideration of the Court. The uses declared were (among others) upon the death of the husband or wife, leaving issue, to appropriate the profits of the trust estate (consisting of land and slaves) to the support of the survivor and the maintenance and education of such issue. The Court ordered the trustee to take the estate into his possession, and, after

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providing for the \*maintenance and education of the children, to apply the surplus to the payment of the husband's creditors.

If the estate consisted of money invested in public securities, no practical difficulty



would arise. But to permit a husband who, by the terms of his own settlement, is entitled to the joint possession and enjoyment of the proceeds of a plantation and slaves, or of the dividends of stock, to protect the whole fund from the claims of his creditors, because of the difficulty of defining and reaching such interest, would be a reproach upon the administration of justice, to which it is not, and should not be, justly obnoxious. The Court is of opinion, that a moiety of the annual rents, issues and profits of the estate included in the marriage settlement, as well as the contingent interest of T. Heyward Thayer, is subject to the payment and satisfaction of his debts. It was said that the house in Broad street had been sold under foreclosure of a pre-existing mortgage. It is ordered and decreed, that it be referred to one of the Masters of this Court to report the present condition of the property included in the settlement, and also a scheme for carrying this decree into effect—parties having leave to apply to the Circuit Court for such further orders as may be necessary.

The decree of the Circuit Court is reformed according to the principles herein declared.

JOHNSTON and WARDLAW, CC., concurred.

Decree reformed.

#### 7 Rich. Eq. \*170

\*E. A. TUPPER et al. v. THOMAS FULLER et al.

B. D. LAZARUS v. WILLIAM FULLER et al.  
(Charleston. Jan. Term, 1855.)

[*Husband and Wife* ⇨151.]

Where husband and wife have a joint interest in property, under marriage settlement, with remainder to issue, &c., "necessaries furnished for the family" are a charge against the husband—not against the trust estate—and the creditor can subject only the husband's interest to his demand.

[Ed. Note.—Cited in *Rivers v. Thayer*, 7 Rich. Eq. 168; *Moore v. Scott*, 66 S. C. 298, 44 S. E. 737.

For other cases, see *Husband and Wife*, Cent. Dig. § 588; Dec. Dig. ⇨151.]

[*Trusts* ⇨274.]

Demands for the food and clothing of negroes, overseer's wages, and other annual expenses of the plantation held in trust, should be borne by him who is entitled to the annual income, and is not chargeable to the corpus.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 389; Dec. Dig. ⇨274.]

The facts of these cases are very fully stated in the following decree of Ch. Dunkin, rendered on the 7th of May, 1851:

Dunkin, Ch. These bills have the same object, and, so far as the Court can perceive, might, and should have been embraced in one proceeding. They are suits instituted by the creditors of William Fuller, and the pur-

pose is to subject his interest under a marriage settlement to the payment of his debts. The settlement was executed in December, 1828, in contemplation of the marriage of William Fuller with Margaret L. Guerard, and comprised the estate of the lady, consisting of landed property and one hundred and twenty-three slaves—the trusts of the deed, among others, as follows, viz.: "to hold the same, and to receive and pay over the profits thereof to the said William Fuller and Margaret L., during their joint lives. Upon the death of either the said William or Margaret, leaving issue of the marriage, to hold the premises, and receive and dispose of the profits thereof for the support of the survivor, and the maintenance and education of such issue. Upon the decease of such survivor, then to distribute the same among the issue," &c. Should no issue be alive at the death of the survivor, then the premises are

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to be at the disposal of William \*Fuller, by deed or will, or, in default thereof, to his right heirs. Mrs. Fuller died in September, 1848, leaving surviving her the said William Fuller, and four sons, the issue of the said marriage; the eldest of whom was about twenty-one years of age, at the time of the hearing of the cause.

On the 2d March, 1850, an order was made by Chancellor Johnston, directing, among other things, that the Commissioner "should set forth a schedule of the property covered by the deed of settlement, and the value of the respective portions thereof—and what proportion of the said settled property, now in the hands of the trustee, is equivalent to the said William Fuller's entire interest, present and contingent; and whether it is practicable to separate his interest, so to be ascertained, and secure the rest of the estate for the exclusive use of the children of the said marriage." This decretal order was entered by consent.

The Commissioner's report was made on the 22d February, 1851. He includes, as part of the trust estate, the plantation called "Baileys," valued at five thousand two hundred and seventy dollars. The complainants insist that this plantation belonged to William Fuller in his own right, and constituted no part of the settled property. It appears, from the evidence, that William Fuller came into possession of this plantation in December, 1829. It had been previously the property of Thomas Fuller, senior, who had purchased from the trustee of the Prescott Fund, to whom a considerable balance was due. No conveyance of the premises was produced; but the slaves of the trust estate were employed on the land. It constituted the winter, or country residence, of William Fuller and his family. On the 11th December, 1829, William Fuller executed a mortgage of the plantation to Thomas Fuller,

senior, to secure a bond of five thousand four hundred dollars, said to be part of the purchase money of the mortgaged premises, which mortgage was duly recorded on the 4th January, 1830. At the January Sittings, 1839, of this Court, a petition was presented

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by the \*trustee of William Fuller and wife, setting forth, among other things, that shortly after the marriage, a plantation had been purchased, with the consent of the petitioner, for the trust estate; that a balance remained due thereon, and also setting forth other claims on the estate, and prayed a sale of fifteen slaves to discharge the debts. An order to that effect was made; and, in January, 1840, the trustee reported that he had sold the negroes for ten thousand dollars, and had applied seven thousand five hundred and twenty-nine dollars and thirty-five cents of the proceeds to discharge the balance due to Thomas Fuller, senior, for the purchase of the Baileys Plantation, which, as the report stated, had been "settled for" by the bond of William Fuller, and by assuming a debt of Thomas Fuller, senior, to the Prescott Fund. This report of the trustee was confirmed by the Court, January, 1840.

The creditors insist that, as Baileys was mortgaged by William Fuller for the purchase money, and the mortgage was recorded, it must be dealt with as his property. The evidence appeared to the Court very satisfactory that William Fuller purchased Baileys as agent for the trust estate. He is a party to the proceedings of 1839, in which the facts in connection with it are set forth; but in the view which the Court takes, it is not necessary to discuss, very fully, the relative rights of the trustee to the marriage settlement, and the creditors, arising out of the apparent legal title. William Fuller mortgaged the property in December, 1829, to secure a bond of five thousand four hundred dollars. In 1839 the trustee paid off this debt to the amount of seven thousand five hundred and twenty-nine dollars and thirty-five cents, and is entitled to be subrogated to all the rights and all the securities held by the mortgagee whose claim he satisfied. Baileys is not worth more than five thousand two hundred and seventy dollars, and would, therefore, be wholly insufficient to satisfy the amount due on the mortgage. No injustice is then done

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to the creditors of William Fuller by \*regarding it, as reported by the Commissioner, a part of the trust estate.

Estimating the entire value of the trust estate at seventy-six thousand three hundred and twenty dollars, the Commissioner has fixed the interest of William Fuller, both present and contingent, at one-tenth, or seven thousand six hundred and thirty-two dollars; and recommends, or rather submits, that "this interest may be set off in negroes,

or the crop on hand and so many negroes as will make the sum." The demands of the complainants amount to six thousand six hundred and seventy-three dollars and thirty-six cents; and they were contracted for "necessaries for the support of the family, and for overseer's wages."

It has been already stated that the order of 2d March, 1850, under which this report was made, was entered by consent. It is the decree of the parties themselves. To the report no exceptions were filed; but, at the hearing, the complainant moved for an order of sale of so much of the settled estate as would satisfy the demands against William Fuller, which had been established before the Commissioner. This motion was resisted by the defendant's solicitor. The case is of some novelty, and of much importance to the parties; and was very slightly discussed. The interest of William Fuller in the premises, is altogether of an equitable character. His judgment creditors have no preference over simple contract creditors. If, as charged in the bill, he is insolvent, all his creditors should be admitted to a distributive share of the fund; but the Commissioner reports that the debts established were for necessities for the family, and for overseer's wages. Should these debts be exclusively chargeable on the equitable interest of William Fuller? Had he received funds of the trust estate, which should have been applied to the payment of these demands? This inquiry may, or may not, be important. But the proposition is, not to sequester the interest of William Fuller; not to direct what he would be entitled to receive annually to be

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paid to the \*creditors, but that the children should purchase out the interest of their father at a valuation fixed by the Commissioner. It is upon this point alone, that the Court determines its inability to proceed without other parties. The children of the marriage have a direct and immediate interest in the proposal for a sale. They are named in the proceedings, but no answer is filed in their behalf, nor do they appear to be represented in such manner as would bind their interests. Certainly no sale would be ordered until a special inquiry was directed whether such sale would be for their interest. So far as the Court can judge, it would, in this instance, be very much to the advantage of the children that the report should be adopted, as it seems to the Court that a very low estimate has been put on the interest of William Fuller, under the marriage settlement. But it would be fruitful of mischief to act upon such impressions, until those principally interested were fully represented, and their rights investigated and considered.

It is ordered and decreed, that the report of the Commissioners, bearing date 22d February, 1851, be filed as of that date; and that the necessary measures be adopted for



obtaining the answers of such of the defendant's children of the late Margaret L. Fuller, as have not yet answered the bills—parties to be at liberty to apply for such further orders as may be necessary to prepare the cause for hearing.

From this decree there was no appeal. Richard Fuller, one of the infant defendants, subsequently died. Two of the others, Henry M. and Arthur Fuller, put in their answers, submitting their rights to the Court. William Fuller the younger having come of age, answered, expressing his willingness that provision should be made for the plaintiffs out of the income of the estate generally, but denying their right to a severance of the interest of the *cestui que trusts*.

The cases were again heard before his Honor Ch. Wardlaw, at February Sittings, 1853, when the following order was passed:

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\*On motion of Mr. Treville and Mr. Fickling for the creditors of William Fuller, it is ordered that the trustee, Thomas Fuller, do forthwith take the trust estate of William Fuller and his children into his possession and management; and that after providing for the maintenance and education of the children of the marriage of William Fuller with Margaret L. Guerard, he do pay over the balance of the annual income of the estate rateably to the judgment debts of the said William Fuller which have been established, until the further order of this Court. It is further ordered, that the said Thomas Fuller do account annually in this Court for his actings and doings as receiver of the said estate. It is further ordered, that it be referred to the Commissioner of this Court to inquire, and report, whether the sale of William Fuller's interest in the settled property, upon the terms, and under the conditions proposed, will be advantageous to the infant parties, with leave to report any special matter.

From this order the defendants appealed on the grounds:

1. Because his Honor has sequestered the income of William Fuller alone, in satisfaction of the plaintiffs' claims; whereas, it is submitted, that the Commissioner having reported them to be debts contracted for the benefit of the trust generally, and there being no proof that William Fuller had received funds which should have been appropriated to their settlement, his Honor should have charged the payment of them, if it was to be charged at all, after providing for the comfortable maintenance of the whole family, on the income of the trust estate generally.

2. Because the fact of the claims having been reduced to judgments at law, entitles them to no higher consideration in equity, than they had when existing in the character of simple contract debts, inasmuch as

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they were not only set up in this Court by the plaintiffs as charges against the trust

estate generally, but were proved by them to have been in their origin contracted for the benefit of the trust estate; and it is submitted that the plaintiffs should be held to the case made by them before this Court.

3. Because the scheme of the trust, according to the provisions of the deed of settlement, is, that the estate shall remain together until the death of the survivor of William Fuller and Margaret his wife; and that none of the *cestui que trusts* shall have partition of either capital or income; whereas his Honor has in effect directed a partition of both.

4. Because under the circumstances, this Court has no power to exchange legal for equitable interests, especially where one of the defendants, who is of full age, objects.

5. Because the order is in other respects contrary to equity.

E. & H. Rhett, for appellants.  
Treville, Fickling, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. It is stated generally in the bills,—particularly in that of Lazarus,—that the accounts contracted by William Fuller, were mostly for “necessaries for the family, and for the benefit of the trust estate;” and it is said in the other bill, that the demands set up by Nix were for services rendered as overseer of the trust plantation.

It is very clear that necessities furnished for “the family,” must stand upon a very different footing from advances made for the support (or to maintain the existence) of the trust estate. Advances made to a beneficiary, constitute a mere debt against him; and implicate the trust estate only so far as

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the interests of such beneficiary in it can be reached and subjected by proceeding in this Court.

William Fuller, who contracted the debts sued on in this case, was bound to support his family, and for the purpose of enabling him to do so, the interests which he has under the settlement were conferred upon him.

During the life of his wife, he had, with her, a joint right to the income and profits; and, her interests not being to her separate use, he had a control over the whole income; and this he should have employed to support “the family.” The children, during the lives of both their parents, had no interest in the income to be made the subject of a contract by themselves; and, besides, their infancy forbade their entering into contracts.

Upon inspecting the accounts filed with the bills, I do not find a single item which could justly be charged upon the corpus of the trust estate, or upon the interest of any other party than William Fuller, who made the contracts with the different creditors.

There is not a single item which went to swell the value of the trust estate. There is a small portion of the goods taken up, which may have been designed for the use of the negroes, and other property covered by the settlement. But the annual food and clothing of the negroes, and other annual expenses of the plantation, should, certainly, constitute a charge upon the annual income, and be borne by him who was entitled to the income then accruing. These observations apply not only to the merchants' accounts, but also to the overseer's wages; the obligations for all of which were incurred before the death of Mrs. Fuller, and while William Fuller was solely entitled to control the income. If the trustee had contracted and paid these debts, he should have settled them with Mr. Fuller out of his income; and, being contracted by Mr. Fuller, himself, his share of the income should alone be resorted to for this payment.

If the demands in this case were chargeable to the children, there are some points

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which would deserve attention. For \*example, look at the account of Lazarus. That account was opened the 1st of April, 1844, and closed the 1st of March, 1848. Mrs. Fuller died in September following, (1848,) until which time no interest accrued to the children under the settlement. The account amounted to one thousand and forty-one dollars and sixty-five cents; yet when it went into judgment, in March, 1849, it was swelled by the allowance of two hundred and twenty-nine dollars and fifty-two cents for interest, to one thousand two hundred and seventy-one dollars and seventeen cents; and by the terms of the confession, this latter sum, (the whole judgment, say one thousand two hundred and seventy-one dollars and seventeen cents,) which did not bear interest under the statute of 1815, was made to bear interests; and all this, it is contended, should be charged, pro rata, upon the children. William Fuller may be properly chargeable with it under his confession; but certainly, if the property or interest of the children were concerned, the demand should be abridged.

Looking to the grounds of appeal in this case,—so far as they have not been already observed upon,—it is not perceived that there is anything in the order of Chancellor Wardlaw to complain of. It certainly was quite irregular (by-the-by) to bring up, by an appeal on behalf of all the defendants, matters in which the infant defendants had an interest directly opposed to the grounds of appeal. This is manifestly the case with regard to the two first grounds set down in the brief.

The Chancellor, we think, has very properly protected the rights of the children, by his order. From the death of their mother, they were entitled to so much of the income as

may be necessary to their maintenance and education. By his order this is reserved to them. The accounts of the trustee, which he has been ordered to report annually in this case, may be excepted to by any party who thinks the expenditures for the children unreasonable. The residue, only, of the income belongs to William Fuller; and of this the order gives his creditors the benefit.

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\*This is all that is positively determined by the order. The point referred to the Commissioner is as yet merely speculative. When the report comes in, it will be time enough to except.

It is ordered that the appeal be dismissed; and the order appealed from affirmed.

DUNKIN, DARGAN, and WARDLAW, CC., concurred.

Decree affirmed.

7 Rich. Eq. \*180

\*WILLIAM LUCAS et al., Ex'rs, v. THOMAS BENNETT LUCAS et al.

(Charleston. Jan. Term, 1855.)

[Wills.  $\hookrightarrow$  730.]

Testator directed his executors to manage his estate until all his children should marry, or attain twenty-one years of age, and then to make division of the same—his minor children and some of his minor grand-children to be, in the meantime, maintained and educated out of the general income; and he fully empowered his executors, if, in their opinion, circumstances should require it, to make the division before the period he had named. The executors determined to execute the power and make the division during the minority of some of the children:—*Held*, that provision must be made, in any scheme of division which might be adopted, for the maintenance and education of the minor children and grand-children out of the general estate, although the counsel of all parties, executors, adults and minors, concurred in desiring that no fund should be reserved for that purpose.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1790; Dec. Dig.  $\hookrightarrow$  730.]

Before Dargan, Ch., at Charleston, June, 1854.

Dargan, Ch. The object of the bill in this case is to enable the complainants, executors of Johnathan Lucas, to account in full, and to settle the estate of their testator entirely, by a full and final distribution of his property among his legatees and devisees; and in order to that, instructions are asked of the Court upon the true construction of the will as to the duty of the complainants to reserve a fund for the support and education of the minor children, who are directed in one clause of the will to be supported out of the general estate. Upon this point, after hearing counsel representing the executors, the adults and the minors, all of whom concur in the opinion and desire that no fund should be reserved, but that each minor child's share



should be charged with his or her own support and education exclusively. I have come to a different conclusion; and must declare in answer to the prayer for instruction and direction, that provision must be made for the support and education of the minor children, and grand-child of the testator, at the general expense of the whole, in any scheme

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of division \*which may be adopted. As I have come to this conclusion against the concurrent opinion of all the counsel in the cause, and the adult defendants do not wish to appear contesting for their own interests against their minor brothers and sisters, I suggest to the complainants that it is entirely in their power to bring the point before the Court of Appeals, without compelling the adult defendants to assume a position of hostility to the interests of minors, and thus affording the parties an opportunity for further argument and consideration upon a question seriously affecting the interests of all.

It is ordered that it be referred to Master James W. Gray, to take the account of the executors of their administration of their testator's estate, and to report thereon; also to ascertain the amount which each of the legatees and devisees is entitled to receive as his or her full share of the testator's estate, upon a final division and distribution thereof. Also to inquire and report what amount should be annually allowed for the support and education of each of the infant defendants, and the amount which each child's share should annually contribute to make up such allowance; and a plan for providing the prompt and certain payment of such contributions after the division of the estate, so that the executors may be discharged of their trust as executors, and thereafter act and be accountable only as guardians of the minors, with leave to report any special matter which may seem to him fit to be brought before the Court.

#### Copy Will.

State of South Carolina:

I, Jonathan Lucas, of Charleston, do make and ordain this to be my last will and testament:

1. I give, devise and bequeath all my estate and property of every kind unto my executors, or such of them as shall qualify upon this my will, and to the survivors and survivor of them, in trust, that they shall

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manage and conduct my \*mills and planting establishments, by such fitting agents, and in such manner as they shall deem most for the advantage of my family, until all my children shall marry, or attain twenty-one years of age, or until my last surviving minor child shall depart this life, and in the meantime my said executors shall apply the net income to the payment of my debts, and to the sup-

port and education of my children who may be unmarried and under twenty-one years, and also to the support and education of the child or children of any of my children who have already died or who may hereafter die before the time appointed for the division of my estate: the surplus income, if any, to be applied at the discretion of my executors, to the advancement of my other children who are or may become adult, or to be invested and abide the final distribution of my estate.

2. When all my children shall have married or attained twenty-one years of age, or when my last surviving minor child shall depart this life under twenty-one—in case that should happen to occur—then my executors shall divide and apportion all my estate as it shall then stand in equal parts among all my children who shall be living when the last of my minor children surviving each other shall marry, or attain twenty-one years of age, or shall happen to die before attaining such age. But grand-children shall be substituted in the place of any parent who is now dead, or who may hereafter die, and shall take respectively the share which the parent, if living, would have taken. And my executors shall take care that the share of each daughter or of a substituted grand-daughter, shall be settled to her sole use, free from the debts or engagements of any husband she may marry.

3. I expressly subject each and every share given as aforesaid, to the following limitations: that is to say, in case any of my children shall die without leaving issue living at the time of its decease, or in case such issue

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of any child shall \*die unmarried and under twenty-one years of age, the share of such child shall revert to my estate, and be equally divided among my other children living at the happening of such contingency, or in case of the death of any child having issue alive at the happening of such contingency, such issue to represent the deceased parent and to be entitled to take a share in common with the other children. And the same rules shall apply to every accruing survived share as to the original one, and all these limitations and conditions shall apply as well to the share of my daughter who has already died and has left issue as also to any others of my children who may die either before or after me.

4. I appoint my executors to be guardians of my minor children, and authorize them to expend upon their education whatever sums they may see fit; and inasmuch as my elder children have had the benefit of their education from my estate, the charges for the maintenance and education of my said minor children shall be borne by my general estate, and shall not be charged to the separate account of the children.

5. I authorize my executors from time to time to make advancements to my children, to an extent not exceeding the presumptive

share of each, and to deliver the possession and control of the same to any child at any time they, the said executors, shall see fit. Such advancements, however, together with all which may have been made by myself, shall be charged against the shares of each child to whom the same may have been made, and shall constitute a part thereof in the final division. The advancements which may be made to any daughter, shall be settled in manner already declared; and I expressly exonerate my executors from liabilities for any waste or loss which may accrue to any advancement or share delivered in pursuance of this my will; and I also declare that they are to be indemnified by my estate for every liability, loss or expense incurred, and shall be held accountable for no errors of judgment in their conduct as executors and trustees.

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\*6. I authorize and empower my executors to sell and convey any portion of my estate which they may deem expedient, either for the purpose of paying debts or making a division, or in the conduct or management of the business; and if, in their opinion, circumstances should require a division of my estate, in whole or in part, before the period which I have named, I fully authorize my executors to make such division and to deliver the property into the hands of the legatees and devisees, such property, however, to remain subject in their hands to the limitations already declared.

7. It is my desire that my Middleburgh plantation and negroes, with the appurtenances, should, if possible, be kept in my family. I therefore authorize and empower my executors to sell and assign the same to some one of my children, such as the said executors shall deem best, and in order to enable such child to pay for the same, the executors shall fix upon the property what they consider a fair price, and may make the terms of sale such as they may deem most advisable to effect the object in view; and they shall be authorized to assign to any other of the children, in part or in entire satisfaction of their shares, as the same may reach, so much of the bonds or securities taken for the purchase as they may deem expedient.

8. I appoint my friends, William Lucas, C. G. Memminger, and W. J. Bennett, to be executors of this, my will; and I authorize a majority of those of them who may qualify and be alive, to do all the acts which my executors are hereinbefore authorized to do; and if there be but one, then I authorize that one; and I do hereby revoke all other wills by me at any time made.

Witness my hand and seal at Charleston, this 25th August, in the year of our Lord one thousand eight hundred and forty-seven.

[Signed] Jon. Lucas. [Seal.]

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\*The executors, agreeably to the intimation of his Honor, appealed from so much of the decree as declared "that provision must be made for the support and education of the minor children and grand-child of the testator at the general expense of the whole, in any scheme of division," and also so much thereof as directed a reference for that purpose, on the grounds:

First. Because the division of the whole estate during the minority of any of the children or grand-children of the testator, was left by him to the sound discretion of his executors, whose decision to divide the whole concludes the question and necessarily casts the support and education of the minors upon their respective portions only.

Second. Because the whole scheme of the will is based upon such a discretion in the executors, and the necessity of a provision for the support and education of the minors out of the general estate, would in effect be tantamount to a denial of the exercise of such discretion, as such provision is wholly inconsistent with a final partition.

McCrady, for appellants.

Campbell, Blanding, contra.

PER CURIAM. We entirely concur in the decree; and it is ordered, that the same be affirmed, and the appeal be dismissed.

JOHNSTON, DUNKIN, DARGAN, and WARDLAW, CC., concurring.

Decree affirmed.

#### 7 Rich. Eq. \*186

\*HONORIA McNISH and Others v. FRANKLIN H. POPE and Others.

(Charleston. Jan. Term, 1855.)

[Principal and Surety ⇨ 175.]

Trustee for sale purchased the land for one thousand five hundred dollars, and the sale was confirmed by the Court—the cestui que trusts being parties to the proceedings. Trustee afterwards sold the land for two thousand and twenty-five dollars, and the money was paid to the surety on his trust bond to be applied to that bond, the surety at the same time undertaking with the purchaser to procure the relinquishment of dower of the trustee's wife. Trustee died, and afterwards cestui que trusts filed this bill against the surety for the money:—*Held*, that the surety might retain, for a reasonable time, a part of the money, to meet the claim of dower, (which the Court considered doubtful,) in case it should be made.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 508; Dec. Dig. ⇨ 175.]

Before Wardlaw, Ch., at Charleston, June, 1853.

Dr. Thomas E. Screven, by deed dated 27th January, 1829, conveyed a tract of land on May River, called the Bowex, to John McNish, trustee of Honoria McNish, John Horatio, Charles Lycurgus, Thomas Julius, Laura, Mary Catharine, Jane Dupre, and Susannah



McNish, in trust for the aforesaid children, and such other children as may be born of the body of Ann McNish, wife of John McNish, to be divided among them equally, share and share alike, and until such division shall take place to be occupied and used entirely and specially for the maintenance and support of aforesaid children.

By deed dated 4th February, 1831, between the same Dr. Screven of the first part, Ann McNish of the second part, and Jeremiah Fickling, and Richard J. Davant of the third part, reciting that Dr. Screven had purchased a plantation called Stockfarm, on May River, and certain negroes, at sheriff's sale, as the property of John McNish, and that he had sold part of the land, and thus reimbursed himself for the money paid, and that Mrs. McNish had released her dower in

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\*the part thus sold, he conveyed the residue to Fickling and Davant, in trust to permit the said Mrs. Ann McNish to receive and take the rents, &c., during her natural life, and after her decease for all such child or children as she shall at the time of her death leave alive and surviving her, share and share alike, as tenants in common, and not as joint tenants, their heirs and assigns for ever.

26th January, 1838.—A petition was presented by Mr. Alexander Edwards, then a practitioner of the law at Gillisonville, in the name of Mrs. Ann McNish, praying that C. L. McNish and J. H. McNish might be substituted in place of Jeremiah Fickling and Richard J. Davant, as trustees under the deed of 5th of February, 1831.

As Mr. Davant, the Commissioner, was a party, this petition was referred to Angus Patterson, Esq., as a special commissioner, who made a report the next day, certifying, on the testimony of George Pope and Alexander Verdier, that C. L. McNish and John H. McNish were proper persons to be trustees in place of Fickling and Davant. That report was confirmed on the same day, and an order entered that C. L. McNish and J. H. McNish be appointed and substituted trustees to the deed of trust mentioned in the petition, upon such certificate being endorsed by the Commissioner upon the original trust deed and duly recorded.

On the next day, the 29th January, 1838, petitions were presented severally by John McNish, as trustee under the deed of 27th January, 1829, and C. L. McNish and John H. McNish, as trustees under the deed of 5th February, 1831, setting forth, in nearly the same terms, that the two pieces of land were adjoining and brought no rent, and ought to be sold. In each case an order was made the same day, referring the petitions to the Commissioner to report on the facts and the propriety of granting the prayer of the petitions, and the gross value of the trust property proposed to be sold.

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\*On each petition the Commissioner made a separate report next day, viz: that from the testimony of Norton, Logan, Verdier, and Pope, filed with the report, it would appear that a sale is beneficial to the cestui que trusts.

On the 2d February, 1838, an order was entered in both cases, on motion of the solicitor for the petitioners, to the effect that the Commissioner hold a reference to ascertain the gross value of the trust property proposed to be sold, and upon the trustees giving bond and security, in double of its value, for the faithful discharge of their duties, the property mentioned in the petitions be sold by the Commissioner, and the proceeds delivered to the trustees, to be held by them subject to the trusts respectively in the trust deeds. Nothing further was done till 1839, when a new petition was presented to the Court at January Term, in the name of C. L. McNish, Honoria McNish, and J. H. McNish, setting forth Dr. Thomas E. Screven's conveyance to R. J. Davant, and J. Fickling, for the use of petitioners, their father, mother, brothers and sisters, viz: Laura, Thomas Julius, Jane Dupre, Mary Catharine, and Sarah DuPont McNish, of a tract of about three hundred and fifty acres, called Stockfarm; and another conveyance by the same in trust to John McNish, father of the petitioners, for the use of petitioners, and the other parties above mentioned, of a tract called the Bower; that the lands in their present situation are of little value, and that it would be much to the interest of the petitioners, who are of age, and to the interest of their father and mother, and of their brothers and sisters, which latter named persons are under the age of twenty-one years, that the same should be sold and the proportional shares of the minors put out at interest, upon bond with good security, bearing interest payable annually. That as the interest of petitioners is small, it would be to their advantage to receive it in fee simple. Prayer accordingly.

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\*The petition has these endorsements: We acknowledge the legal service of this petition, 28th January, 1839.

John McNish,  
Ann McNish,  
Laura McNish,  
T. J. McNish,  
Jane D. McNish,  
Mary C. McNish.  
Susannah D. McNish.

At the same time an order was entered, on motion of Mr. Singleton, that the order of reference be extended to the next term.

In this state matters remained till 1841, when a report on the last named petition was filed, certifying that Dr. Screven conveyed by deed of 5th February, 1831, the land described in the petition to Fickling and Da-

vant in trust, and that in 1838, on the petition of Mrs. McNish, an order was made for change of trustees, on condition of the substitution being endorsed on the original deed by the Commissioner, and duly recorded.

That the original deed had been sent to Charleston for registration, and could not be found; and so the order, in this respect, could not be complied with. That he, the Commissioner, had no evidence of the execution of the other deed; that from the testimony of George Pope both the tracts are worth together not more than fifteen hundred dollars, and that a sale would be advantageous to the cestui que trusts.

On the same day, on motion of the solicitor for the petitioners, an order was entered, modifying the order made in January, 1838, so far as to dispense with the endorsement on the original deed, directing the land described in the petition to be sold, and that on the trustees, C. L. McNish and J. H. McNish giving bond and security in double its value the proceeds be delivered to the trustees, to be held by them subject to the trusts respectively in the trust deeds.

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\*On the 1st March, 1841, Mr. Davant, the Commissioner in Equity for Beaufort District, offered both tracts for sale in one lot, and set them down to C. L. McNish, as purchaser, at fifteen hundred dollars, and made him a deed, which bears date the same day, and is expressed to be for the consideration of fifteen hundred dollars paid, and took a receipt from him for the purchase money, and took a bond from C. L. McNish, J. H. McNish, George Pope and F. H. Walsh, in the penal sum of fifteen hundred dollars, reciting the appointment of C. L. McNish and J. H. McNish as trustees, in place of Jeremiah Fickling and R. J. Davant, under a deed made by Thomas E. Screven, and conditioned for the faithful performance of their said trust. C. L. McNish on the same day mortgaged the land to George Pope as a counter security against his bond. At the sitting of the Court in May, 1841, Mr. Davant reported that he had sold to C. L. McNish both tracts of land for fifteen hundred dollars and taken his receipt for the purchase money, deducting costs, which report, on the 19th February, 1842, was confirmed.

By deed bearing date the 29th December, 1843, C. L. McNish conveyed the same premises to B. E. Guerard, in consideration of two thousand and twenty-five dollars, which was received by George Pope, who signed the following memorandum:

"Gillisonville, 29th December, 1843.—Received of Mr. C. L. McNish, through the hands of Mr. B. E. Guerard, two thousand and twenty-five dollars, which is to be applied to the trust bond given by him for the benefit of the McNish family."

At the same time, George Pope bound him-

self by a written contract with the purchaser to procure the consent of all the adult cestui que trusts interested in the two tracts of land purchased by him, and to procure a relinquishment of dower from Sarah Jane McNish, the wife of C. L. McNish, or return the purchase money, and to give up his mortgage to be cancelled.

Prior to the 5th day of January, 1844, a

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bill was filed by S. \*Lawrence, as the next friend of Jane McNish, Susan McNish and Mary McNish, infants, to restrain George Pope from paying over the money in his hands to C. L. McNish, or John H. McNish, and an injunction was granted by the Commissioner on the day last mentioned, which injunction, at the sitting of the Court in February, 1844, was continued, and a provisional order was made, that in case the defendants did not answer, the Commissioner should inquire how much should be set aside out of the purchase money as the price of Stockfarm.

On that bill no further proceedings were had, and C. L. McNish died in the same year, leaving a widow and two children.

On the 1st December, 1847, the complainants and their mother filed their bill against B. E. Guerard, as well as J. Fickling and R. J. Davant, and John McNish, John H. McNish, and the personal representatives of C. L. McNish, when they come within the jurisdiction, praying to set aside the sale to C. L. McNish, and to have the Bower and Stockfarm divided between them and B. E. Guerard, as the purchaser of the shares of C. L. McNish and J. H. McNish. Mr. Guerard put in his answer, claiming as a bona fide purchaser, without notice, for consideration, and the cause came on to be heard in January, 1849, when the bill was dismissed with costs as to Stockfarm, and retained for further inquiry as to the Bower, and with leave to make John H. McNish a party. On appeal this decree was confirmed, with a slight modification.

In February, 1850, the cause came on again, and the bill was dismissed with costs. Afterwards leave was obtained to sue the bond of George Pope, at law, and an action was brought in the Court of Common Pleas in the name of the Commissioner. Pending this action, Mrs. McNish died on the first of October, 1851. In April, 1852, the case, Davant v. Pope, was tried, and a verdict had for plaintiff, from which the defendant appealed, and the Court of Law ordered the judgment to stand as a security until an account should be taken in this Court.

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\*This bill was then filed against F. H. Pope, executor of George Pope, and the administrators of Mrs. McNish, as well as the administrators of C. L. McNish, and J. H.



McNish, the surviving trustee, were made parties.

The defendant, F. H. Pope, put in his answer, denying that he was liable on the bond, because the bond was for the trustees of Stockfarm only; and denying that he was liable on his receipt of the money, because he received it as an indemnity against the dower of C. L. McNish's wife.

The case was heard on the 11th July, 1853, by Chancellor Wardlaw, who, on the 30th November, 1853, delivered the following decree:

Wardlaw, Ch. The plaintiffs are six children of John and Ann McNish, being all the children of these parents, except Charles L. and John H., and the defendants are F. H. Pope, executor of George Pope, John H. McNish, and the administrators of said Ann McNish and Charles L. McNish. The object of the suit is to obtain satisfaction from a fund deposited with the testator, George Pope, of the interests of the plaintiffs in the Bower and Stockfarm tracts of land.

The facts of the case are many and complicated, and the pressure on my time inhibits me from any special statement of them or of the pleadings. I refer instead to the cases of *McNish v. Guerard*, 4 Strob. Eq. 66 (with Chancellor Johnston's final decree therein, in manuscript,) and of *Davant v. Pope*, MS., Charleston, Law, Jan., 1853 (6 Rich. 247), upon the same subject of controversy, and to the pleadings and evidence in this case in writing. Ann McNish died about October 1st, 1851, and Thomas J. Bresnan has administered upon her estate: C. L. McNish died at a date not exactly appearing, but as I infer, early in 1844, and L. C. Gordon has administered upon his estate; besides these, I

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am not aware of any important fact \*not appearing in the previous cases, which may not be more conveniently reserved for statement in the course of the brief discussion proposed upon the doctrines involved in the case.

The case is complicated by the previous proceedings of the Courts and the acts of the parties; and the extent of the remedy to which plaintiffs and others in the same interest are entitled, is disputable. It is clear that George Pope's representative can have little cause of complaint as to any order for the distribution of the larger portion of the trust funds in his hands, and that the children of Ann McNish are justly entitled to this larger portion, although technical difficulties may obstruct full relief to them.

C. L. McNish and J. H. McNish were express trustees of the Stockfarm only, and their bond to the Commissioner for the faithful performance of their trusts, with George Pope as surety, refers in terms to Stockfarm only. Upon the intimations of opinion in *McNish v. Guerard*, and my own apprehen-

sion of the doctrine on the point, I hold that the trusts declared in the separate deeds of Dr. Screven, as to the Bower and Stockfarm, were executed in the beneficiaries as to both tracts; and that the conveyance by Commissioner Davant of the two tracts sold jointly, for fifteen hundred dollars, under proceedings in this Court, in which all the parties in interest concurred, carried the legal title in both tracts to C. L. McNish; at least for the purpose of completing his conveyance to Guerard, and investing the latter with an absolute estate in fee. In May, 1841, the Commissioner made report of the sale, which was confirmed by the Court, in which he stated that he had taken the receipt of C. L. McNish, as trustee, for the net proceeds of both tracts sold jointly; that C. L. McNish and his co-trustee, meaning John H. McNish, had given security for the faithful performance of their trusts; and that he, as Commissioner, had executed a conveyance of the land to C. L. McNish. On December 29, 1843, C. L. McNish having sold and conveyed both tracts to B. E. Guerard, paid the

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purchase money, two thousand \*and twenty-five dollars to George Pope, and took his receipt for the same, "to be applied to the trust bond given by him (C. L.) for the benefit of the McNish family." On the same day Mr. Pope agreed with Guerard, who was the agent in depositing the purchase money, to procure for Guerard the consent of all the adult beneficiaries interested in said two tracts of land, and also to procure relinquishment of dower from Sarah Jane McNish, wife of said C. L. McNish, in said two tracts of land, &c. So much of this agreement as relates to the consent of the adult beneficiaries had been already achieved by their being parties to the proceedings under which the land was sold, and it is unimportant, except as showing that both C. L. McNish and George Pope acknowledged this to be a trust fund belonging to the plaintiffs and others.

These facts are sufficient to constitute both C. L. McNish and George Pope, trustees, by implication, of the proceeds of sale to Guerard, and not merely of the original price paid by C. L. McNish. It may be that both are under peculiar obligation as debtors by specialty for the price of Stockfarm at Commissioners' sale; but this does not restrict their liability as debtors by simple contract for the price of both tracts on re-sale. The purchase of Stockfarm, by C. L. McNish, was voidable, as made by one acknowledging himself trustee at a sale substantially his own. *Ex parte Wiggins*, 1 Hill, Eq., 353. And where, as in this case, a trustee consents that the estate for which he is trustee shall be mixed and consolidated with another estate of his beneficiaries as to which he may have no fiduciary connection, and becomes purchaser of the mass at his own

sale, his purchase of the whole is voidable. On this account, greater effect is to be given to his subsequent acts and declarations representing himself, notwithstanding his legal title, as remaining trustee for the whole. Beneficiaries are not bound to treat a voidable sale as void, and may affirm it, as the plaintiffs do here, and proceed for the amount of resale and interest as the result

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of the management of their \*estate by the trustee. Story, E. J., 321, 323. I consider George Pope as being in the same predicament with C. L. McNish. 4 Strob. Eq., 81. I conclude, with some slight hesitation in going beyond the price paid by C. L. McNish, that the fund in the hands of Pope is the substitute for both tracts of land, and the subject for distribution.

The defendant Pope, executor, insists that the widow of C. L. McNish is a necessary party to this bill, inasmuch as she is entitled to dower in both tracts; and his testator received the fund in question upon agreement with Guerard, through whose hands he received it, to procure the relinquishment of her dower. I shall not undertake to determine, in this suit, whether she is entitled to dower in one or both, or neither of the tracts of land. While her claim to the full extent in both tracts is too specious to be rejected without hearing her, I am not disposed to invite her to be a litigant. She has made no claim of dower hitherto, and her demand will soon be barred by the statute of limitations. But I am informed by defendant's counsel, since the hearing, that she has actually taken some measures for the ascertainment of her claim. Neither this widow, nor Guerard, against whom the demand for dower must be asserted, is a party to this suit; but their equities may be protected through the equity of Pope; and I regard his equity to be reimbursed from the fund on his agreement with Guerard as to this dower, which was a condition of his receiving the fund, and in consequence of which receipt he surrendered a mortgage of the premises, to be superior as the party in possession, to any equity of the beneficiaries of the fund. They have voluntarily exercised their option of pursuing the fund as the result of the management of their equitable interests by trustees, instead of claiming the land, and they must take the fund subject to superior equities. The share of C. L. McNish, from his breach of duty as trustee and from his warranty to Guerard, is primarily liable for the dower which may be claimed; but that share is insufficient for the satisfaction of the claim if estab-

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\*lished in full. I am much embarrassed in granting instant relief to the plaintiffs, to determine the additional amount which should be reserved for meeting this possible claim of dower. If the widow proceed in the Court

of Law and establish her demand, she will recover about one-sixth of the value of the land at the date of her husband's alienation, with interest from the date of his death; but if she proceed in this Court, she may recover rents and profits exceeding the interest on one-sixth of the fee simple value, and to an extent utterly unascertained and indefinite. There is some slight difference against John H. McNish in the comparison of the equities of the beneficiaries of this fund, but it seems insufficient to retard him more than the others in the enjoyment of their interests. He was nominal trustee as to one of the tracts of land, but he has committed no injurious breach of trust. I find no resource except in reserving in Pope's hands a sum sufficient to satisfy the demand for dower, if successfully prosecuted. As the widow of C. L. McNish and B. Guerard are not parties to the suit it would be unsafe and improper to order the whole fund to be paid into Court without calling them in.

It was suggested by defendant, Pope, that there might be other creditors of C. L. McNish, perhaps of superior rank to the plaintiffs; but no such creditor has intervened during the long term of this litigation and it is unlikely that any can have so strong an equitable claim to this fund as the beneficiaries of it; and the Court feels no obligation to delay on this account parties who have already suffered much from delay and blunders, on a suggestion not proved and coming from one interested in promoting procrastination.

The rights of the plaintiffs were not the same in the two tracts of land; their right of enjoyment as to Stockfarm being postponed for the lifetime of their mother, Ann McNish, and as to the Bower being immediate upon the execution of Dr. Screven's conveyance; and their rights in the fund substituted for the lands are the same as in the

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lands originally. The comparative values of the two tracts, producing this fund by sale in mass, have not been ascertained. It was stated for plaintiffs, at the hearing, that the tracts might be considered as of equal value, but no agreement was made on the point, and the Master must inquire and report as to their respective values, estimated in the aggregate at two thousand and twenty-five dollars, on December 29, 1843, unless the parties accord and waive.

It is ordered and decreed, that one of the Masters inquire and report as to the proportions of Stockfarm and the Bower in producing on December 29, 1843, the aggregate price of two thousand and twenty-five dollars; and that defendant F. H. Pope, executor, pay to the plaintiffs and John H. McNish, in equal shares, three-fourths of this aggregate price, with interest from December 29, 1843, on so much thereof, as represents the value of the Bower, and with in-



terest from October 1, 1851, on so much thereof as represents the value of Stockfarm; and that said defendant, Pope, pay to Thomas J. Bresnan, administrator of Ann McNish the interest on three-fourths of so much of the aggregate price as represents Stockfarm, from December 29, 1843, to October 1, 1851.

It is also ordered, that said executor be allowed to retain one-fourth of said aggregate price with interest from December 29, 1843, until the further order of the Court, with leave to any of the parties after the lapse of ten years, from the death of C. L. McNish, to move for the payment of the amount reserved. Let the costs of this suit be paid from the fund in the hands of Pope, executor.

All the parties, except F. H. Pope, appealed on the grounds:

1. That the wife of a trustee is not dowable out of the trust property.

2. That C. L. McNish was a trustee, and

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is estopped from averring to the contrary. That the deed made to him by the Commissioner in Equity could not divest him of the character of trustee; not only because a trustee cannot buy the trust property without the express leave of the Court, but because in that transaction C. L. McNish acted as buyer and seller, and Mr. Davant as his agent.

3. That independent of the trust, the seisin of C. L. McNish, if he had any seisin at all, could not support the right of dower; because it was at best but a seisin in transitu; as the Commissioner's deed, the trustees' bond, and the counter security by mortgage, were all one transaction.

4. That Pope has no greater equity than C. L. McNish would have had; but C. L. McNish would have been clearly liable to costs; and the decree should not have condemned the complainants and those in the same interest with them to pay costs, but should give the same relief against Pope as the Court would give against the representative of McNish if he were able to answer.

5. That the right of the representatives of C. L. McNish, and of all claiming under him, are confined to the fund arising from the Bower; for by the terms of the deed of February, 1831, the proceeds of Stockfarm are distributable among the surviving children of Mrs. Ann McNish.

Petigru, for appellants.

De Treville, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. The decision of the Chancellor is not that the widow of Lycurgus McNish is entitled to dower in the premises purchased by him at the commissioners'

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sale;—but, \*merely, that, if she is, the fund

in the hands of Pope should be subject to the value of her dower.

We think his decision is right, and that he has properly exercised his discretion to retain for a reasonable time so much of the fund as may be required to meet her claim.

The purchase of the premises by Lycurgus may have been subject to an avoidance by those interested in the land, on the ground that he was a trustee; but, being parties to the proceeding under which the sale was made, they waived their equity by assenting to the confirmation of the purchase.

That confirmation was a waiver of all equities in the land, and by his bond Lycurgus became trustee for the price of fifteen hundred dollars obtained for the land; and Pope became surety for the trusts undertaken.

If, by their subsequent sale to Guerard, a profit was made on Lycurgus's purchase, it was for him alone to determine whether that profit should enure to the *cestui que trusts* of the one thousand five hundred dollars or to himself; and if by an act entirely voluntary, he indicated an intention to convert it to them, neither he nor his surety should be so harshly dealt with as to deny them the privilege of discounting out of the profit the means by which it was to be secured.

It appears that Guerard stipulated for a title disencumbered from the dower of Lycurgus's wife; and that when Pope, as the agent of both parties (Lycurgus and Guerard) received the two thousand and twenty-five dollars, to be applied to the bond, he at the same time bound himself to Guerard, to procure an extinguishment of the dower, or to return the money to Guerard.

Such a transaction means, in substance, that the fund they received—less the amount of the dower,—is trust money. So the Chancellor has held; and we approve his decision.

It is ordered that the decree be affirmed and the appeal dismissed.

DARGAN and WARDLOW, CC., concurred.

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\*DUNKIN, Ch. I think C. L. McNish was a trustee, as well in the purchase as the resale of land—that this is proved as well from the circumstances attending the sale as from the receipt afterwards given to Mr. Guerard. This might well be regarded as a declarative acknowledgment of the fiduciary nature of the transaction. I am equally well satisfied that of such estate the widow of the trustee is not dowable; and, after a lapse of nine years without any claim on her part, I should not have been dissatisfied if the chancellor had made a decree for the payment of the entire fund. I do not understand that either the Circuit Court, or this

Court, have expressed any definite opinion upon the widow's right, and, as she was not a party in the cause, and the Chancellor thought proper to retain a portion of the fund to await the final determination upon that subject, I would not interfere with this exercise of his discretion.

Decree affirmed.

7 Rich. Eq. \*201

\*DANIEL W. SCHMIDT v. JOHN W. SCHMIDT et al.

(Charleston. Jan. Term, 1855.)

[Wills ⚡8.]

J. S., who had had possession of his children's property, in 1826 made a deed by which he conveyed to trustees, in fee, certain real estate, for the use of himself for life, and after his death for his children, with a proviso, that the share of any child who should call him to account for the property of theirs which he had in possession, should be forfeited, and revert to him. In 1846, J. S. republished his will. In 1848, on bill filed by J. S. against his children, it was adjudged that the deed of 1826, was intended merely as a security, that J. S. had accounted with his children, that the trusts were satisfied, and J. S. reinstated in his original estate:—*Held*, that J. S. had such an equitable interest in 1848, when his will was republished, in the real estate embraced in the deed of 1826, that it passed under the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 13; Dec. Dig. ⚡8.]

[Judgment ⚡686.]

*Held*, further, that a distributee of J. S., a child by a second marriage, was, as his privy, estopped by the decree of 1848, from showing that the deed of 1826 was not intended as a mere security.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1209; Dec. Dig. ⚡686.]

[Wills ⚡482.]

A testator's equitable estate will pass by his will, whether he afterwards acquires the legal title or not.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1011; Dec. Dig. ⚡482.]

Before Dargan, Ch., at Charleston, June, 1854.

Guillaume Dumont, by his will dated 2d December, 1805, devised his real estate, subject to an annuity to his wife, to his two children, Ursule Dumont and Blaise Dumont, and to the survivor, if either should die under age and unmarried, and devised to his wife and children his personal property; and ordered that his widow and his friend Peter Laurans, whom he appointed executors, should not be liable to be called to account by his children for the application of the income, which, during their infancy, was to be applied for their benefit, according to the discretion of the executors.

Blaise Dumont died under age and unmarried. Ursule Dumont married Dr. John W. Schmidt; and by a marriage settlement dated 12th January, 1810, all the estate of Ursule Dumont, including her reversionary interest in the devise to her brother, deriv-

ed from her father, and all her interest in

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\*the estate of her grand-mother, Ann Rossignol, and three negroes belonging to Dr. Schmidt, were settled to her sole and separate use during her life, and after her death to her children.

Ursule Schmidt died in her husband's lifetime, leaving three children: John William Schmidt, Jun., Mary Elizabeth Ursule Schmidt, and Mary Selena Schmidt, infants.

By deed dated 10th July, 1826, reciting the marriage, and that Mrs. Schmidt died intestate, leaving the said children minors, being in her lifetime, and at the time of her death, entitled to considerable real and personal estate, derived from her father and others, which became vested at her death in her children, and was in his possession,—and that in consideration of love and affection for his said children, and also in satisfaction of any and every claim and demand whatsoever which they, his children, may have against him on account of their mother's estate, he was desirous of making a liberal and adequate settlement upon them, Dr. Schmidt conveyed to his mother-in-law, Marie Adelaide Rossignol Dumont, his plantation in St. Bartholomew's Parish, his house in Church street continued, his house in Meeting street, and seventy-one negroes; the trusts declared are in effect for himself for life, and after his decease for the above children, and the survivors and survivor of them, in case any of them should die under twenty-one years without issue; with powers of sale and exchange, and of appointing new trustees, and with this proviso: "That if any one of the said children should at any time hereafter call the said J. W. Schmidt, his heirs, executors, administrators, and assigns, to an account for the whole or any part of the property, real or personal, received as aforesaid from the said Ursule Schmidt, then the share of such child in the property granted and released shall be forfeited, and the same shall revert to the said J. W. Schmidt, and become absolutely a part of his estate, free from the trusts, conditions, and limitations of this deed."

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\*On the 23d day of January, 1827, Dr. Schmidt purchased another lot of land in King street, at the sale of the Commissioner in equity, who, by his directions, conveyed the same to the same trustee, on the same trusts declared in the deed of 1826.

Marie Adelaide Rossignol Dumont, the trustee, died in the year 1833, having by her last will devised all her estate, in general terms, to her three grand-children above named, and appointed Dr. Schmidt and his son her executors.

Mary Selena Schmidt, the youngest daughter, married C. M. Arnold; and by a marriage settlement dated 2d July, 1845, between



C. M. Arnold of the first part, Mary Selena Schmidt of the second part, and John W. Schmidt, her father, of the third part, she conveyed to her father, as trustee, all her estate, enumerating not only the property of her mother, but also the plantation on Ashepoo, the house in Church street continued, the lot in Meeting street, and the Ashepoo negroes, being the property mentioned in the deed of 1826. To this deed Dr. Schmidt is an executing party.

On the 1st day of March, 1845, Dr. Schmidt executed his last will and testament, whereby he gave to the complainant, his son by his second marriage, a legacy of five thousand dollars, under some restrictions, and all the rest of his estate to his other children.

By deed bearing date 5th May, 1846, John W. Schmidt, Jun., in consideration of nine thousand one hundred and fifty dollars, conveyed to his father all his interest in the following property, viz.: a lot and two houses west side of King street, Nos. 355 and 357, fifty feet front and two hundred and twenty feet deep; a lot on the west side of King street, No. 167, thirty-three feet and upwards front, and one hundred and sixty-one feet deep; a lot adjoining the above, sixteen feet on King street, and one hundred and sixty-two feet deep; a lot in Society Street; two tenements on Crafts' wharf; two lots in Wall street; and a lot in Ann

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street, in Wraggsborough, \*Eastern part of No. 5; and thirty-eight negroes; and any other property to which he might be entitled under Ann Rossignol, William Dumont, Marie Adelaide Rossignol Dumont, Blaise Dumont, or Ursule Schmidt, or under his mother's marriage settlement. This is the same property described in the settlement of Mary Selena, as derived from her grandmother, Marie Adelaide Dumont, and her grand-father, William Dumont.

On the 15th of May, 1846, Dr. Schmidt republished his will by a codicil then executed, by which he disposed of the interest purchased from his son.

On the 16th November, 1846, by a deed of partition made between Dr. Schmidt, as the assignee of his son, and his daughters, Mary Selena Arnold and Mary Elizabeth Ursule Schmidt, the property of their mother, being the same described in the conveyance from J. W. Schmidt, Jun., to his father, was divided, and a third part assigned to each.

On the 1st of December, 1847, a bill was filed by Dr. Schmidt against C. M. Arnold and wife, Mary Elizabeth Ursule Schmidt, and J. W. Schmidt, Jun., which set forth the deeds of 1826 and 1827—the death of Mrs. Dumont—the purchase of his son's interest in her estate—and the partition, and alleging that the deed of 1826 was intended to secure to his children the delivery of their mother's estate: that he is disposed to con-

sider the want of an express provision for that occurrence an oversight in the draught of the deed; but is advised that the consequence of the omission is, that there is a resulting trust to himself, the donor, and that he does not insist on the mistake. That Mrs. Dumont died leaving him executor, and that he had proved her will—sets forth the marriage of his daughter, Mary Selena, and her marriage settlement—also his purchase from his son, and the partition since made between him and his daughters. That as the deeds of 1826 and 1827 were intended as trusts to secure to his children the faithful payment and delivery of their mother's

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estate, and \*as those trusts have been performed, he is entitled to a reconveyance; but that there can be no reconveyance, because he is executor of Mrs. Dumont, and trustee of Mrs. Arnold, and prays that it be declared that the trusts in said deeds are discharged, and the whole interest vested in him. The answers, filed by the same solicitors, on the 13th of the same month, admit everything in the bill.

On the 7th of February, 1848, a decree was entered in the same cause, founded on the admissions in the answers, declaring that the trusts of the deeds of 1826 and 1827 were satisfied; that Dr. Schmidt could not reconvey to himself, and that he is possessed in his own right in fee simple absolute of the premises, freed and discharged from all trusts.

On the 18th day of June, 1853, Dr. Schmidt died, leaving a large estate, and leaving his will and codicil in full force.

The bill was filed on the 1st of March, 1854, claiming the legacy of five thousand dollars, and a distributive share of the real estate purchased since the execution of the codicil, including the real estate contained in the deeds of 1826 and 1827, relying on the decree of 1848, as equivalent to a reconveyance.

The defendants admitted the complainant's right to a distributive share of two tenements purchased after the codicil, and denied his right to the legacy, and to anything further.

The cause was heard on the 6th and 7th of June, 1854, at Charleston, before his Honor Ch. Dargan, who delivered the following decree:

Dargan, Ch. John W. Schmidt, the elder, departed this life A. D., 1853. His will bears date the 1st March, A. D., 1845. By his will, he disposed of his whole estate to his son John W. Schmidt, and to his two daughters, Mary Elizabeth Ursule Schmidt, and Mary Selena Arnold, wife of C. M. Arnold, (who are the defendants,) subject only to a legacy

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of \*five thousand dollars to the plaintiff, who is his youngest son, and born of his last marriage.

The plaintiff has filed this bill, among other matters, for this legacy. The payment of the legacy is resisted on account of the supposed conditions, and restrictions, with which the gift is made. The plaintiff was an infant at the date of the execution of the will. The language of the will, in respect to this legacy, is as follows: "I appoint as guardian, my daughter Mary Elizabeth Ursule Schmidt, to my son Daniel Webster Schmidt. I give to my daughter Mary Elizabeth Ursule Schmidt, in trust for my son Daniel Webster Schmidt, five thousand dollars, in trust for the clothing and education of my son Daniel Webster Schmidt; the said five thousand dollars to be expended in any way that my daughter Mary Elizabeth Ursule Schmidt may think proper; and that my son Daniel Webster Schmidt, nor any other person, shall call my daughter Mary Elizabeth Ursule Schmidt to an account for the said five thousand dollars in this State, nor any other State, in Law or in Equity. I leave my son Daniel Webster under the sole care of my daughter Mary Elizabeth Ursule Schmidt, being fully satisfied that my daughter Mary Elizabeth Ursule Schmidt will do all that can be done for the welfare and interest of my son Daniel Webster Schmidt." The testator then gave the residue of his estate real and personal, to his three other children.

The defendant Mary Elizabeth Ursule Schmidt contends, that the terms of the bequest of five thousand dollars to the plaintiff are such, that he, though now of age, has no right to demand, and receive the same from her, without her assent. I incline to think, that the proper construction of this clause is, that the absolute control which she was to have over the fund, and her exemption from liability on account of it, were to endure during the infancy of the legatee, and no longer. It could scarcely have been the intention of the testator, that the plaintiff should never have his comparatively small legacy at all, if his sister, constituted

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his guardian by the will, should, in the exercise of a capricious and absolute discretion, choose to deprive him of it. A parent may appoint a testamentary guardian, and clothe him with all the authority of a parent, but his own control exists only during the nonage of the child. A testator may give an estate, and limit it over on the most trivial event, but he cannot give property in fee, and limit, or restrict the proprietary rights. The beneficiary of a trust estate, if not under disability, has as absolute a power and control over his interest in such estate, whatever that interest may be, as he would, if invested with the legal estate. It is true, that his interest may be so restricted, that an attempt at alienation may be the ground, or condition of his estate passing away from him to another. But nothing of this kind

has been done: and if it had been, still he would be entitled to the possession until the condition happened. So, that if the testator meant, what it is contended he meant, still the plaintiff is entitled to receive his legacy. Such intention would be a vain attempt to restrict the rights of property in a way which the law does not permit. The testator died intestate as to none of the property which he owned at the date of his will. He gave this five thousand dollars to the plaintiff without remainder or limitation; and no one but he, (now that he is of age,) has a right to its possession or use. If it was certain that he would dissipate it on the very day he received it, the case would be the same. The rights of property must attach to it.

The defendant, Elizabeth Ursule Schmidt, must account to the plaintiff for the legacy of five thousand dollars given to him by his father's will, with interest from one year after the testator's death. It is so ordered and decreed. In such accounting, the said Mary Elizabeth Schmidt must have credit for all sums of money which she has disbursed for, or on account of the plaintiff, without enquiry as to the propriety of such disbursements. The will clothes her with an absolute discretion in this respect during the plaintiff's infancy. It is so ordered and decreed.

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\*It is alleged in the bill, and admitted in the answer, that the testator died intestate, as to some real estate, which he acquired after the execution of the will: which, of course, could not pass under the residuary clause in favor of the defendants. There was a house and lot on East Bay, also a house and lot on Market-street, which were thus acquired after the execution of the will, and codicil, and without any subsequent republication of the same. These lots are distributable among the plaintiff and the defendants, the plaintiff being entitled to the one-fourth part thereof; and it is so ordered and decreed. And it is further ordered and decreed, that the plaintiff or either of the defendants, have leave to move for an order at the foot of this decree for a writ of partition, to effect the division of the said two lots on East Bay, and Market-street.

I now come to the consideration of the gravest, and most controverted issue of this case. The plaintiff contends, that the testator died intestate as to other estate, namely, a plantation on Deer Creek, near Ashepoo, in Saint Bartholomew's parish, and two lots in the city of Charleston, which he owned prior to the 10th of July, Anno Domini, 1826; and which, by a deed bearing that date, he conveyed to Marie Adelaide Rossignol Dumont, in trust, for certain uses and purposes declared therein.

It is admitted on all sides, that the testator became re-invested with the absolute



estate in this property prior to his death. But it is alleged on the part of the plaintiff, that he did not become so re-invested until after the execution of his will, and that therefore the real estate conveyed by said deed of 10th July, 1826, did not pass under the will: and that consequently it also is intestate estate, and subject to distribution. On the part of the defendants, it is said, that this deed was but a mortgage or security for certain pre-existing liabilities of the testator to the defendants, his children by his first marriage, for funds of theirs, which they had inherited from deceased relatives, and which had come into the testator's possession.

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\*And again, the defendants say, if this be not the true construction of the deed of 10th July, 1826, the testator, prior to the execution of his will, became re-invested with the absolute estate in said property, by virtue of the conditions in his favor contained in the deed itself.

This question is involved in a complicated state of facts. The evidence is contained entirely in the deed itself, and certain other deeds and matters in pais, executed afterwards, and in connection with it; and in the statement of the parties in the pleadings. If I were to attempt a synopsis, I could not, without the most elaborate care, improve upon the statements made in the bill and answer. This deed of the 10th July, 1826, purports to be in consideration of various sums of money and portions of property, the estate of the testator's deceased wife, Mary Ursule Schmidt, the mother of the defendants, to which the defendants were entitled by virtue of the marriage settlement of their mother, or as her distributees; also of certain property to which these defendants were entitled, from the estate of their grandfather, Guillaume Dumont: also in consideration of love and affection; and with the view of making a settlement and provision for his children, (these defendants.) It is to be remarked that, from what seemed to be conceded on the trial, there was some mistake in the recital of the consideration in the deed. It does not appear that Mrs. Schmidt, (testator's wife,) ever had any estate of her own. The error, however, if there was an error, is unimportant, as the defendants were confessedly entitled to a considerable property, derived to them from deceased relatives, which the testator in this deed acknowledges to have come into his possession, and to have been appropriated to his own use. The main object of the deed of July, 1826, was to make provision for the satisfaction of this claim. That was the moving consideration. The consideration, besides love and affection, and a nominal sum, was the satisfaction of this claim, and any other claim which these defendants might have against the settlor.

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\*The property conveyed to the trustee, (Marie Adelaide Rossignol Dumont,) was the plantation in St. Bartholomew's Parish, Colleton, containing one thousand one hundred and seventy-five acres, and all the stock thereon, sixty-two negroes, and two houses and lots in the city of Charleston, specifically described in the deed: the said property all belonging to the testator at the date of said deed. There was a life estate in the use of the property reserved to the testator: and after his death, it was to go to his three children, the issue of his first marriage, who are these defendants, with a limitation over to the survivors, or survivor, if one or two of them should die under twenty-one years without issue; and if all of them should die under twenty-one years without issue, the property was to revert unconditionally to the grantor, (defendants' testator.) To these limitations is to be superadded, (probably,) an implied limitation to the three children, in the event that they should all attain the age of twenty-one years, which in fact they have.

It is not irrelevant to remark, that the grantor's children being then infants, could not accept the provisions of said settlement, which were to be in satisfaction, and bar of their claims, before they attained their majority. They had the option, on attaining their majority, respectively, to accept, or to repudiate, and fall back on their rights. They, each one of them, at different times, repudiated the provisions of this settlement, and claimed an account of their own estate in their father's hands.

The will, as I have shown, is dated the 1st day of March, 1845. It was re-published by the due execution of a codicil dated the 15th May, 1846.

It is an undeniable proposition, that if a grant is made, and the grantee repudiates, or refuses to accept the estate conveyed, the grantor is re-invested with his former estate. And during the period of suspense, while the grantee's right of election by reason of non-

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age, or other disability, cannot be \*exercised, in whom must the rights of property inhere? Can the grantor be divested, until the grantee is invested? While the option of the grantee continues, must not the grantor be considered as the owner of the property for every purpose, save that it is subject to the election of the grantee? It seems to me, that under these circumstances, the deed must be considered as an escrow, until the grantee has accepted: it is only from that time, the grantor can be considered divested of his estate.

Be these general views correct, or otherwise, the facts are these. Before the execution of the will, namely, on the 5th May, 1846, J. W. Schmidt, Jun., repudiated the provisions of the deed of 1826. By his deed, dated 5th May, 1846, he sold his share of the

estates, constituting the consideration of the deed of 1826, to his father for nine thousand dollars. One of the testator's daughters, Mary Selena, intermarried with Cicero M. Arnold. There was a marriage contract, and by the deed of marriage settlement, she conveyed her estate, which she had derived from her mother, grandfather, &c., to the trustee for the uses of the marriage settlement. As to these two, there was a clear repudiation of the provisions of the deed of 1826, before the date of the re-publication of the testator's will by codicil, on the 15th of May, 1846.

There is no evidence of a refusal on the part of Mary Elizabeth Ursule, to accept the deed of 1826, in satisfaction of her claims, before the 16th November, 1846, at which time there was a formal settlement between her, the trustee of the settlement of Mr. and Mrs. Arnold, and her father as the assignee of his son, John W. Schmidt, Jun., in which there was a mutual and formal acknowledgment of satisfaction. I am of the opinion, however, that the testator was never divested of his estate conveyed by the deed of 1826, so far as to prevent it from passing under the devise of his will, subject to the conditions of the deed. I think, that where one possessing an estate, grants it away for

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some contingent purpose, the estate \*remains in him for every other purpose, save that for which it is granted.

But the strongest ground upon which this part of the defense may be rested, is that which assumes, that the deed of 10th July, 1826, is a mortgage or security. On this assumption, the estate was never out of the testator, but only subject to an incumbrance. Equitable estates in lands owned by a testator at the execution of the will, pass under its devise, though the testator afterwards acquire the legal title. If the testator, before the execution of the will, have a contract for the purchase of real estate, which is capable of being enforced by a decree for a specific performance, such equitable estate will pass under the devise of the will, though the testator only afterwards, or never afterwards in his life, acquires the legal title. It is clear beyond dispute, that mortgaged lands will pass by a devise, whether the mortgage be, or be not satisfied in the testator's life. If it be not satisfied, the lands will pass to the devisee, subject to the incumbrance.

Such being the law, let us see what are the facts of this case. And first, as to the form of the deed of 1826. It is not in the usual form of a mortgage, but it is not on its face an absolute deed. It purports to be a deed with a defeasance, though the defeasance is implied. The grantees were not to have the property conveyed in the deed, and their own claims also, to satisfy which, was the express purport of the deed. If they

refuse to accept it in satisfaction, it must necessarily revert to the grantor, or be considered as never having been out of him. Such is the face of the deed. And I would not consider it any strained construction which would regard such a deed as a security.

But the deed itself has been decided by this Court to be a security or mortgage, in a case where all the parties in interest were before the Court.

After the partition and release of the 16th November, 1846, namely, in December, 1847,

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the testator filed a bill against \*these defendants, who were properly made parties before the Court; in which he recites the consideration, and the provisions of the deed of 10th July, 1826, and in which, he charges that deed to have been a security merely. He states the settlement, partition, and release of the 16th Nov., 1846, and his desire to have satisfaction entered on said deed, or a reconveyance. He states, that subsequently to the date of the deed, he had become the trustee of the marriage settlement of Arnold and wife,—and to enhance the difficulty, he had become the executor of Marie Adelaide Rossignol Dumont, who was the trustee of the deed of 1826: under this combination of characters, charging that the deed of 1826 was a mortgage or security, he set forth the difficulty of having satisfaction entered upon said deed in a satisfactory and conclusive way,—he prayed that the Court would grant him relief by adjudging the deed to be a security, and that it was satisfied.

These proceedings were followed by a formal decree of the Court, in which it was adjudged that the deed of the 10th July, 1826, was a mortgage or security, and that it was satisfied.

It is vain to say, after this, that the deed of 10th July, 1826, was not a security merely—it was so adjudged to be, between all the parties in interest. The fact that the plaintiff was not a party, cannot alter the case. He could not have been a party in the proceedings, under which this deed was decreed to be a security. He had no interest in its provisions. He cannot, in this collateral way, draw into question the character of the deed. He cannot deny, what the parties admitted, and what the Court adjudged it to be: that is, a security merely. This was long before the plaintiff had any interest to stamp it with another character, and before the parties to that deed, who were before the Court, could have had any design to defeat him of any rights. This plaintiff claims under, and is privy to one, (namely, his father, J. W. Schmidt,) who alleged it to be a security, and obtained a decree of the Court to

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that \*effect. It seems to me useless to extend my observations upon this topic.



It is so ordered and decreed, that so much of the bill as claims that the property conveyed in the deed of 10th July, 1826, was intestate property, and prays a partition thereof, be dismissed. It is further ordered and decreed, that each party pay his or her own costs.

The complainant appealed on the grounds:

1. That by the settlement of 1826, Dr. Schmidt parted with the whole fee, which was vested in Marie Adelaide Rossignol Dumont; and the uses exhausted the whole estate; and that the declaration that he was entitled to a resulting use, or seized of the estate subject to a charge, is inconsistent with the text of the instrument.

2. That by the arrangements made with his children after 1845, John W. Schmidt became possessed of an equitable estate in fee simple in the premises, and died intestate as to such estate.

3. That the complainant was entitled to a partition of said estate, as in case of intestacy.

Petigru, for appellant.

Memminger, contra.

The opinion of the Court was delivered by

WARDLAW, Ch.—A trust deed of July 10, 1826, from Dr. John W. Schmidt to M. A. R. Dumont, is obscure and inartificial in its frame, and the interpretation of some of its provisions would be difficult, if we were unaided by the acts of the parties and of the Court, in execution of the instrument. If the construction of this deed were to be originally settled by us upon its own terms, we should hold that the grantor thereby parted conditionally or alternatively with his whole estate in the subjects of conveyance, and that no trust resulted to him in

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the event which has happened, of all the three children of his former marriage, the objects of the conveyance, having attained the age of twenty-one years. The express gift to the trustee of the whole legal estate, and the reservation to the grantor of the use to himself for life only, and of reverter to him of the legal estate only in case all of the children died under the age of twenty-one years without issue—attended by provisions for a division of the estate among survivors or survivor of these children, issue of any of them representing a deceased parent, in case one or two of them died infants; and for like division among the persons who should be entitled to the respective shares of the estate, when the youngest child should attain twenty-one years—these circumstances raise by necessary implication a limitation to the three children in case all of them should attain full age.

The grantor, by this deed, conveys his own estate in trust for his three children, in full satisfaction of all claims or demands on

their part against him on account of their mother's estate, with a proviso, that if any of them should call him or his representatives to account for the property received by him from the mother, the share of such child should be forfeited and revert to him. It is plain that this deed proposes an alternative to the beneficial donees who were incapable at the time by infancy from exerting their option. The plaintiff insists that the deed was defeasible only as to the shares of such of the children as should call the grantor to account for the rents and profits of their estate. It is more probable, however, that the grantor, in addition to this, intended to provide for his exemption from account for such portions of the estate of the children as he may have wasted or converted. He seeks to protect himself from "an account for the property," and not merely of the rents and profits. Granting the plaintiff's interpretation, the deed might be denominated not improperly a security, for it pledges certain estate of the grantor, in compensation of the claims of the children, on

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the contingency that an accounting be waived. It is in effect a conditional conveyance in fee, in trust for the payment of certain debts. If this view be taken, a reconveyance to the testator after the republication of his will, would not be the new acquisition of an estate, so as to be incapable of passing by adequate words in his previous will. After a conveyance for a mere particular purpose, as for the payment of debts, or the creation of a charge, the grantor, in contemplation of equity, remains seized of his original estate, and his equitable interest will pass by his will. If such conveyance be made by a testator before the execution of his will, and the charge be removed by a reconveyance after his will, the whole estate will pass by general terms of devise, although it may be sometimes necessary to consider the heir of testator trustee of the devisee; but this cannot be often necessary with us, as our Act makes the mortgagor owner of the legal estate. If such conveyance be made by a testator after his will, it is no revocation in equity; and even in England, where the mortgagee is legal owner, if a testator, after his will, makes a mortgage, and subsequently obtains reconveyance, his devise will operate on his equitable interest, and the reconveyance will be treated as no essential modification of his original seisin in equity, and the heir will be converted into a trustee for the devisee. *Livingston v. Livingston*, 3 Johns. Ch. 155; *Harwood v. Oglander*, 6 Ves. 219. Sir William Grant, M. R., says in *Rose v. Cunningham*, 11 Ves. 454, "it has been long decided (*Doe v. Pott*, Doug. 684; *Watts v. Fullarton*, Doug. 691,) that where a written agreement for the purchase of an estate has been executed, the purchaser has the estate in equity; and as he has it in equity,

it will pass by his will; which will not be revoked by the subsequent conveyance of the legal estate." An equitable interest, while the legal estate is inchoate, is not different in principle from an equitable interest subsisting after a conveyance for a particular charge.

Suppose, however, we concede to the full-

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est extent the plain\*tiff's views of the construction of the deed of 1826, as an original subject of adjudication, that by the deed Dr. Schmidt parted with the whole fee, and exhausted the uses, and that there is no evidence of repudiation, by the donees beneficially entitled, of the condition of the deed —(and, for myself, I am not satisfied that the beneficial donees did repudiate the conditions of gift before the republication of the will;—the plaintiff still encounters the insuperable obstacle of *res judicata*. The decree of February 7, 1848, in a cause instituted by the father of plaintiff, under whom he claims, against the children of the father by the former marriage, explicitly adjudges as properly interpreted by the pleadings, that the deed of 1826 was intended as a security to protect the interests of these children in the estate derived from their mother and other maternal relatives; that the children had called for and received from their father a satisfactory account and payment of their claims in right of the mother and maternal relatives; that the trusts of the deed in favor of the children had been discharged and satisfied; and that the father was reinstated in his original estate in the subjects of conveyance. This decree was in strict pursuance of the allegations by the bill, and the admissions of the answers. The direct issue in the cause was whether the deed was a security—a particular charge upon the legal estate, which had been satisfied; and the decree, in strict conformity to the pleadings and evidence, sustained the affirmative of the question. It would be a torture of the decree, to allow the plaintiff's view, that it was a mere arrangement by consent, that the legal estate, previously parted with, should be reinvested in the grantor of the deed. The pleadings and evidence on which the decree was based, presented the single issue, whether the original owner by his deed had ousted himself of his original estate in fee, by the particular charge upon it; and it was adjudged that he had not so ousted himself.

The judgment of a Court of competent jurisdiction directly upon an issue, is conclusive as to the parties and privies in the

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\*same Court, and in all Courts of concurrent jurisdiction. It is not necessary to the conclusiveness of such judgment, that it should be on the only point in the cause, although

it must comprehend some material and traversable allegation directly and not collaterally in issue, and essential to the decision. Here the decision was on the single issue made by the pleadings and proofs. *Manigault v. Deas*, Bail. Eq. 293; 2 Smith L. C. 442.

That the present plaintiff, claiming through his father, is bond by an estoppel on his ancestor, is too plain for illustration. Judgment for or against an ancestor binds his heirs. *Locke v. Norbourn*, 3 Mad. 141; *Outram v. Morewood*, 3 East, 353.

It is ordered and decreed that the decree be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, and DARGAN, CC., concurred.

Decree affirmed.

### 7 Rich. Eq. \*219

\*ELISHA CARSON, Assignee, v. A. B. O'BANNON, and Others.

(Charleston. Jan. Term, 1855.)

[*Husband and Wife* ⇨31.]

By marriage settlement of wife's property, husband was entitled to receive the rents, issues, hire and profits, for the mutual benefit and support of himself and wife, but not to be in any manner subject to his debts, contracts and engagements. Husband and wife separated, and husband assigned his interest under the insolvent debtors' Act:—*Held*, that the assignee was entitled to receive one moiety of the rents, issues, hire and profits, and the wife the other moiety to her sole and separate use.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 188; Dec. Dig. ⇨31.]

[*Husband and Wife* ⇨31.]

By the settlement, the trustees were empowered to sell a house and lot, and reinvest five thousand dollars of the proceeds, subject to the trusts of the settlement—the balance, if any, to be for the use of husband and wife, free of any trust. The premises were sold for seven thousand dollars:—*Held*, that the assignee was entitled to one moiety of the proceeds after deducting the five thousand dollars, and certain charges to which the balance was held first liable.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 187; Dec. Dig. ⇨31.]

[*Husband and Wife* ⇨31.]

A previous separation had taken place between husband and wife, and husband had filed a bill against the trustees for an account. The parties became reconciled, again lived together, and, thereupon, it was decreed by consent, that the counsel fees and costs be paid out of the trust estate, and the trustees released from accounting before the master, as had been before ordered in the cause:—*Held*, that this was no adjudication and settlement of the rights of the parties, except as to the liability of the trustees to account to the husband up to the time of the decree.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 178–195, 883, 884; Dec. Dig. ⇨31.]



[*Husband and Wife* ⚭31.]

The wife's equity to a further settlement claimed in her behalf, but not allowed by the Court.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 178–195, 883, 884; Dec. Dig. ⚭31.]

Before Dunkin, Ch., at Charleston, February, 1853.

Dunkin, Ch. Augustus Benjamin O'Bannon took the benefit of the insolvent Debtor's Act, at Barnwell Court, in March, 1849. The plaintiff, E. Carson, was appointed assignee. In the schedule was included such interest as the petitioner had under the marriage settlement hereinafter to be mentioned, and also whatever interest he had under a decree made in Charleston district, in February.

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1848. These proceedings were instituted on 8th August, 1849, for an account from the trustees under the marriage settlement, and to have the interest of the defendant, A. B. O'Bannon, subjected to the payment of his debts.

It appears that in 1829, A. B. O'Bannon was about to intermarry with Henrietta Portner Schmidt, and, in contemplation of that event, a house and lot of land at the corner of Market and King streets, in the city of Charleston, together with two slaves, being the property of the lady, were conveyed and assigned to her mother, Elizabeth Schmidt, and her brother, John F. Schmidt, in trust for the purposes therein declared. These uses were, among others, "to permit and suffer A. B. O'Bannon, the intended husband, during the joint lives of himself and his wife, to receive and take the rents, issues and profits of the real estate, and the hire and profits of the personal estate, for their mutual benefit and support, but not to be in any manner subject to the debts, contracts and engagements of the said A. B. O'Bannon; after the termination of their joint lives, the rents, &c., were to be held for the use of the survivor during life, and afterwards for the issue of the marriage living at the death of the survivor, absolutely. In default of such issue, then to the heirs at law of the wife, their heirs and assigns, absolutely, and forever." But it was further provided, that in the event of the survivorship of the wife, and no issue of the marriage, the property should pass to such person or persons as she might by deed, or will, duly executed, direct, limit and appoint the same. It is also provided, that in case it might thereafter be deemed advantageous to sell the said property, or any part thereof, the trustees should be authorized to dispose of the same, "upon receiving from the said Henrietta Portner a written request to do so, which request shall be signed by the said Henrietta, in the presence of two or more credible witnesses; and that the trustees should immediately thereafter re-invest the proceeds

in other property, to be held subject to the same uses; with the exception, however, that

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should the aforesaid \*house and lot be so sold, the sum of five thousand dollars (\$5,000) only, shall be in trust to and for the same uses as those already expressed. The balance of the purchase money for the said house, after deducting the said sum of five thousand dollars, if any balance there be, shall be for the use and benefit of the said A. Benjamin O'Bannon, and Henrietta Portner Schmidt, his intended wife, free and absolutely discharged of and from any other or further trust."

The marriage took place in April, 1829; and the trustees, in the proper discharge of their duties, caused the premises at the corner of Market and King streets to be insured. In the memorable conflagration of 1838, the house was consumed, and the trustees received from the insurance company, the sum of six thousand four hundred and twelve dollars and fifty cents, and they afterwards sold the vacant lot to Nathan Hart for seven thousand dollars.

The parties lived together until 1842, in the district of Barnwell. In consequence of some unhappy differences between them, Mrs. O'Bannon came to Charleston and resided with her mother, Mrs. Elizabeth Schmidt.

In January, 1845, A. B. O'Bannon filed his bill in this Court against the trustees to the marriage settlement, praying an account according to his rights under the settlement. To that bill the wife was also made a party defendant; the fact of her returning to her mother in Charleston is stated, and that, since that period the trustees had ceased to pay him any part of the income. The answer of the wife relied on certain acts of misconduct on the part of her husband as a justification of her withdrawal; and the answer of the trustees referred to the facts thus set forth in the answer of their co-defendant as their reason for declining to account to the husband. After the hearing of that cause in June, 1847, the court passed a decree declaring that the trustees should account before the master for their transactions in the manner and to the extent specified in said order, and that the grievances of

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the wife, whatever they \*might be, as well as her claim for relief and redress, were the proper subject matter for a cross bill on her behalf, and that no final order would be made upon the rights of the parties until Mrs. O'Bannon had had an opportunity of filing a cross bill or instituting such other proceedings as she might be advised. The decree was filed 26th February, 1848. At this stage the solicitors of the parties used their influence with their respective clients, and a reconciliation was effected. The husband

and wife again lived together; and on the 6th July, 1848, the following order was entered by Chancellor Dargan: "O'Bannon v. O'Bannon, et al. On hearing Mr. Simons for the complainant, and Mr. Hunt for the defendant, it appears that the parties, having happily adjusted the difficulties out of which this case originated, are now desirous that no further proceedings should be had in the cause: It is therefore ordered, with the full assent and concurrence of both sides, and at their solicitation, that the trustees under the marriage settlement of the complainant and his wife have leave to sell and dispose of so much of the trust property as may be sufficient to satisfy and pay all the costs and counsel fees, on both sides; and that upon their so paying the costs and counsel fees as aforesaid, the trustees be released from accounting before the master as heretofore directed and adjudged by the Court." In compliance with this order the trustees sold out stock belonging to the trust estate to the amount of about thirteen hundred dollars, which was paid into the hands of the master and by him disbursed. The evidence of Mr. Simons accompanies this decree. He stated the objects of the parties; that the order of July, 1848, was regarded by all as an end of the litigation; that the parties lived together, as he believed, until the Spring of 1850, when they again separated.

As between A. B. O'Bannon and his wife, the effect of this seems to have been, and was intended to be, a discharge to the trustees for their transactions since 1842, or rather their conduct in accounting with Mrs.

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O'Bannon from that time thereby \*received the sanction and approbation of her husband. A. B. O'Bannon and his wife were then living together, or about to live together, and thenceforward the trustees would pay over to him the annual income, &c., as provided by the settlement, and as they had done until the separation in 1842. It would be received by him, to be applied "to their mutual benefit and support, but not to be in any manner subject to the debts, contracts or engagements of the said A. B. O'Bannon." On the part of Mrs. O'Bannon, the order of July, 1848, and her return to reside with her husband had the effect of what is called, in Doctor's Commons, condonation. Any past causes of complaint were forgiven, and were, to all legal intents and purposes, as though they had not been.

In March following, A. B. O'Bannon having to encounter difficulties of a different character, made the assignment under which these proceedings are instituted. On the 13th July, 1850, an order was entered in this cause, at the instance of the defendants, or some of them, and with the consent of the plaintiff's solicitor, that Mrs. O'Bannon should have leave at any time within thirty days thereafter, to file such cross bill in this cause as

she may be advised to do. It does not appear that any further proceedings were had under this order.

The plaintiff does not seek to impeach the settlement of 1829, nor does it seem open to attack. It was, for the most part, an antenuptial settlement of the intended wife's real estate, and was duly recorded. In reference to the premises at the corner of Market and King streets, the estate vested in the trustees for the purposes declared in the deed. It is hardly necessary to say that if, in the course of years, the premises had quintupled in value it would have no effect. Nor if, in the same space of time the buildings on the premises had been thrice consumed by fire while under insurance, would it be doubted that the amount of the insurance would be so much capital in the hands of the trustees. But after all the various uses of the settlement had been fully declared, a power was

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\*given to the trustees to sell and re-invest. And here it is worthy of remark, that they were authorized to sell only "upon receiving from the said Henrietta Portner a written request so to do, which request shall be signed by the said Henrietta in the presence of two or more credible witnesses." After providing for the immediate re-investment of sales in other property to be held subject to the same uses, it is added "with the exception, however, that, should the aforesaid house and lot be so sold, the sum of five thousand dollars only shall be in trust to and for the same uses and purposes as those already expressed, the balance of the purchase money for said house, after deducting the said sum of five thousand dollars, if any balance there be, shall be for the use and benefit of the said A. B. O'Bannon and Henrietta Portner Schmidt, his intended wife, free and absolutely discharged of and from any other or further trust." When it is born in mind that this was the inheritance of the lady which the settlement was intended to secure, and that it had been effectually accomplished by the formal provisions of the deed, it is manifest that an exception of this character should be strictly interpreted. The question could never arise but in the event of a sale. That was only provided for hypothetically; and then was incumbered with provisions and restrictions to be controlled by the wife. The language of the exception, loose as it is, evidently contemplates, substantially, a re-investment of the purchase money, and regards a surplus as problematic, and in any event, inconsiderable. Neither A. B. O'Bannon, nor any one claiming as assignee, can, however, have any equity beyond the terms of the exception. The premises were sold to Nathan Hart. The purchase money was seven thousand dollars. Of this sum the amount of five thousand dollars is properly held subject to the uses previously declared, and the residue was for the use and benefit of the husband



and wife, free and discharged from all other and further trust.

On the part of the plaintiff it is insisted

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that as assignee of *A. B. O' Bannon*, the trustees should account to him for this surplus, while on behalf of the wife it is urged that, as this is the proceeds of her inheritance, and as it is declared to be for the use and benefit of her husband and herself, she is entitled as against the assignee of her husband, to an equitable settlement of, at least, a portion of this surplus to her sole and separate use. The trustees acknowledged that they received the proceeds of the sale to *Nathan Hart*, and that they have held it subject to the uses of the settlement. In the judgment of the court the trustees would have been authorized to pay the surplus to *A. B. O' Bannon* and his wife, and they were bound to do so if required. But no demand was ever made, unless the suit instituted by *O' Bannon*, and afterwards abandoned, can be so regarded. But *A. B. O' Bannon* and his wife united in procuring the order of July, 1848, by which the sum of thirteen hundred dollars was appropriated to defray the expenses of the litigation between them. Such orders are always regarded as the act of the parties. In accounting for the surplus of two thousand dollars, the trustees should deduct the value of the stock sold out to meet the order of July, 1848. One moiety of the balance, with interest from the date of filing the bill, 8 August, 1849, must be paid by the trustees to the plaintiff as assignee of *A. B. O' Bannon*. In all questions of this kind between the wife and the assignee of the husband, it is the practice of the Court to inquire whether an adequate settlement has already been made. It has been remarked that in the settlement of April, 1829, only the property of the wife was included, and nearly the whole was real estate which she had inherited. The income was to be paid to the husband for the mutual benefit and support of himself and his wife during their joint lives. The husband has become a bankrupt. In the anonymous case, 4 Eq. R., 94, where the bill was by the wife for alimony, to which the Court did not think her entitled, yet, as the husband and wife were, in fact, living apart, and it was necessary that she should

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be maintained, the Court \*directed one-half the income of the property which had been settled to the joint use of the husband and wife, to be paid to her. From analogy to the principle of this case the Court is of opinion, that in addition to the payment hereinbefore directed, the trustees should account to the plaintiff as assignee for one moiety of the annual income of the trust estate since the date of the assignment, and during the joint lives of *A. B. O' Bannon* and wife, or until otherwise ordered, and that

the other moiety of the income, together with one moiety of the surplus aforesaid, be paid to the said *Henrietta P. O' Bannon* to her sole and separate use; and it is so ordered and decreed.

It is further ordered and decreed that the trustees file a schedule of the trust estate, and that they account for the income since the date of the assignment upon the principles hereinbefore declared. And that they also account for the surplus of the sale to *Nathan Hart*, over and above the sum of five thousand dollars, in the manner heretofore directed, and that the master state the accounts.

It is further ordered and decreed that the plaintiff account for his transactions as assignee, and that the master take an account of the same, as also of the debts due by the defendant, *A. B. O' Bannon*, which are entitled to payment under the Insolvent Debtors' Act, out of the assigned fund, and that the master report on the same, with leave to report any special matter.

It is finally ordered and decreed that either party may have leave to apply at the foot of this decree, for such further order as may be necessary to carry the same into effect, or as circumstances may from time to time seem to require.

Each party to pay their own costs, those of the plaintiff to be chargeable on the assigned fund, and those of the trustees on the income of the trust estate.

The defendants, the trustees of Mr. and Mrs. *O' Bannon*, and Mrs. *O' Bannon*, appeal-

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ed from the decree of his Honor, *Chan\*cellor Dunkin*, and prayed that the same may be reversed, and the complainant's bill dismissed, upon the following grounds:

1. Because it is respectfully submitted, that the order or decree of the 6 July, 1848, was a final adjudication and settlement by this honorable Court of all points in controversy between the parties, and against all the claims made by the then complainant, *Augustus B. O' Bannon*, either upon the capital or income of the property settled by the marriage settlement of 1829.

2. Because the said decree of 1848, viewed as a settlement of all the controversies between the parties, with their assent, and under the sanction of this honorable Court, operated as a judicial settlement of all the surplus of the sale of the lot at the corner of King and Market streets over and above the sum of five thousand dollars and the costs and fees in the said causes, which costs and fees having been paid, and the said decree fully satisfied, the said trustees held the said surplus thenceforward as part of the settled property subject to the provisions of the said marriage settlement for the joint support of husband and wife, without liability for the husband's debts.

3. Because the complainant in the present

case being only the assignee of the rights of A. B. O'Bannon, whatever these might be, cannot claim more than he could, and is therefore not entitled to have or demand the aforesaid surplus or any account thereof.

4. That the order for leave to file a cross bill for Mrs. O'Bannon was not compulsory on her, but only permissive, and it is submitted that she has not waived her equity for a further settlement by not filing such bill, but that this Court should of its own motion take notice of her equity to have a further

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\*settlement, even if the decree of 1848 does not operate as such settlement.

5. That even if the said A. B. O'Bannon might be let into the participation of the profits of the settled property since 1848, yet by the express terms of the settlement the same could only be received and enjoyed by him jointly with his wife for their mutual support, without being in any manner subject to his debts, contracts or engagements, and the complainant claiming only as assignee under the Insolvent Debtor's Act, and for the satisfaction of O'Bannon's debts, can have no account of the profits and income of the settled property against the express provisions of the said settlement.

6. That even if O'Bannon's share of any portion of the income of the settled estate under other circumstances would have been liable to his creditors, and the assignee entitled to such share, this must nevertheless be subject to the superior equity of the wife to have a further settlement under the circumstances of her abandonment by her husband, and it is respectfully submitted that the Court should have sent it to the Master to inquire and report whether it were proper and necessary to have a further settlement, and if so, then whether of the whole, or of what part.

7. That as all the settled property was the estate and inheritance of the wife, and brought into the marriage by her, and the same is not more than sufficient for a mere support of her alone, and the husband has abandoned her, and does not contribute to her support, it is submitted that the whole property should be settled to her sole and separate use, and the whole income paid to her.

McCrady, James Simons, for appellants.  
Northrop, contra.

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\*PER CURIAM. This Court concurs in the decree, which is hereby affirmed, and the appeal dismissed: and it is so ordered.

JOHNSTON, DUNKIN, DARGAN and  
WARDLAW, CC., concurring.

Decree affirmed.

## 7 Rich. Eq. \*230

\*W. W. WALKER and Others v. Ex'ors.,  
PETER W. FRASER and Others.

(Charleston, Jan. Term, 1855.)

[*Husband and Wife* ⚭35.]

P. F. was trustee under marriage articles by which husband and wife covenanted to settle the share of the wife in the estate of her late husband, "as soon after said estate is divided as may be practicable," to the joint use of husband and wife during the coverture—then to the use of the survivor, and on the death of the survivor, to the issue of the wife by her late husband, and the issue of the then intended marriage. Under bill afterwards filed, to which the trustee was no party, the estate of the wife's late husband was divided, and her share therein, consisting of money and choses, paid over to her husband. No settlement was ever made and the husband died some fifteen years after the division, insolvent:—*Held*, that the trustee, by his neglect to have the wife's share settled according to the provisions of the articles, had made himself liable to the remaindermen.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 214; Dec. Dig. ⚭35.]

[*Husband and Wife* ⚭35.]

The bill stated, that the money and choses went into the hands of the trustee or his agent or agents, and the prayer was that he might account for what was received, or, but for his wilful neglect or default, might have been received by him:—*Held*, that, under the statement and prayer, relief might be given on the score of the trustee's neglect to have the share settled.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 209; Dec. Dig. ⚭35.]

[*Remainders* ⚭17.]

The marriage articles were executed in 1832,—the husband received the wife's share in 1836, and in the same year the wife died. The trustee died in 1849,—the husband in 1851, and in 1852, this bill was filed by the remaindermen—the eldest of whom was then twenty-eight years of age:—*Held*, that the claim could not be regarded as stale—the remaindermen not being bound to file their bill until after the death of the husband, the surviving tenant for life.

[Ed. Note.—For other cases, see *Remainders*, Cent. Dig. § 16; Dec. Dig. ⚭17.]

Before Dunkin, Ch., at Georgetown, February, 1854.

Dunkin, Ch. Legrand Guerry Walker departed this life, intestate, on the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and twenty-nine. His heirs at law and distributees were his widow, Mary E. Walker, and his three children, then of tender years, to wit, Hasford Walker, William Walter Walker and

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Catharine L. Walker. Administration of his estate was committed to his widow and to Peter Walker and Benjamin Walker, brothers of the intestate.

On 3d April, 1832, Mary E. Walker, the widow of the intestate, being about to intermarry with Edward Thomas, articles of agreement were entered into between the said parties and Peter W. Fraser, in which it was recited, among other things, that the estate of Legrand G. Walker, deceased, was yet undivided, and it was covenanted on the part



of the said Mary E. Walker and Edward Thomas that, as soon as practicable after the division of the estate, they would, by proper assurances, settle the distributive share to which the said Mary E. Walker was entitled to the purposes and uses declared in said articles, to wit, to the joint use of Edward Thomas and his intended wife during the coverture—then, to the use of the survivor, and on the death of the survivor, to the issue of the body of the said Mary E. by her late husband, L. G. Walker, and the issue of the marriage then about to be consummated. The marriage took place—Mrs. Thomas died (it is said in the bill) some time in 1836, leaving her children above named, as also two children by the latter marriage. In 1839, Catharine, one of the children by the former marriage, departed this life, unmarried and intestate. In September, 1851, Hasford Walker, another of the children, died intestate, and letters of administration were granted to his widow, Mary A. E. Walker. In December, 1851, Edward Thomas died intestate, and, as it is said, insolvent, and administration on his estate was granted to R. E. Fraser.

Sometime in 1849, Peter W. Fraser died, leaving a will of which two of the defendants are executors, and leaving a large estate, real and personal. These proceedings were instituted on 21st February, 1852, by the plaintiffs, who are the children of Mary E. Thomas, deceased. The bill charges that sometime after the marriage, a bill was filed by Thomas and wife against the other distributees and the legal representatives of Walker's estate for an account and parti-

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tion—and the plaintiffs allege \*that the distributive share of their mother, amounted to between ten and eleven thousand dollars, "which amount, consisting of money and choses in action, went either into the hands of the said Fraser, as trustee, or into the hands of his agent or agents acting under his authority." This is the entire charge of the bill upon which it is sought to render the estate of the trustee responsible. Twenty years had elapsed since the testator, Peter W. Fraser, became a party to the articles, and some three years had expired since his decease before the bill was preferred. The defendants aver their entire ignorance of all the matter charged, require strict proof thereof, and deny the liability of the estate of the testator.

It is due to the memory of the trustee to state that the evidence affords no ground whatever for the charge that, either by himself or his agents, he ever received any part of the fund in which Mrs. Thomas had an interest as a distributee of her deceased husband. The only foundation for the complaint of the plaintiffs is that he omitted to take the proper measures to prevent the or-

der of the court which directed the share of Mrs. Thomas to be paid to her husband and herself, or that he neglected to require a settlement of the same, at or after the division, according to the covenant in the articles contained.

The articles were executed and duly recorded in April, 1832. All the parties resided in Georgetown district. The trustee lived on Waccamaw until about 1840, and then removed to Pee Dee, where he died in 1849. His residence was about twelve miles from Georgetown, and the witness said he came to town half a dozen times in the course of the year. He had been educated a lawyer, but the witness did not know that he ever practiced. On 24th April, 1835, Edward Thomas and Mary E. Thomas, his wife, instituted proceedings in this court against the personal representatives and the children of L. G. Walker, deceased, for an account and division of his estate. Peter W. Fraser appears to have been no party to these proceedings, nor does the existence of the ante-nup-

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tial agreement appear to have \*been in any manner brought to the notice of the Court. Part of the estate consisted of a plantation on Black river and some real estate in the town of Georgetown. The real estate was sold by the Commissioner, and, on the 28th April, 1836, Mr. Commissioner Cohen filed his report, setting forth an account of the real and personal estate of L. G. Walker, deceased, and the share to which the complainants in these proceedings were entitled. This report was, on the same day, confirmed by the Court. It is only necessary to add that, in the report so made and confirmed, the Commissioner stated that he had set off to Edward Thomas and wife "their share in money and securities." It appears from the statement of the bill that Mrs. Thomas died in the course of that year (1836.) Her husband survived until 1851. The witness (B. H. Wilson) thought he was solvent in 1842 and continued so for two or three years afterwards, but he died insolvent.

It is very important to the community that the duties and responsibilities of trustees in cases of this character should be settled and well understood. The office is essentially gratuitous, is commonly regarded as merely honorary, and yet it may impose no ordinary obligations of vigilance and involve liabilities of the gravest character. Mr. Justice Story remarks that, although in a variety of cases it is not easy to say what the precise duty of a trustee is, yet "in a general sense a trustee is bound, by his implied obligation to perform all those acts, which are necessary and proper for the due execution of the trust which he has undertaken. He is bound to good faith and reasonable diligence." But "where a trustee has acted with good faith in the exercise of a fair discretion, and in the same manner as he would ordinarily do

in regard to his own property, he ought not to be held responsible for losses." In reference to such circumstances, it has been properly remarked, that the rules in regard to the liability of trustees should not be laid down with a strictness to strike terror into mankind acting for the benefit of others, and

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not for their own; and that, as \*trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it. To add hazard or risk to that trouble, and to subject a trustee to loss, which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office. *Ex parte Belchin and Parsons, Amb. 219. Knight v. Earl of Plymouth, 1 Dick. 126.*

Perhaps it is impracticable to prescribe any less general rule for the conduct of trustees, or a more liberal principle to be observed in the investigation of their transactions. The object of creating a trust of this character is to protect the interests of those who are unable to protect themselves. In marriage settlements these persons are the wife and children. The leading purpose is, in the first instance, to secure the property from the marital rights of the husband which would otherwise attach. When the trustee accepts the office by becoming a party to the instrument, he is, in the language of Mr. Justice Story, "under an implied obligation to perform all those acts which are necessary and proper for the due execution of the trust which he has undertaken." By certain Acts of the Legislature the instrument is declared void unless recorded within a specified time in the proper offices. The trustee is entitled to the possession of the deed, and it is his duty to see that the same is recorded according to law. If he neglect to have the deed properly recorded and loss ensue, he is responsible for such loss to the cestui que trusts. *Cooper v. Day, 1 Rich. Eq. 26.* The language of the Chancellor is, "that if the trustee, after accepting a trust, does, or omits any acts materially calculated to destroy the trust, or impair the interests of his cestui que trusts, and, in so doing, betrays the want of that diligence which a man of ordinary prudence would exercise in relation to his own property or interests, he is

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responsible for \*the consequences that may ensue." See *Lewin on Trusts, ch. 12, sec. 1, p. 265.*

It is proper then to inquire what were the duties of the trustee in this instance; and whether the loss, if any, which ensued, was in consequence of his acts, or omissions. In April, 1832, the estate of Legrand G. Walker was yet unsettled and undivided.

His widow would become entitled to one-third after payment of debts. In view of these circumstances, and reciting them, the ante-nuptial agreement was made, whereby the said Edward Thomas and Mary E. Walker covenanted and agreed with the said Peter W. Fraser, to settle and assure to him in trust, for the purposes therein declared, all the real and personal estate to which the said Mary was or might be entitled as a distributee of her late husband, "as soon after the estate is divided as may be practicable." The marriage took effect. The deed was properly recorded; and three years thereafter, to wit, in April, 1835, the proceedings in partition were instituted, carried on, and not consummated until more than a year after their institution. For the purposes of the present inquiry it is superfluous to remark that the plaintiffs in those proceedings should have brought to the notice of the Court the ante-nuptial agreement of April, 1832, and have made the trustee a party to the record. The husband, Edward Thomas, was the actor in those proceedings. It was his duty to have imparted the necessary information to his Counsel, and, through him, to the Court. He may have forgotten the existence of the ante-nuptial articles. He may have studiously concealed their existence, in order to prevent any obstacle to his receipt of the fund; or (which is, perhaps, the most probable conjecture) he may not have deemed the disclosure necessary, as he proposed, at some convenient period, to make a settlement in accordance with the articles.

Nor would it be profitable to speculate as to any possible effect upon rights derived under those proceedings in consequence of the fact that the trustee was no party thereto.

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\*The primary object of the ante-nuptial agreement was to prevent the improvident or unauthorized interference and control of the husband. His supposed interests, or his purposes, might conflict with the interests of his family, and a trustee was interposed chiefly to guard their rights against the consequences of his acts. Independently of the articles, the wife and children had an equity for a settlement of this property, which would have been recognized if it had been brought to the notice of the Court. But the articles prescribed the terms of settlement, and would have presented an irresistible claim to the protection of the Court. It may well be presumed that the trustee was appointed because it might have been anticipated that the husband would not be sufficiently active in presenting or advancing interests which were in derogation of his absolute right of enjoyment. The trustee owed to his cestui que trusts the exercise of that diligence and care which a man of ordinary prudence would use in his own concerns. Was this ordinary vigilance



exercised? The partition of Walker's estate was not a thing done in a corner. The proceedings were of public notoriety. Many persons were parties, either as plaintiffs or defendants. The sale of the real estate for the purpose of partition required a notice to be published in the Gazette of the district. The trustee was a large landed proprietor—a resident of the district, and on visiting terms with the family of the cestui que trusts. It seems inconceivable that he should have been in ignorance of these proceedings. It is more probable that he considered it no part of his business to interfere in any manner—that he had discharged his duty when the articles were recorded, and that, if he received no part of the trust property, he incurred no responsibility. It is a very common self-delusion, of which trustees should be disabused. Under the circumstances of this case, it was the duty of the trustee to have taken cognizance of the proceedings in partition, and to have interposed active measures to secure the in-

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terests of the cestui que trusts and prevent the payment to the husband, Edward Thomas.

But if the trustee had been absent from the country, or, from any other cause, may be assumed to have been ignorant of the judicial proceedings by which Edward Thomas reduced the fund into his own possession, his subsequent duty was still more plain; and by the terms of the articles, was scarcely left to implication. Edward Thomas and Mary E. Walker, his intended wife, had therein covenanted and agreed with the trustee to settle, by good and sufficient conveyances, the interest of Mrs. Walker in her late husband's real and personal estate "as soon after said estate was divided as might be practicable." The estate of L. G. Walker was divided in 1836-1837, and the whole amount of Mrs. Thomas' interest therein was received by her husband. No measures whatever appear to have been adopted by the trustee to require Edward Thomas to comply with his covenant. The witness (B. H. Wilson) thinks that Thomas remained solvent for about ten years afterwards, when he became insolvent, and so continued until his death in 1851, the trustee himself having died in 1849. In the meantime, it may be remarked, that Mrs. Thomas had died soon after the division, and but one life intervened before the right of enjoyment on the part of the children would attach. The husband was bound by his covenant "to transfer the estate to the trustee by proper assurances—as soon as practicable after the partition;" and it was the duty of the trustee to enforce the obligation. The duty became more imperative if the trustee was aware of the proceedings in partition and omitted to interfere. After considering all the circumstances, the Court is reluctantly brought to the conclusion that the conduct

of the trustee amounted to that degree of negligence which rendered him responsible to the cestui que trusts for the loss sustained, whatever that may be. But the Court is unable to perceive any evidence of agency on the part of Edward Thomas, much less is there any ground to suppose that any part

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of the trust fund came to the hands of the trustee. He, or rather his estate, is to be amerced in consequence of his acquiescence, or non-feasance. In one aspect it is a hard case; but the trustee undertook, as has been already suggested, to look after and protect the interests of those who are supposed to be incapable of ascertaining and protecting their own. If he had declined the office others might have assumed it, or other precautionary measures might have been adopted. If he had received the fund, either by himself or his agents, he would be responsible. But I think the trustee, or his representatives, are entitled to have the case presented as it, in fact, existed, and to have an opportunity so to meet the case. The trustee was dead some years before these proceedings were instituted. His estate passed to his child, then of immature years, and necessarily ignorant of all the transactions. So far as the Court can perceive, three-fifths of the fund, with the loss of which it is sought to charge the estate of the trustee, was a vested interest in parties who were of full age before the death of the trustee in 1849, and were men grown some eight years before the bill was filed. Although they were not entitled to the possession of the estate, yet, having vested interests, they might, according to *Cooper v. Day*, have maintained their bill at any time to remove the trustee, or render him responsible for his negligence or other misconduct. Whether they were bound to prefer their bill, which they had a right to prefer; or might wait until the death of Edward Thomas, although they had themselves attained maturity, and then pressed to render the estate of the deceased trustee responsible, without incurring the objection of stale claim, or other defence of that character, are questions which the Court would be unwilling to decide until the facts are more fully and accurately developed. In *Cooper v. Day* [1 Rich. Eq., p. 30, the original bill, filed in 1838, was dismissed as to the trustee, because, among other grounds, the facts of misconduct, &c., were not charged so as to subject him to liability, although the subsequent bill of 1841, charging specif-

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ically the acts of negligence, &c., was sustained. It is due to the character of the claim, especially when the estate of a deceased person is subject to be charged for his alleged default, that the default should be plainly set forth. It is a legitimate and effective argument against the trustee, (and

the force of it has been recognized by the Court,) that the parties all resided in the same neighborhood, and were on terms of intimacy. The same circumstances may provoke the inquiry, why the trustee was not stimulated to his duty, or called to an account for his supineness or neglect, by those who had so strong a motive to action, and who must be presumed to have been cognizant of their rights. It may, or may not, be difficult to afford a satisfactory answer to any such inquiry. Although there is no novelty in the general principles applicable to the duties and responsibilities of trustees, the case itself is one of new impression. The amount involved is important to the parties—the precedent may be still more important, as declaratory of the liabilities incurred by trustees in marriage settlements, and the rights, as well as the remedies, of those whom they represent.

It is ordered and decreed, that the plaintiffs have leave to amend their bill by setting forth any acts of neglect or default specifically on the part of the late Peter W. Fraser, trustee, which may have rendered him responsible to the plaintiffs, and that the defendants have leave to defend themselves against the said amended bill as they may be advised. It is further ordered and decreed that the Commissioner state an account of the moneys received by the late Edward Thomas, (distinguishing between principal and interest,) under the proceedings in partition in this Court to which reference has been made, and that he report thereon, with leave to report any special matter. It is further ordered and decreed that he take an account of the estate of Edward Thomas, deceased, in the hands of his administrator and report thereon.

Complainants appealed from the decree and moved that it be modified, because—

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\*1. His Honor erred in not decreeing that the representatives of P. W. Fraser, trustee, should account for the trust fund which was either received by him under the marriage articles of Thomas and wife, or but for his wilful neglect or default might have been received by him.

2. Because no objection having been taken to the alleged variation between the allegations of the bill and the proof during the progress of the cause, his Honor should have proceeded to grant relief on the case as made.

The defendants also appealed and insisted that the circuit decree is erroneous in not dismissing the bill, for that the case made by the complainants is in the nature of a claim for damages for the nonperformance of his contract against the estate of the testator, P. W. Fraser, and it is submitted that no such responsibility attached to him under the marriage articles to which he was a par-

ty; and that there is no equity to extend their construction against him.

Simonton, for complainants.

Mitchell, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. The liability of the estate of the trustee for his breach of trust, is so thoroughly discussed in the circuit decree, that this Court deems it necessary to add little on that point beyond its approval of the conclusion attained by the Chancellor. This conclusion is assailed by the defendants on the ground that the liability of the trustee did not arise because he did not receive the moneys of the trust estate, and that the husband was really the trustee for transferring the funds to Mr. Fraser. It is the usual course of Courts of Equity to charge

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\*trustees and their representatives with the consequences of a breach of trust, whether they derive benefit from the breach of trust or not; as where one of two trustees receives no money, but by concurring in an act which enables the other trustee to receive, makes himself liable for the other's devastation. *Adair v. Shaw*, 1 Sch. & Lef. 272. Thus in *Kinloch v. I'On*, 1 Hill, Eq., 190 [26 Am. Dec. 196], a trustee who lived remotely from the trust estate, and had not otherwise intermeddled in the trusts, except by joining the other trustee and the husband in a conveyance of the land held in trust, and thereby contributing to put the proceeds of sale in the power of the husband, was made responsible for the husband's waste of the fund. In *Kinloch v. I'On*, the original trust estate was a sum of money advanced by the father of the wife to the husband, and by the marriage contract it was made the duty of the husband to invest the money in property to be held by the trustees on the trusts declared in the contract; and of course no liability attached to the trustees until such investment had been made by the husband. But in the present case no such trust or confidence is reposed in the husband. The articles here contain no intimation that the husband was to exercise any discretion concerning the trust estate. Edward Thomas and Mary E. Walker covenanted with the trustee, that, in case of their intermarriage, they would convey and assure to the trustee in fee all her estate, particularly her undivided share of the estate of her late husband L. G. Walker, "as soon after said estate is divided as may be practicable," in trust, for the joint use of said Edward and Mary during their joint life, then for the use of the survivor for life, and on the death of the survivor for the use of the heirs of the body of the said Mary, living at the date of the articles, and of the heirs of her body to be begotten by the said Edward. The husband was merely under a legal liability by cove-



nant: and the trustee by accepting the covenant came under the trust and obligation to enforce the liability and duty thereby created. It is one of the chief ends of mar-

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\*riage contracts to interpose a responsible person in the character of trustee in the place and for the protection of the wife, who is necessarily under the disability of coverture, and of the children, who may be under the disability of infancy, against the rights and interference of the husband: and we should not make a construction defeating this end, where it is not required by the text or context. The Chancellor after reviewing the facts, says, it is inconceivable that the trustee should have been in ignorance of the proceedings in partition in 1836-7, by which the estate of L. G. Walker was distributed, and under the operation of which the thirds of Mrs. Thomas, as widow of Walker, passed into her husband's hands and were ultimately wasted. Yet the trustee did not interpose for his beneficiaries during the pendency of these proceedings, nor at any time before his death in 1849; and he must be held to have suffered the husband to receive the trust funds, and to have acquiesced in his abuse of the trust. When the trustee accepted the trust by joining in the execution of the articles, he incurred the obligation of discharging actively the duties of his office; and his withdrawing from all participation in the affairs of the trust, so far from affording any excuse to him, was in itself a breach of trust.

The Chancellor, however, although he asserted clearly and strongly the doctrines of the Court as to the liability of trustees, refrained from final judgment in this case, and directed the plaintiffs to amend their bill by charging specifically the acts of default or neglect by the trustee on which they relied to make his estate liable, and gave leave to the defendants to defend themselves further against the bill when amended. The plaintiffs appeal because final judgment was not pronounced; and we are of opinion, the Chancellor concurring, that the appeal is well taken. In the stating part of the bill, the plaintiffs, after setting forth the proceedings for the partition of L. G. Walker's estate, allege that the share of their mother, consisting of ten or eleven thousand dollars in mon-

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ey and \*choses, "went either into the hands of the said Fraser as trustee, or into the hands of his agent or agents acting under his authority;" and part of the prayer of the bill is that an account may be taken of the share of plaintiff's mother, "which was received by the said Peter W. Fraser, as trustee, under said marriage settlement, or but for the willful neglect or default of the said Fraser might have been received by him, or by any other person or persons acting under his authority." It is clear on the

evidence that the trustee did not receive the share of the mother of plaintiffs by himself or any regularly appointed agent, and perhaps it would be straining too hardly even against a negligent trustee to affirm that mere non-feasance on his part, should be held to imply sufficiently that he authorized the receipt of the money by the person who did receive. Yet the great purpose of strictness in pleading is to prevent surprise on the opposite party by any variance between the allegations and proofs; and here the prayer of the bill, at least not inconsistent with the stating part, gave distinct notice to the defendants that the estate of the trustee would be pursued for the negligence or default of the trustee in not receiving the money. The defendants complained of no surprise, and made no objection to the evidence for departure from the allegations. Objection on the score of such variance should be promptly taken when the evidence is offered, or it will be considered as waived. *Hatcher v. Hatcher*, McMul. Eq. 311. In this Court while we endeavor to discourage laxity of procedure, we also discourage prolixity and delay, and seldom permit ourselves to be embarrassed by mere technicalities in achieving the right of the cause. In our opinion the bill in this case, although not very exact, states adequately the grounds on which relief may be granted.

Again, the Chancellor was reluctant to proceed to final judgment from some doubt whether the defendants might not defend themselves against some of the plaintiffs on the ground of the staleness of the claim.

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Until the death of Mrs. Thomas in \*1836, it could not be ascertained who were the heirs of her body entitled to take in remainder under the trusts of the articles. The trustee died in 1849; Edward Thomas, the surviving life tenant, died in 1851, when the right of the plaintiffs to enjoyment accrued; and the bill was filed in July, 1852.—When the bill was filed, the oldest child of Mrs. Thomas had been of mature age about seven years; the next child, who died shortly before the filing the bill, and the representative of whom is a plaintiff, would if living have been about twenty-six years of age; and the two other children, who are plaintiffs, were infants. It is clear that none of the plaintiffs could be affected by the Statute of Limitations, or the lapse of time, while they were under this disability of infancy; and the time which has elapsed since the oldest attained full age is insufficient to make his claim stale. In a contest between tenant for life and remainderman on one side, and on the other a third person claiming adversely to the successive rights of both, it may be that such adverse right might be so matured by lapse of time as to inhibit relief by a Court of Equity. *Cholmondely v. Clinton*, 2 Jac. and Wal. 1: *Price v. Copner*, 1 Sim. and Stu.

347; *Harrison v. Hollins*, 1 Sim. and Stu. 471; *Foster v. Blake*, 4 Bligh, 140. But in a contest between remainderman and tenant for life, where the tenant for life is to do some act to accrue for the benefit of the remainderman at the death of the tenant for life, I incline to the opinion that the remainderman is not bound to inquire until the death of the tenant for life whether the act has been done; and that, as Sir Edward Sugden argues in *Bennett v. Colley*, 4 Sim. 181, he may wait until the death of the tenant for life, although he may, if he pleases, have his remedy sooner. In the case last cited, a testator bequeathed a church lease for twenty-one years, renewable of course at the end of every term of seven years, to A, for life, with remainder to his first and other sons; and directed the lease to be continually renewed by the persons in possession for the time be-

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ing. A neglected to renew in \*1784 and died in 1830. His eldest son attained twenty-one in 1800, and in 1831 filed his bill to be compensated for the loss of the lease out of A's assets; and it was held that he was entitled to the relief notwithstanding the lapse of time. Sir Lancelot Shadwell in giving judgment says, in substance, that although there was incipient damage to the remainderman in 1784, and there was prospective damage during the whole lifetime of the tenant for life, yet that the ultimate damage against which a Court of Equity would be finally called upon to relieve would not happen until the death of the tenant for life, and that although preventive relief might be afforded sooner, the full measure of justice could not be ascertained until the right of the remainderman accrued in possession.

The present case is much stronger than the case of *Bennett v. Colley*. Here, in the case of the plaintiff whose neglect to sue is the grossest, seven years, only, expired before suit after he became sui juris, and this is quite too brief an era to raise the presumption of his acquiescence in the breach of trust; and as the trust in question is a technical and express trust, the Statute of Limitations has no application. It is conceded, that if the trustee had received the moneys which were the proceeds of the mother's share, and had failed to invest them properly, he as an express trustee could not protect himself by the Statute; but it is supposed that his failure to receive the moneys presents a case different in principle from his failure after receipt to make the proper investment. I do not comprehend this distinction. The nature of of this breach of trust, where the breach is inferred from negligence, cannot change the nature of his trust. If he had done any act which purported to be a full execution of his trust, and which his beneficiaries were bound to notice, the statute would run in his behalf from the date of such act; but that state of things is foreign to the case. His breach

of trust consists in mere non-feasance—his failure to require from the husband an assurance of the wife's interest as soon as practicable after her share was separated

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\*from those of her tenants in common, to be enjoyed in severalty. What was the date of the practicability of a conveyance after a division was effected, is utterly indeterminate; and the statute must begin to run from some definite day. During the whole life time of the surviving tenant for life, the remainderman might reasonably forbear from suit on the belief, either that a conveyance had been made to the trustee, or that the the practicable epoch for the conveyance had not arrived in the opinion of the trustee.

The case of *Cooper v. Day*, 1 Rich. Eq. 28, cited in the Circuit decree, holds that remaindermen, whose interests are vested, are entitled, in the life time of the tenant for life, to file a bill to have the trusts in their favor declared, and to have the trustee removed if he has misbehaved. So here, the plaintiffs within any reasonable time after the share of their mother had been ascertained, might have filed a bill for the removal of the trustee, and the appointment of a receiver in his stead, and for the security of their interests under the marriage articles; but they were not compelled on pain of forfeiture to seek such preventive relief, and in reliance upon the fidelity of the trustee, and the sufficiency of his estate, might wait until they were entitled to enjoyment. In *Cooper v. Day*, although the neglect to record the trust deed, which was the ground of the trustee's liability, had happened long before the suit, the question of the statute was not raised.

It is ordered and decreed, that the commissioner of this Court for Georgetown take an account of the estate of Edward Thomas, deceased, in the hands of his administrator, and report the extent of the assets applicable to the claims of the plaintiffs.

It is further ordered, that the representatives and distributee and the trustees of the distributee of Peter W. Fraser, deceased, account with the plaintiffs before the said commissioner for the share of Mary E. Thomas in the estate of her late husband, L. G. Walker, which ought to have been assured

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\*to the said Fraser, as trustee under the marriage articles of Edward Thomas and wife; and that said commissioner report the account distinguishing between principal and interest.

It is further ordered that the costs be paid from the estate of Peter W. Fraser, deceased.

It is finally ordered, that the Circuit decree be affirmed except as herein modified, and that the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Decree modified.



## 7 Rich. Eq. \*248

\*ALEXANDER W. BLACK v. WILLIAM KELLY.

(Charleston. Jan. Term, 1855.)

[Equity ⇐362.]

A case had been called once on the docket, and afterwards, on motion of defendant's solicitor, a day was assigned for its hearing, of which complainant's solicitor had notice. On the day assigned, complainant's solicitor did not appear in Court until near the hour for adjournment, and before he came in the bill was dismissed because of his not appearing, on motion of defendant's solicitor:—*Held*, that the discretion of the Chancellor in dismissing the bill, was properly exercised.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 760; Dec. Dig. ⇐362.]

[Equity ⇐384.]

The Chancellor is required to call the docket but once, and parties are required to be ready and present their causes for trial when they are called. After calling the docket through, the Chancellor obtains control of the order of business, and may prescribe when a cause shall be tried.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 821; Dec. Dig. ⇐384.]

Before Dargan, Ch., at Charleston, June, 1854.

On the 22d June, the following order was entered in this cause:

"This case was twice called on the docket: the second time it was called, Thursday, 22d June instant, was fixed on and assigned for the trial of the cause. On the cause being called for trial on the day so appointed, and the solicitors of the plaintiff not appearing on motion of Yeadon, Solicitor for the defendant, it is ordered and decreed that the bill be dismissed.

(Signed,) Geo. W. Dargan."

Afterwards, on the 30th June, the following order was entered:

"On motion of J. B. Campbell, complainant's solicitor, it is ordered that he have leave to file the affidavit submitted herewith.

(Signed,) Geo. W. Dargan."

The affidavit is as follows:

"Jas. B. Campbell says, that he has been

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present in Court at \*the call of this cause—once only during the term. On that occasion, Mr. Yeadon, the defendant's solicitor, suggested, that a day for the hearing be appointed, remarking that it was a cause, which he should press to trial. This deponent replied, that he also desired a trial, and if he did not, he conceded that the defendant was entitled to it. That his only difficulty was in getting the testimony of one Doctor Jones, which he deemed important; but if he could not procure the attendance of that witness, he would go to trial without him; and asked, for that reason, that the appointment might be at as late a period in the term as possible. Mr. Yeadon then remarked, to the effect, that he was anxious to get through with his causes so as to be able to leave for

Europe, and that he had a letter from Doctor Jones, which he would send to Mr. Campbell, and that might satisfy him as to his testimony. This deponent then said, if the letter upon inspection should prove satisfactory, he would agree to any day of the term, except of the third week, during which he might desire to be absent, as he expected to be called upon by a member of his family who was ill, to go north on the 17th instant to return on the 25th instant. He was, in consequence of illness and death in his family, withdrawn from the business of the Court from the 13th to the 19th instant, and he knows he never had any agency or part in the appointment of this cause for hearing on Thursday the 22d day of June. He had no knowledge of its having been so appointed till informed by his Honor, the Chancellor, on Wednesday the 21st instant.

"He would not have consented to the appointment of that day, when the only opportunity he had to signify assent or dissent was offered for the reason that he expected to be absent from the city as above.

"On Wednesday, the 21st instant, his Honor, the Chancellor, called his attention to the case, stating that it had been appointed for the next day, but was the second in order, and as it was a short case, and as

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the other appointed would take \*more time, he proposed to reverse the order and hear this cause first.

"This deponent made no objection, either to the appointment of the day, or the reversal of the order. Mr. Yeadon was not present to object or assent, and this deponent received no further notice from any one, but prepared and was ready for a trial on Thursday, and expected to have an opportunity as soon as the case of Read v. Read, then being heard, should be concluded. He was engaged till a little before two o'clock, at his office in Broad street, at which time he came out for the purpose of going to the Court House—when, finding that it was raining, he turned to Edgerton & Richard's store, and bought an umbrella, where he was detained a few moments in conversation with Mr. J. J. Middleton—came out with him; and while they were standing in the street, Messrs. De Saussure and McCrady passed, and informed him that Read v. Read was concluded. This deponent then hastened to the Court House, and was there informed that this cause had been dismissed in consequence of his absence. Upon examination of the order, he found it there stated, that the trial of the cause had been fixed for that day, on his, this deponent's motion. He called the attention of the Court to this error, and Mr. Yeadon very properly concurred that it was an error, and that the appointment had not been made on motion of Mr. Campbell.

"His Honor, the Chancellor, thereupon erased the error from the order, remarking at the same time, as he was understood by this deponent, that he was still of the impression that the appointment had been made on motion of Mr. Campbell."

The complainant appealed, and moved that the cause be restored to the docket upon the grounds:

1. Because the circumstances under which

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the cause was \*called, as if appointed by consent, and the bill dismissed in the absence of complainant's counsel, did not warrant the same.

2. Because the Chancellor's declaring that the cause was beyond his control, except by consent of defendant's solicitor, and thereby preventing a formal motion to restore, was an error of law, and the complainant was entitled, on motion, and sufficient cause shown, to have the cause restored to the docket and set down for hearing.

3. Because, at any time during the term, and before enrollment of a decree, it is within the control of the Chancellor to erase, amend, alter or reverse the same; and the decree, in this case, should have been set aside by the Court, without the consent of the parties.

Campbell, for appellant,

Yeadon, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. This case is submitted to us on the brief without argument; and where counsel refrain from all attempt to enlighten us by illustration of principles and citation of authorities, we may be excused in attaining and declaring our determination in a perfunctory manner, and without elaborate research or discussion.

Taking the case as made by the affidavit of the solicitor of plaintiff and appellant, we do not perceive that any sufficient showing is made against the Chancellor's exercise of discretion in dismissing the bill. It is stated and admitted in this affidavit, that at an early day of the June sitting, the affiant received notice from the solicitor of defendant that the trial of this cause would be pressed, and acknowledged that defend-

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ant \*was entitled to a trial; that the day before the order of dismissal, the Chancellor informed the affiant that the cause was set down for hearing the next day, and that a cause precedent in order would be postponed; and that affiant then made no objection to the time and order of hearing mentioned to him, nor intimated that the day of hearing had been assigned without his consent; and yet, that the solicitor did

not appear in Court until 2 o'clock, within an hour of the time of adjournment, and after the bill had been dismissed in consequence of his absence.

It is not suggested in the affidavit that any express application was made to the Chancellor to vacate the order of dismissal and restore the cause to the docket, although it is intimated in the grounds of appeal that the Chancellor expressed an opinion that the order could be vacated by consent only, and thus repressed a direct motion to vacate and restore, as the opposing counsel resisted. The brief, however, does not present a fit case for the discussion of the power of the Court over its previous orders at the same sitting; and the appeal may be disposed of by considering the propriety of the order actually made.

In the regular procedure of the Court, the Chancellor is required to call once, if the length of the sitting be sufficient for the purpose, and once only, all the causes on the dockets; and all parties and their counsel are required to be in attendance on the Court, and to present their causes for trial when they are reached in regular sequence. The Chancellor, after calling the dockets from beginning to end, and allowing every party in his turn to offer his complaint or defence, obtains control of the order of business; and he may afterwards prescribe the course of hearing upon any arrangement which may seem best adapted to the convenient and satisfactory dispatch of business. Where special days are assigned for hearing particular causes, he reasonably expects special punctuality in the attendance of parties, witnesses and

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counsel, \*and the most stringent exaction on his part in enforcement of such attendance cannot be fairly denounced as an abuse of discretion. In the present case, according to his own showing, the plaintiff failed to offer his claim for adjudication on the regular call of the docket, and another day for trial was assigned, which seemed to be satisfactory to his solicitor, as he intimated no objection to the time assigned when premonished of it by the superogatory courtesy of the Chancellor; yet on neither occasion was the party in waiting and ready to proceed, as he should have been on both, and on the latter occasion, his solicitor, without exhibiting any sufficient excuse for his absence, or deputing any one to inform the Court of the reason of his absence, did not appear in Court until the judicial day was within an hour of expiration. We think that the discretion of the Chancellor, (really not the subject of appeal), was rightfully exercised in mulcting the plaintiff with costs; and we suppose, without any rigid investigation of the matter, that costs only, and not inhibition



of new suit, follow the order of the Chancellor.

It is ordered and decreed, that the decree be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Appeal dismissed.

7 Rich. Eq. \*254

\*THOMAS NAPIER v. J. J. GIDIERE,  
Executor.

(Charleston. Jan. Term, 1855.)

[Attachment ⇨261.]

Bonds taken under the order of the Court, pending litigation, for security of the rights of the litigants, as creatures of the Court are within its judicial control, and should not be employed vexatiously.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 929-944; Dec. Dig. ⇨261.]

[Judgment ⇨570.]

On such a bond suit at law had been brought by leave of the Court, and plaintiff was nonsuited on the merits, and the nonsuit was sustained by the Court of Appeals. Application for leave to bring a new suit on the bond was refused—the applicant not showing that he could now make a different case from that made on the former trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1031; Dec. Dig. ⇨570.]

[Bonds ⇨71.]

The Court will not order such a bond to be cancelled on the mere motion of the obligors.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 54; Dec. Dig. ⇨71.]

Before Dargan, Ch., at Charleston, June, 1854.

A report of the case was made by his Honor, the presiding Chancellor, which is as follows:

"This was a motion on the part of the plaintiff, that the bond of the defendant should be delivered to him, to the end that he might institute a suit on said bond, against Gidiere and his sureties, in the Court of Law. The plaintiff had formerly brought a suit on said bond, and was nonsuited, on the ground that no process of attachment had been lodged in the sheriff's office. The plaintiff appealed, and moved to set aside the verdict. The appeal was dismissed, and the verdict stood. The plaintiff now moved that the bond be delivered up to him, with leave to bring another action at Law upon said bond; he offering, as a condition precedent, to pay the costs of the former suit.

"The motion was refused; unless the plaintiff could show, that he could make a different case from that made in the former trial. The plaintiff made no pretence that he could adduce any additional evidence. It was contended, that the nonsuit concluded nothing, and that the plaintiff had a

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right \*to sue again. Though the nonsuit

could not operate as a bar, or an estoppel, the decision in the former trial, confirmed by the decision of the Law Court of Appeals, settled this, that the plaintiff could not recover on the proof then made; and unless he could satisfactorily show, that he could supply the defects in the testimony, on which the former action failed, he ought not again be allowed to harrass the same Court, and the parties with another action. The motion was refused.

"A motion was then submitted on the part of the defendants, that the bond be delivered up to be canceled. This motion was granted, and an order to that effect was passed. As there was no prospect that there ever could be a recovery upon the bond, I thought it was time that this expensive and protracted litigation should be brought to a close."

The plaintiff appealed from the refusal to grant his order, and also from the order, directing the bond of Gidiere to be delivered up to be canceled, on the grounds:

1. That after the Court of Appeals in Equity had directed a suit at Law to try the liability of the defendant on his bond, the plaintiff was entitled to a verdict of the jury as to that issue.

2. That the plaintiff in nonsuit is not compelled to adduce additional testimony, (before suit,) to enable him to bring another action; which is proper in those cases where the verdict of the jury is to be reviewed, additional testimony having come to light since the verdict, but that a judgment in nonsuit is not the same as a verdict of the jury, and cannot decide the issue of liability or not.

3. That a nonsuit is no bar or estoppel to another action on the bond, and that upon the terms of his paying the costs of the nonsuit, the plaintiff is entitled to proceed again.

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\*4. That the question, as to whether the plaintiff could ever recover on the bond, was one of Law, and not of equity—to be decided by a jury on the testimony then adduced.

5. That the order granted was contrary to Law and Equity.

Whaley, for appellant.

Petigru, Memminger, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. This case in various stages has been frequently considered in the Courts of Law and Equity. Speers Eq. 215 [40 Am. Dec. 613]; 3 Strob. Eq. 192; 4 Strob. 438; 5 Rich. 386; 7 Rich. 168. And this appeal involves the question, whether the Court of Law shall be further vexed with the plaintiff's clamor.

The Chancellor on circuit refused the plaintiff's motion, that the bond of defendant be delivered to plaintiff, with leave to bring another suit at law thereupon. Plaintiff

had instituted, with leave of this Court, one suit at law upon this bond, in which he was nonsuited, by the judgment of the Circuit Court and the Court of Appeals, because the facts proved by him were insufficient in law to authorize a recovery. Leave to prosecute his claims further on the bond was offered to him, if he could show that he could vary substantially the case once presented and adjudged, but he did not profess that he could adduce any additional evidence.

The grounds of appeal to some extent are taken in misconception of the principles on which the Chancellor acted. He did not dispute the legal propositions, that a nonsuit is not ordinarily a bar to another action in the same right, and that a plaintiff, who has control of the instrument which is the cause of action, is not bound, as a con-

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dition precedent to renewed \*clamor after nonsuit, to exhibit additional evidence. He merely decided, that bonds taken under the order of this Court, pending litigation, for the security of the rights of the litigants, as creatures of the Court are within its judicial control; and that they should not be employed vexatiously.

We concur in these views of the Chancellor. Such bonds are not demandable as of right by any party, and in the administration of the jurisdiction of the court, they are granted in judicial discretion, in each case, according to its exigency, to preserve or protect the rights of the parties. The first order in this case was, that the defendant, as executor of Descoudres, should pay into Court, before final judgment, a certain sum of money admitted to be in his hands as assets of his testator. Surely this order was administrative and discretionary, for no plaintiff can demand execution until he has obtained judgment: and the substituted order, that defendant give bonds to pay the money in his hands within ten days after the judgment of the Court of Appeals on his appeal, or render his person under the attachment which plaintiff had issued upon the former order, must be of the same administrative and discretionary character. The bond executed in pursuance of the order, must follow the nature of the order, and be equally liable to revocation and control as the order itself. A security granted on a particular exigency, does not necessarily survive the occasion. The mode adopted by the plaintiff for the enforcement of the former order, was an attachment against the person of defendant; probably adopted in prudent foresight, that a *fi. fa.* would only produce the sheriff's return of *nulla bona*; and the latter order secured to the plaintiff the same remedy. It was his fault or his choice to withdraw from the sheriff the process authorizing arrest of defendant's body, and not to renew such process. The Judges of

the Court of Law, to which tribunal the plaintiff was once remitted by our permission, have solemnly determined that the plaintiff could not under the circumstances

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of the case recover, according to the \*law of the land; and there is no propriety in asking them for a renewed expression of their judgment on the same state of facts. It is urged by the plaintiff that a verdict of a jury is the only final determination of a cause at law, but we suppose that the maxim is still of force, *ad questionem facti, non respondent iudices, ad questionem legis non respondent juratores*. The Judges inform us, in the last report of this case, (7 Rich. 168,) that in the existing and apparent state of facts, the plaintiff cannot get to the jury, and must be nonsuited by the Court. We look to the Judges for the establishment of doctrine, and to the jury for the finding of facts; and when we are advertised that, upon a conceded state of facts, a plaintiff cannot recover in a co-ordinate tribunal, we should violate comity and good sense in permitting a new trial, if we have the discretion to refuse the application. The motion of the plaintiff for leave to sue again, admits our discretionary control over the bond by necessary implication. This might be further demonstrated by showing our control over *ne exeat* bonds, by taking forthcoming bonds in substitution, and by other analogous cases, but we consider that the doctrine of the decree needs no elaborate vindication. *Lattimer v. Elgin*, 4 Des. 26; *Mitchell v. Bunch*, 2 Paige, 606; *Jesup v. Hill*, 7 Paige, 95; *McNamara v. Dwyer*, Ib. 239.

We prefer, however, the Circuit Chancellor concurring, to vacate the order, that the bond of Napier and his sureties be cancelled; and refusing the present application for new suit without showing of new evidence, to keep the obligation in the custody of the Court, to be used in an action at law, when the plaintiff may satisfy us that he can make a case in that Court substantially different from the case already determined. It is a grave thing to cancel a deed or obligation, the most solemn form of contract; and it is irregular in procedure to order such cancellation on mere motion, without bill or petition, bringing all the parties in interest before the Court. Besides we cannot foresee, that the plaintiff may not, at some future

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time, present \*for adjudication, on the instrument of contract, a very different case from that which is adjudicated. It is within the range of possibility, that he may establish, on satisfactory evidence, that, having an attachment in the sheriff's office against Gidiere, the latter at all times refused to render himself in pursuance of the condition of his obligation. It is a fallacious argument for defendant, that as the sheriff



being witness to the bond, must be always produced by plaintiff, and as the sheriff, the best witness, has testified that there was no attachment in his office when the defendant offered to render himself, there cannot be such change of circumstances as will justify the plaintiff's recovery on the bond. The sheriff is no better witness than any other person; and it might be that the sheriff, when made a witness in a new suit, should acknowledge mistake in his former testimony; or that other witnesses might overthrow his testimony. Whatever doubts there may be as to the right of a party to assail the general character of his own witness offered from necessity, there can be no doubt that in such case he may prove by other witnesses a state of facts differing from the testimony of the indispensable witness.

It is ordered and decreed, from caution, that the order heretofore passed, granting leave to plaintiff to sue or continue suit at law on the bond of defendant, and requiring the Master of this Court to attend the Court or Law, and produce the bond, be recalled as to any further proceeding.

It is further ordered, that the order cancelling the bond of defendant and his sureties be annulled, and that said bond be retained within the custody of the Court, subject to its future order.

It is finally ordered, that the Circuit decree be modified as indicated in this judgment; and that in other particulars the decree be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Decree modified.

#### 7 Rich. Eq. \*260

\*ALONZO J. WHITE v. THOMAS BENNETT, and Others.

(Charleston. Jan. Term, 1855.)

[*Specific Performance* ⇨105.]

After notice, in April, 1850, that vendor renounced the agreement, vendee's delay, in filing his bill, until July, 1852, held to oust him of his remedy in Equity by decree for specific performance.

[Ed. Note.—Cited in *Sams v. Fripp*, 10 Rich. Eq. 456; *Kirksey v. Keith*, 11 Rich. Eq. 39; *McMakin v. Gowan*, 18 S. C. 505.

For other cases, see *Specific Performance*, Cent. Dig. § 328; Dec. Dig. ⇨105.]

Before Dunkin, Ch., at Charleston, February, 1853.

Dunkin, Ch. John Laurens and his sister, Caroline, (afterwards Mrs. Read,) owned each one-sixteenth of certain unimproved marsh lands extending from East Bay to the channel of Cooper River. The complainant alleges that some time in November, 1849, he contracted for the purchase of these interests from Philip J. Porcher, as the agent of the proprietors, and that he was to pay fif-

teen hundred dollars for the share of each; that the contract for the share of Mrs. Read had been consummated, but that John Laurens had declined to complete the contract for his portion, and had subsequently sold and conveyed the same to his co-defendant, Thomas Bennett, who purchased with notice of the prior agreement. The prayer of the bill is, that the defendant, John Laurens, may be decreed to perform specifically the agreement which he made through his agent, P. J. Porcher; and that the conveyance to Thomas Bennett may be delivered up to be cancelled. This is the general outline of the case presented by the plaintiff. The answers of the several defendants, and the testimony taken at the hearing, set forth the proper modifications of this statement, and exhibit, with no material discrepancy in the same, the narrative of facts claiming the attention and judgment of the court. The evidence accompanies the decree, and makes part of it. From the statement of Philip J. Porcher, it appears that in November, 1849, he met the late James W. Read, (the husband of Mrs. Read,) who told him that he and his wife

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had an interest in the marsh land, and requested him, (as a broker,) to go and offer it to Edward R. Laurens, his wife's uncle, for one thousand dollars, if he would give that price. Said he meant the whole of the marsh land. The witness accordingly saw E. R. Laurens, who said he did not think it was worth more than one thousand dollars, but that the witness could get more than that for it from others, and that he would not take it—said that Calder had purchased an eighth, and had been offered three thousand dollars for it. He also told witness, if he could sell Read's share for fifteen hundred dollars, he might sell John Laurens' also—that he (Edward R. Laurens) was to get the proceeds of it. Witness mentioned to complainant that he had these shares for sale, and would take three thousand dollars for them. Complainant said he thought he knew a party who would take them, and he would see the party. It was ultimately agreed that complainant should be the purchaser. H. P. Walker, Esq., the professional adviser of the complainant, prepared the conveyances. When they came to execute the papers, both Edward R. Laurens and J. W. Read objected, stating that they did not mean to include the marsh lands situate on the opposite side of the river. The conveyances, as prepared, included not only the marsh land adjoining East Bay, but also the marsh lands, including several small islands, between Town Creek and Hobcaw, as also eleven acres of land between Schute's Folly, on the east side of Cooper River, and Hog Island channel; and at this juncture Mr. Porcher wrote to John Laurens the letter of 1st December, 1849, stating what had passed, and the difficulty which had occurred,

and requesting to hear from him on the subject. This was followed by his (Porcher's) letter of 7th December, stating his hope that they would be able to arrange the matter. Both letters reached John Laurens in the country by the same mail, and he immediately replied that he "had never authorized any one to sell, or offer for sale, any portion of his lands; that some time previously he had given to his uncle, E. R. Laurens, his (J. L.'s)

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\*sixteenth of the marsh lands in Laurens street; and if he had sold, or agreed to sell, it was a matter in which he (J. L.) had no interest, and could exercise no control—but that it was to be distinctly understood, that he had not given to his uncle any part of his interest in Town Creek Island, or in Schute's Folly." It may be remarked, that the family residence is at the corner of Laurens street and East Bay; and the marsh land is bounded on the north partly by the family mansion and grounds attached, and partly by Laurens street, and on the west by East Bay. The answer of John Laurens states that in 1846, or 1847, he was on a visit to his uncle, Edward R. Laurens, whose daughter he had married; that his uncle was the devisee of the family mansion, and was residing there at the time. That he, several times, expressed regret that he had not an interest in these marsh lands, and that he, (J. L.,) supposing from what he said that they would be of some peculiar value to him, requested him to accept his interest, and to prepare a deed of gift for the same, which he would execute; that his uncle accepted the gift, but that the deed never was prepared, although the request to do so had been more than once repeated by him (J. L.) Mr. Porcher continued his narrative, that the complainant becoming satisfied that he (the witness) was mistaken as to the Town Creek and Schute's Folly land, gave up that point; that they then agreed for the lands intended to be sold; that they agreed about every thing, until they came to the southern boundary; the witness was of opinion that there was a street there; complainant said, "no, that it called for Bennett's land;" complainant, in talking, convinced witness that no street had been laid out, and witness then gave him that boundary as he directed—the agreement was accordingly drawn, which he verifies, and is as follows:

"Memorandum of agreement between P. J. Porcher, as agent of J. W. Read and wife, and E. R. Laurens, and J. H. Read, junior, their trustees, and of John Laurens, (acting in conformity with instructions conveyed to

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him,) as appears by \*the letter of the said J. W. Read to him, dated 9th December, 1849, and of the said John Laurens to him, dated 10th December, 1849, of the one part, and A. J. White of the other part. The said P. J. Porcher, as agent, as aforesaid, agrees to

sell to A. J. White two sixteenths in the marsh land formerly the property of Henry Laurens, deceased, situate in Charleston, between Laurens street, East Bay, Thomas Bennett's land, and Cooper River channel, at the price of three thousand dollars, viz., fifteen hundred dollars for share of Mrs. Read, and fifteen hundred dollars for share of John Laurens, both payments to be made in cash; and the said A. J. White agrees to buy the said property, and to pay the said price for the same, on the execution, by all proper parties, of sufficient conveyances of the said two sixteenth shares, such conveyances to bear date the 20th November now last past.

"Witness our hands this 19th December, 1849.

A. J. White. [L. S.]

Philip J. Porcher. [L. S.]

Agent of all parties above mentioned.

"Witness, James L. Stocker."

That after the execution of this agreement, complainant referred the matter back to Mr. Walker to prepare the titles; they were accordingly drawn, and witness delivered them to E. R. Laurens to be executed by the parties. They were returned by E. R. Laurens unexecuted, accompanied by another deed properly executed, but having the southern boundary altered; complainant refused to receive this deed, on account of that boundary. Afterwards a deed for Read's interest was executed and delivered, with the southern boundary according to the agreement, upon the stipulation on the part of the complainant to indemnify in consequence of this boundary, which stipulation was indorsed upon the conveyance; about the other one-sixteenth (of John Laurens) they discussed a long time. At length E. R. Laurens agreed to submit it to Mr. Petigru, and if he said

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\*John Laurens could sign the deed, he would do it. Upon consulting Mr. Petigru, witness was told by him that John Laurens could not conscientiously sign the deed with that boundary, in consequence of previous deeds which the family had executed. There the matter dropped. Witness never heard any more upon the subject until he afterwards learned that Laurens had sold to Thomas Bennett, and that an equity case would come out of it. The witness identified the deed prepared by Mr. Walker, and which Laurens declined to execute. The objection as to the southern boundary was after the agreement of 19th December, and was made when this title was tendered to be executed; that the witness carried the title to Mr. Petigru, and asked him if Laurens could sign it. The next day witness called at Mr. Petigru's office, and he showed witness some family papers (of the Laurens' family,) and said he (Laurens) could not sign it. In order to understand the character of this objection, as well as the subsequent testimony, it may be well to state that on 2d June, 1829, the



heirs of Henry Laurens, deceased, (among whom were John Laurens,) being about to divide and lay out the marsh lands on East Bay belonging to that estate, made a communication to that effect to the City Council of Charleston, and expressed their willingness to have a piece of land in front of Society street reserved for a public street, upon certain conditions, and suggested that the value of such donation would be considerable, as, without it, the public had no egress to the river. On 16th June, 1829, Council agreed to the conditions, and referred to the City Attorney the matter of obtaining a deed of release. In July, 1829, it was brought to the notice of Council, that the heirs of Laurens desired an additional covenant on the part of the Council, in relation to the land to be ceded by them for the continuation of Society street; the matter was deferred; but on 21st August, 1832, Council agreed to the terms proposed, and directed the City Attorney to prepare the deeds accordingly. In June, 1844, the subject was fully reviewed by the City Council, the

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\*committee suggesting that the minority of some of the parties was the probable cause of the delay, and they again instructed the City Attorney to take the proper measures, as set forth in the report in relation to Society street.

In the mean time, to wit, on the 23d June, 1829, the heirs of Henry Laurens executed a deed purporting to be under the authority of proceedings had in this Court, at the sittings immediately previous to the date of said deed, by which, in consideration of four thousand two hundred and fifty dollars paid to them by Thomas Bennett, they conveyed to him all that parcel of land in the city of Charleston, butting and bounding to the west on East Bay street, to the south on lands now belonging to the said Thomas Bennett, to the north by a street forty feet wide to be a continuation of Society street, and to the east by Cooper River, "as will more fully appear by a plat thereof made and executed by Charles Parker, City Surveyor, dated 17th June, 1829, and hereto annexed as part of these presents." This plat plainly delineated a street forty feet wide, as a continuation of Society street from East Bay to the channel of Cooper River, as the northern boundary of the land thus granted by the heirs of Henry Laurens, deceased, to Thomas Bennett. The deed and plat were both recorded in the Register Office, 10th August, 1830.

Mr. Porcher, in his cross-examination by the defendants, referred again to the interview which he had with Mr. Petigru, in consequence of E. R. Laurens' statement that he (J. L.) would sign the deed if Mr. Petigru thought he might do so. Witness said that the paper which Mr. Petigru brought down was a deed from the Laurens' family to Mr. Bennett, in which they had given, or reserved

to Mr. Bennett, the right to that street; this was Mr. Petigru's objection. Mr. P. wrote an interlineation, which, he said, if made, Mr. Laurens might sign the deed; the interlineation was like that in the deed afterwards executed by John Laurens to Thomas Bennett; this interlineation was

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submitted to the complainant, and \*he declined to receive such deed. When they were drawing the agreement of 19th December, witness hesitated about calling for the Southern boundary on Bennett's land, as witness was under the impression there was a street there, as he had heard something of it. Complainant said, that rumor had all been done away with, and there was no street there; upon this representation, witness introduced this as the Southern boundary; if left to himself, he (witness) would have given a street as the Southern boundary, but complainant convinced him he was mistaken. All witness's instructions as to the disposal of John Laurens' interest, were received from Edward R. Laurens. Witness understood that he was authorized to dispose of all John Laurens' rights, whatever they might be; the Laurenses never authorized or recognized the Southern boundary as given by witness. At the time of the agreement, witness had seen no papers; if witness had seen the deed from the Laurens family to Thos. Bennett before he signed the agreement, he never would have signed it, giving that boundary.

H. P. Walker, Esq., was the next witness called for complainant. His statement is fully detailed in the notes of evidence. Mr. Walker was the professional adviser of complainant, in November, 1849, in relation to this transaction. He examined the title, and was of opinion that the legal title to what was called "Society street continued," was in the Laurens family, and he drew the conveyances accordingly; these were rejected, and returned. Edward R. Laurens brought him a deed calling for Society street as the Southern boundary, and a deed was also brought, leaving the Southern boundary in blank; both were rejected by witness. Mr. Walker stated that Mr. Campbell became acquainted with the contract before the deeds, including the Schute's Folly and Town Creek land, were out of witness' possession. He was in witness' office, as an acquaintance, while he was drawing the deeds. When Mr. Campbell became acquainted with

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the contents of the deed, \*he remonstrated with witness, as he was requiring a deed with a description of this character, it was injurious to Mr. Bennett, and he showed witness the deed of 1829 from the Laurens family, with this plat attached. Witness must have told Mr. C. that although Mr. B. might have the use, John Laurens had the soil. Mr. C. never conversed with witness afterwards, until the difficulty arose as to the

completion of the contract. On 2d January, 1850, witness addressed a letter to John Laurens, (of which he adduced a copy,) which he thinks he is not mistaken in saying that he left with Col. Porcher. Between the date of this letter and that of the 11th of January, hereafter to be noticed, witness and Mr. Campbell had a conference at his office, and they attempted to draft a deed which would reconcile the claims of Mr. Bennett and the complainant. They accordingly framed a deed, which he (the witness) thought his client (the complainant) might very safely accept. (Witness produced from his papers the deed thus drafted.) The deed thus prepared remained in Mr. Campbell's possession for a day, and was then withdrawn by witness; it was withdrawn because complainant was unwilling to take any thing less than what he deemed his right. When the witness informed the complainant what was the character of the deed, he (complainant) objected, because it recognized the deed of 1829; as that deed (of 1829) was executed by the guardian of John Laurens, complainant was unwilling to recognize the deed of 1829 or do anything which would have that appearance. Witness finding that his course was somewhat censured, or not approved by his principal, withdrew the deed. On the 11th January, the witness addressed the letter of that date to John Laurens, which he thinks he left also with Mr. Porcher; and on 23d January he addressed the final letter of 23d January to Mr. Porcher, which he (Mr. P.) thinks was duly received by him. Mr. Walker, in conclusion, said he did not think he had ever seen Mr. Petigru's handwriting on the subject. Mr. Campbell told him (witness)

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that Mr. Petigru thought it was \*shameful in them to ask for such a boundary. Some time afterwards, Edward R. Laurens came to witness with the deed having the Southern boundary on Society street, and said, if they did not take that, it would be sold to somebody else. Witness replied, that could hardly be done with their agreement on record. Laurens replied, he did not care a fig about that. This conversation was prior to the conveyance to Mr. Bennett. Witness ceased to have any communication with any party after the Spring of 1850, certainly not after April, he considered it useless to make any further effort.

The deed from John Laurens to Thomas Bennett bears date 11th July, 1850, and was placed on record on the day following.

Defendants offered in evidence (among other things) a letter from E. R. Laurens to J. B. Campbell, as solicitor of Mr. Bennett, stating that John Laurens had refused, and still refused to convey to Mr. White his one-sixteenth of the marsh lands, with a Southern boundary upon the lands of Mr. Bennett; and that it was time the matter should be definitely settled one way or the other, and

requested to know whether Mr. B. would take the land at the same price, calling for a street or private way in continuation of Society street, as the Southern boundary. The deed of 11th July, 1850, to Thomas Bennett, describes the land as lying on the Eastern side of East Bay street, in the City of Charleston, between Laurens street and Society street continued; butting and bounding to the East on the channel of Cooper River, to the South on lands of Thomas Bennett, saving and reserving to the said Thomas Bennett his right in the continuation of Society street, as contained in a deed of the adjacent property, by Eliza Laurens, and others, dated 23d June, 1829, &c.

Mr. Petigru was examined for the defendants, and his recollection confirmed the statement of Mr. Porcher, so far as related to the interview with himself. He said Mr. (E. R.) Laurens had consulted him as a friend on the subject of the boundary to be given, and

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that he had recommended, in the \*way of concession, that a deed should be given with a description such as that contained in the deed of 11th July, 1850, to Thomas Bennett, (which was read to the witness.)

It seems only necessary further to add, that in the deed prepared jointly by Mr. Walker and Mr. Campbell, (and which seems to be in the handwriting of the former,) the premises are described, and bounded "to the South on land of Thomas Bennett," &c., "saving and excepting so much thereof as, by a certain deed of conveyance, bearing date the twenty-third day of June, 1829, was conveyed to the said Thomas Bennett."

This bill was not filed until 22d July, 1852. Mr. Walker testified, however, that he did not know of the deed to Mr. Bennett until long afterwards; although, at the request of complainant, he had kept searching the offices; thinks he first knew of it in May, 1852.

The case will be first considered between the complainant and John Laurens. And it is deemed more simple, although perhaps not strictly in accordance with the true position of John Laurens, to regard him as in all respect represented by Edward R. Laurens.

It has been properly remarked, that the specific performance of contracts belongs rather to the extraordinary jurisdiction of the Court of Chancery. For the breach of such contract, as of all others, the ordinary forum applies a remedy, although the remedy may be sometimes inadequate. The interference of this Court rests upon a sound judicial discretion. The agreement may relate to lands—may be in no manner repugnant to the Statute of Frauds, may be perfect in all its parts, and yet this Court be bound, on well settled principles, to decline its aid, and leave the party to such compensation in damages, as the common tribunals afford. In *Wedgwood v. Adams*, 6 Beav. 600, Lord Langdale, M. R., states the course of the Court. He



says—"The Court must always have regard to the circumstances of each case, and see whether it is reasonable that it should, by its

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extraordinary jurisdiction, interfere \*and order a specific performance, knowing at the time that if it abstains from so doing, a measure of damages may be found and awarded in another Court. Though you cannot define what may be considered reasonable or unreasonable by way of general rule, you may very well, in a particular case, come to a balance of inconvenience, and determine the propriety of leaving the plaintiff to his legal remedy by recovery of damages." "So, if the terms of the agreement are uncertain: If there has been an innocent misdescription of the premises: if the enforcement of the agreement specifically would injure the rights of third persons, or would subject the party himself to hardships, as in the instance cited by Lord Hardwicke in *Ramsden v. Hyllton*, (2 Ves. 307,) relief is refused. The subject was fully discussed by Lord Redesdale in *Harnett v. Yielding*, 2 Sch. & L. 549." "The party seeking a specific performance must show (says he) that he does not call upon the other party to do an act which he is not lawfully competent to do; for, if he does, a consequence is produced that quite passes by the object of the Court in exercising the jurisdiction, which is to do more complete justice. If a party is compelled to do an act which he is not lawfully authorized to do, he is exposed to a new action for damages at the suit of the person injured by such act; and, therefore, if a bill is filed for specific performance of an agreement, made by a man who appears to have had a bad title, he is not compellable to execute it, unless the party seeking performance is willing to accept such a title as he is able to give, and that only in cases where an injury would be sustained by the party plaintiff, in case he were not to get such an execution of the agreement as the defendant can give. I take the reason to be this, among others, not only that it is laying the foundation of an action at law, in which damages may be recovered against the party, but also that it is, by possibility, injuring a third person, by creating a title with which he may have to contend. There is also another ground on which Courts of Equity

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refuse to \*enforce specific execution of agreements, that is, when, from the circumstances, it is doubtful whether the party meant to contract to the extent that he is sought to be charged—all these are held sufficient grounds to induce the Court to forbear decreeing specific performance, that being a remedy intended by Courts of Equity to supply what are supposed to be the defects in the remedy given by the Courts of Law; under these circumstances, therefore, considerable caution is to be used in decreeing specific performance of agreements."

It is not very clear that the decision of this case would require the Court to invoke the aid of principles thus strongly stated. The authority given to Mr Porcher was altogether indefinite, except that he was to sell the interest of John Laurens, as well as that of Mrs. Read; nothing was said of quantity or boundaries, and yet it may well have been deemed sufficiently explicit for the purpose contemplated. It was very manifest that he misapprehended the intention of the parties when he undertook to bargain for their lands on the opposite side of the river. When the error was discovered, of course, neither party was bound, and a less sum was offered in Mr. Porcher's letter of 7th December. The written agreement of 19th December, 1849, is on its face sufficiently vague; nothing is said of quantity or boundaries, except in general terms. But the evidence of Mr. Porcher shows that the boundaries were discussed prior to the signature of the agreement. Intending to bargain for no more than the interest of his principals, he was under the impression that "Society street continued," or "some street," was the Southern boundary, until assured to the contrary by the complainant; and then, without referring to his principals, he signed the agreement, thereby intending to give Mr. Bennett's land as the Southern boundary, being convinced by the reasons of the complainant, that there was no street on the Southern boundary. The argument on the part of the complainant, is, that under this agreement, the defendant, John Laurens, could be compelled

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to execute a title \*calling for the land of Thomas Bennett as the Southern boundary, without any recognition of the existence of a street on the Southern border, or any reservation of the rights of Mr. Bennett, in relation to such street, under the deed of 1829. It appears to the Court an entire misapprehension to infer that, because no right in the public could be established, and that, moreover, some infirmity may exist in the conveyance of 1829, therefore the complainant is entitled to a decree. The Court would not compel John Laurens to do an act which would stir such litigation. In the language of Lord Redesdale, they would not oblige him to execute a conveyance, which, by possibility, might injure a third person, by creating a title with which that third person may have to contend. Under such circumstances, the Court does not call in question the validity of the agreement, or its obligatory character, but leaves the party to such compensation for the breach as is afforded in an action for damages.

But this is not the ground upon which the defendant, John Laurens, would choose to place his case. On 2d June, 1829, those assuming to act for him, and in his behalf, while he was yet a minor, undertook to enter into an agreement with the City Council of Charles-

ton, for the mutual benefit of the parties to the agreement, by which he, with the other heirs of Henry Laurens, did dedicate to the public use as a street, a certain portion of marsh land which they then owned, and through which the street was to pass from East Bay to the channel of Cooper River; and in consideration of such dedication, certain valuable immunities were secured to the owners of the adjacent lands. Some two years afterwards, to wit, in June, 1831, the head of the family, Mrs. Henry Laurens, asked and obtained from the City Council "permission to erect a fence across" Society street continued, then recently granted by the heirs of Henry Laurens to the city; with a proviso, that the same be removed as soon as the City Council should direct the same. On the 23d June, 1829, the southern part of this

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marsh land was conveyed to Thomas Bennett under decree of this Court, by persons assuming in like manner to act for the defendant; and, in their deed, the northern boundary of the land was described as "a street forty feet wide, to be a continuation of Society street," which street was distinctly laid out in a plat accompanying the deed, as running through the marsh land from west to east, leaving the land thereby granted to Thomas Bennett to the south of the street, and the residue of the marsh land to the north of said street. Whether the heirs of Henry Laurens could now deny the right of the public, or could disregard the representations thus made to a subsequent vendee, or whether John Laurens would now be at liberty to repudiate all the acts thus done in his name, are inquiries which the Court is not called on to solve. But the Court is asked to compel John Laurens to do an act which would throw discredit on these transactions, and would effectually estop him from confirming these transactions, if they now needed confirmation on his part. He was willing to execute a deed, the draft of which was prepared by the solicitor of the complainant, and acquiesced in by the solicitor of Mr. Bennett. The deed calls for the land of Thomas Bennett as the southern boundary of the premises to be conveyed, with a reservation of "so much thereof as by the deed of 23d June, 1829, was conveyed to the said Thomas Bennett." This was rejected, says Mr. Walker, by the complainant, "because it recognized the deed of 1829." If the defendant had been so unfortunate as to embarrass himself by inconsistent obligations,—if, after a parol engagement to convey to one, he had entered into a written agreement to sell to another who was to pay on receiving a good title,—Equity would not interfere in behalf of the latter vendee. Such was the doctrine maintained in *Patterson v. Marty*, 8 Watts, (Pennsylvania,) 374. Specific performance of a contract for the sale of land was refused at the instance of a vendee,

where the contract was made in disregard of a prior parol sale by the vendor, though

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the vendee was ignorant of such prior sale, but the party was left to his action for damages.

Mr. Sugden, commenting on the opinion of Lord Redesdale in *Harnett v. Yielding*, remarks that it is, however, the received opinion, that the purchaser may elect to take the title, such as it is, although no injury would be sustained by him in case the agreement were not executed: and that this rule does not lead to the difficulty apprehended, because, in such case, the covenants must of course be so framed, as not to leave the seller exposed to any action on account of the flaw in his title. *Sugd. Vend.* 209.

This is, substantially, what the defendant, John Laurens, seems, at all times, willing to have done. More than twenty years prior to the agreement of December, 1849, Mr. Bennett had purchased from the family part of the premises, with a representation that his northern boundary was a street extending the entire length of his line from west to east. So soon as the difficulty arose, he, (John Laurens,) was willing to execute a deed leaving the southern boundary in blank; and afterwards, a deed giving Mr. Bennett's land as the southern boundary, but with the qualification that this should not implicate the defendant, or embarrass Mr. Bennett in relation to his rights under the previous purchase. If John Laurens had entered into an explicit agreement to convey, by metes and bounds, the entire premises from Laurens street to Mr. Bennett's land, and had subsequently declined for these reasons, and on 1st of May, 1850, when all negotiation had avowedly terminated, this bill had been filed, the Court would be obliged, on acknowledged principles, either to leave the party to his legal remedy, or, entertaining the bill, have required the defendant to execute a conveyance with the reservations specified. It is not irrelevant to observe that the deed, with such reservation, was prepared with the co-operation, or received the acquiescence and assent, of the solicitor of Mr. Bennett. This deed

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had been declined by the complainant. "After April," (says Mr. Walker,) "I ceased to have any conversation with any party—I considered it useless to make any further effort." Previous to this time, or about this time, El. R. Laurens had expressly notified the witness that unless the complainant received the title tendered, the land would be sold to some other person. The Court only stops to remark that, at this juncture, it was the duty of the complainant to have applied promptly for the aid of this Court, if he considered himself aggrieved. See *Southcomb v. the Bishop of Exeter*, 6 Hare, 211, (27 Eng. C. R.) and a case there cited, in which Sir John Leach dismissed the vendor's bill,



because he did not file it until the expiration of a year after the purchaser had declared the contract at an end. In the principal case it is observed to be "no uncommon thing for the Court to dismiss a bill, intending thereby to leave parties to their legal remedies, and upon the express ground that they are entitled to what the law will give them, though not entitled to the extraordinary assistance of a Court of Equity." More than two years elapsed after the notice of Mr. Laurens, before this bill was filed. In the meantime, to wit., on the last day of May, 1850, Mr. E. R. Laurens addressed a communication to the solicitor of Mr. Bennett, in which, adverting to what had been done, and that it was time the matter of the marsh land should be definitely settled one way or the other; that "John Laurens had refused, and still refused, to convey with the southern boundary demanded; and that he understood Mr. B. would give the same price, with the southern boundary on Society street continued, he asks to hear from him on the subject." On 11th July following, a conveyance was accordingly executed to the defendant, Thomas Bennett, by John Laurens, describing the premises as situate "between Laurens street and Society street continued," and, in other respects, precisely as set forth in the draft prepared by Mr. Walker and Mr. Campbell. Certainly Mr. Bennett must be affected with notice of

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the agreement of December, \*1849, because it was known to his solicitor; but he knew also of the subsequent negotiations, and that they had been finally terminated. For the reasons heretofore stated, the complainant could have demanded from the defendant, John Laurens, no more than he had offered to do. When this was declined, the defendant, John Laurens, was absolved from any equitable obligation to the complainant, and the purchaser from him can stand in no worse situation.

It is ordered and decreed that the bill be dismissed.

The complainant appealed on the grounds:

1. Because under the agreement made through P. J. Porcher, the complainant was entitled to a conveyance from the defendant, John Laurens, of his interest in the premises, in conformity with the terms of that agreement; that there was no impediment either in equity or conscience to such conveyance, and as the defendant, Thomas Bennett, purchased with notice of the previous agreement, the conveyance to him will not be allowed to defeat the equitable rights of the complainant.

2. Because if the premises, or John Laurens' interest therein, were inaccurately described in the agreement, or if there were any real objection founded either on the former conveyance to Thomas Bennett, or on the offer to the City Council of part of the premises to be used as a street, to his giving a

conveyance in accordance with the description in the agreement, yet the complainant would still be entitled to a conveyance of John Laurens' interest, according to such description as might be supposed consistent with his legal or moral obligations, and it is respectfully submitted that his Honor should so have decreed.

3. Because the complainant having never abandoned his contract, but continuing to insist on his rights under it, ought not, as it is respectfully submitted, be denied that equita-

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ble \*relief to which purchasers are entitled in this Court, on the ground of laches, or lapse of time, or the notice given by the defendant, E. R. Laurens.

Walker, Mitchell, for appellant.

Campbell, Lesesne, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. In this case Thomas Bennett, a purchaser with notice of the claim of the plaintiff, has no superior equity to that of his vendor John Laurens. Where a person purchases with full notice of the legal or equitable title of other persons to the same property, he will not be permitted to protect himself against such title; and his own title will be postponed or made subservient to theirs. Courts of Equity will declare him a trustee for the benefit of the persons whose rights he has sought to defraud or defeat. Story Eq. 395.

Then the single question in the case is, whether or not John Laurens is bound to specific performance of the agreement of P. J. Porcher as agent, to convey the land in controversy.

This Court is of opinion, that the decree of the Chancellor dismissing the bill may be well maintained, on the single ground of improper delay in the plaintiff in applying for the peculiar remedy of equity after notice that his vendor renounced the agreement. Granting that John Laurens is responsible for the conduct of his donee by parol of the land, yet this donee, Edward R. Laurens, in April, 1850, gave distinct notice to plaintiff that John Laurens did not feel obliged to convey, and would not convey, the land according to the plaintiff's interpretation of Porcher's agreement as to boundaries, and that unless plaintiff would accept a conveyance which, now confessedly, fulfils in substance the engagements of John Laurens and the demands of the plaintiff, the land would

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be sold to some other \*person. Yet the bill was not filed until July 22, 1852, two years and a quarter after this notification. Time is not usually regarded in equity as of the essence of contracts, and anciently it was considered that it could not be rendered essential by the stipulations of the parties concerning lands; but the tendency of recent decisions is to require persons concerned in

contracts relating to lands as in other contracts, to regard time as material. Other cases confirm the case of *Southcomb v. Bishop of Exeter*, 6 Hare, 211, cited in the Circuit decree. In *Heaply v. Hill*, 2 Sim. and Stu. 29, (1 E. C. R. 332,) Sir John Leach, V. C., dismissed a bill by a lessee for specific performance of an agreement for a lease, because it was not filed for more than two years after the lessor had given notice to the plaintiff of his purpose not to perform the contract on account of the latter not having fulfilled it on his part; where the only reason assigned for delay was that plaintiff's attorney had mislaid the papers relating to the transaction. In *Watson v. Reid*, Russ. and Myl. 336, (4 E. C. R. 404,) Sir Thomas Plumer, M. R., dismissed a vendor's bill for specific performance, on the ground of unreasonable delay, where the vendor did not file his bill until about a year after notice from the purchaser that the latter abandoned the contract. In *Walker v. Jeffreys*, 1 Hare, (23 E. C. R. 348,) Sir James Wigram, V. C., approved the foregoing two cases as sound in principle, too authoritative to be shaken, and as establishing a rule, that if one of two parties to a contract concerning lands gives the other notice that he will not perform the contract, the other after such notice must be prompt in the assertion of his right to enforce the contract, or equity will consider him as acquiescing in the notice, and abandoning any equitable right to the specific execution of the contract, and will leave the parties to their remedies and liabilities at law. Where there is nothing but a resting on the equitable estate, without clothing it with a legal title, by a person in possession of the land and enjoyment of the profits, this is not such laches as will prevent relief.

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*Crofton v. Ormsby*, 2 Sch. and Lef. 604. But here the plaintiff has never been in possession, and contracted to buy lands yielding no rent on mere speculation. According to the rule in *Walker v. Jeffreys*, the plaintiff is ousted from what is called, perhaps improperly, the extraordinary jurisdiction of this Court. I agree with the remark of Sir William Grant, M. R., in *Hall v. Warren*, 9 Ves. 608, that "supposing a contract about lands to have been entered into by a competent party, and to be in the nature and circumstances of it unobjectionable, it is as much of course in this Court to decree a specific performance as it is to give damages at law." It is sometimes said that giving a specific performance is matter of discretion, but although this is true, yet as Lord Eldon says in *White v. Damon*, 7 Ves. 35, "the discretion is not arbitrary and capricious. It must be regulated on grounds that will make it judicial." Discretion does not mean the caprice of a man sitting in the seat of judgment; and merely implies some latitude in the Judge to afford or withhold relief under

the circumstances of each case, according to the rules and doctrines of the Court. For instance, when we declare the plaintiff in this case barred from specific performance by his unreasonable delay, we are not governed by the statute of limitations or any other statute, and we exercise a judicial discretion controlled by authoritative decisions in the Court.

The only excuse made for the plaintiff's delay in filing his bill, is, that having recorded the agreement in the registry of mesne conveyances for Charleston, he waited to ascertain to what other purchaser John Laurens might convey the premises, and that he did not in fact ascertain that the land had been conveyed to Mr. Bennett, until a month or two before filing the bill. This excuse seems feeble than that assigned in *Heaply v. Hill*, although of the same general character.—Registry of an agreement for the sale of land is not required by any statute, and of course cannot operate as implied notice to all persons. Mr. Bennett's conveyance of the

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land was \*registered as required by our statutes, within a few days after July 11, 1850, and affected plaintiff and all other persons with implied notice. There can be no pretence of necessity on the part of plaintiff for waiting to ascertain a subsequent purchaser from John Laurens; for the plaintiff might have proceeded against John Laurens for specific performance as soon as he refused or improperly delayed to fulfill his agreement; and surely his pendency would afford much more implication of notice to subsequent purchasers, than the unrequired registry of the agreement.

If there was no other defence in the case the plaintiff must fail on his laches in pursuing the peculiar remedy of this Court. But we do not mean to disparage the reasoning of the Chancellor as to other objections to the bill; nor to affirm that plaintiff could have maintained his bill if filed the day after notice to him that Laurens had abandoned the contract. The refusal of the plaintiff to accept a conveyance tendered to him of all which he could equitably exact, even when advised to accept by his own counsel; his misrepresentation, whether innocent or intentional, to the broker and agent of defendant misleading the agent concerning Society street continued; his refusal to recognize to any extent the deed of 1829, which his vendor wished to affirm; the nature of his purchase, being of wild-lands of fluctuating and speculative value, for which he might be adequately compensated by damages at law; his insisting that John Laurens should violate his conscientious scruples, and possibly impair the rights of his previous grantees, Mr. Bennett and the City Council; the irregularity of the agent's deputation; the indefiniteness of the description of the premises in the agreement,—these circumstances of



themselves make the specific execution of the agreement very objectionable.

It is ordered and decreed that the decree be affirmed and that the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Decree affirmed.

#### 7 Rich. Eq. \*281

\*J. TUCKER, and Others, v. THOMAS D. CONDY, Ex'or.

W. G. DE SAUSSURE, Adm'r, v. SAME.

(Charleston. Jan. Term, 1855.)

[*Executors and Administrators* ⚡260.]

The assets of a deceased debtor are distributable among his creditors with reference to the rank of their demands at the time of his death; and this order will not be disturbed so as to give preference to the first creditor who obtains judgment against the executor.

[Ed. Note.—Cited in *Edwards v. Sanders*, 6 S. C. 333; *Wilson v. Kelly*, 19 S. C. 167.

For other cases, see *Executors and Administrators*, Cent. Dig. § 939; Dec. Dig. ⚡260.]

Before Johnston, Ch., at Charleston, March, 1854.

The second of these cases was a creditor's bill, in which the plaintiff (no other creditor having come in) obtained by consent, in June, 1853, a decree for about \$26,000 on two bonds of defendant's testator—the decree to be paid at the rate of \$2,000 annually until the whole amount should be paid. The bill first stated was also filed by bond creditors to a large amount of the testator: it alleged that the assets of the testator were insufficient to pay his debts; and prayed, inter alia, that the plaintiff in the second case be enjoined from enforcing his decree; that an account be taken, and the assets of testator distributed according to law.

His Honor made an order for the suspension of the decree in the second case, from which the plaintiff therein appealed.

De Saussure, for appellant.

Lesesne, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. Upon the point argued before us, (which, indeed, is not brought

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before us in any ground of appeal,) we \*entirely agree with the Chancellor. The point argued is, that, although according to the statute, and according to all the decisions upon its construction, the assets of a deceased debtor are distributable among his creditors, with reference to the rank of their demands at the time of his death; yet that this order is to be disturbed, so as to give a preference to the first creditor who obtains judgment against the executor.

Upon such a proposition the Court cannot hesitate. It is utterly untenable.

It is ordered that the order be affirmed and the appeal dismissed.

DUNKIN, DARGAN, and WARDLAW, CC., concurred.

Appeal dismissed.

#### 7 Rich. Eq. \*283

\*SEAMAN and MURE v. D. F. FLEMING, et al.

(Charleston. Jan. Term, 1855.)

[*Fraudulent Conveyances* ⚡81.]

A mortgage given to secure future advances, if free from actual fraud, is valid against the creditors of the mortgagor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 210; Dec. Dig. ⚡81.]

[*Mortgages* ⚡151.]

Future expenditures by the mortgagee will be protected unless made with the intent to defraud some other creditor of the mortgagor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 332; Dec. Dig. ⚡151.]

[*Mortgages* ⚡151.]

Voluntary payments by the mortgagee, made before bill filed by other creditors of mortgagor, protected; but such payments after the bill filed held fraudulent.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 335; Dec. Dig. ⚡151.]

[This case is also cited in *Verdier v. Verdier*, 12 Rich. Eq. 143; *National Bank of Chester v. Gunhouse & Co.*, 17 S. C. 494, without specific application.]

In April, 1848, Fisher Day executed to D. F. Fleming his bond and mortgage—the condition of the bond being as follows:

"The condition of the above obligation is such, that if the above bound Fisher Day, his, or either of his heirs, executors, and administrators, shall, and do well and truly pay, or cause to be paid, unto the above named D. F. Fleming, his certain attorney, executors, administrators, or assigns, the full and just sum of forty thousand dollars, or so much as will fully indemnify and hold him harmless from any loss for or on account of his present or future endorsements, liabilities to pay money incurred by the said D. F. Fleming on his account and refused, and repay the said D. F. Fleming all such sums of money as the said Fisher Day may now or hereafter owe the said D. F. Fleming by borrowing or otherwise from him forthwith on demand without fraud, or further delay, then the above obligation to be void, and of none effect, or else to remain in full force and virtue."

In May, 1848, the plaintiffs recovered judgment against Day, and this bill was filed in September of the same year to set aside the mortgage; for an account of the moneys received by Fleming under it; and to enjoin

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him from paying over the \*proceeds of the

mortgaged property to Day. In February, 1850, the cause was heard by Chancellor Dargan, who sustained the validity of the mortgage, and ordered an account. The Master submitted his report, disallowing certain items claimed by Fleming. Exceptions were taken which were heard in June, 1853, before his Honor, Chancellor Wardlaw, who overruled the exceptions.

The defendant Fleming appealed from both decrees.

Walker, for appellant.

Northrop, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. Assuming the defendant's right of appeal from Chancellor Dargan's decree—which as it has not been contested here by the counsel on the other side,—the Court is not disposed to deny; then, it is of little consequence whether that decree has been properly construed by the master or not.

I am satisfied that if that decree has not upheld the defendant's right to the security of the mortgage for subsequent advances, it should be reformed, so as to give him that security.

We may entertain our individual opinions as to the policy of allowing such securities to be taken. But the legality of taking them is too well established by decisions, to allow us, now, to act upon our personal impressions. I need not refer to cases in our own Court. The same principle is admitted at law. Nor is it confined to special liens, such as mortgages; but obtains, also, where a general lien, such as a judgment has been voluntarily given to secure future advances, and to make sure the eventual balance in favor of the creditor. Bonds (and if a higher security were added to them, that, also,)

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given for \*official conduct, are nothing but a security given for an eventual balance, dependent entirely upon the future conduct of the obligor, and, therefore, within his power as to increasing or diminishing the amount ultimately to be established under the instrument. A mortgage, or a judgment taken for indemnification by the surety of an administrator or guardian at the time he becomes surety, has never been doubted to be a good security to him, and may enure to the benefit of the estate;—and, if good at all, can only be good for future transactions.

The Chancellor, by his decree of 1850, having established that the execution of the mortgage was fair, and that it was not executed for a fraudulent purpose,—it follows that it should be allowed to accomplish the purpose which it professes on its face: which was to indemnify the mortgagee not only for debts then existing, but for future advances.

But although an instrument may be free from fraud in its inception, it is not to be

used for fraudulent purposes: and if anything of that kind is done, or attempted, no doubt this Court will overrule it.

The defendant, Fleming, has been charged the full amount of what he has received under the mortgage and from the mortgaged goods; and should be allowed every expenditure he made, which, as between himself and his mortgagor, was good; unless the expenditure was intended as a fraud upon some other creditor.

I shall first select the expenditures made by Fleming after the bill was filed, which he claims as credits.

The bill was filed the 18th September, 1848; after which the actual expenditures set down in the report amounted to six hundred and seventy-one dollars and forty-four cents. Of this sum the Master has allowed three hundred dollars for the expenses of sustaining the bona fides of the mortgage; and as no appeal is taken from this part of the report, it is not drawn unto review before us. The same may be

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said of the further \*sum of thirty-four dollars and thirty-one cents, allowed on the interest account. This is not drawn in question; and, besides, it is not properly in the nature of an expenditure, but a mere adjustment of the interest on the account as it should be settled: which is all very proper.

So far, all is well enough. Then the Master rejects the sum of twenty-nine dollars and three cents, charged as paid to Dayton for services. He reports that there was no proof of any consideration for the payment. Surely the master was right in requiring such proof for an expenditure after the bill was filed. The defendant was not at liberty to expend the money for which the bill was filed, without showing some necessity for it, such as would justify it in the eyes of the Court.

Another expenditure after the bill, was one hundred and twenty-seven dollars and fifty-nine cents, paid over to Day himself, the insolvent debtor. If such a payment were sustained, it would be so easy to defeat such a bill as this, that it would be the merest folly in parties to file them,—and the merest mockery in the Court to profess any jurisdiction to sustain them.

Thus, it appears, that the master has properly overruled credits, in favor of Fleming, after bill filed, to the amount of one-hundred and fifty-six dollars and sixty-two cents, and sustained others to the amount of three hundred and thirty-four dollars and thirty-one cents.

With all this we are not dissatisfied. But, then, there remains an expenditure made the 20th September, 1848, two days after bill filed: being one hundred and eighty dollars and fifty-one cents, paid on Day's note in bank. This must be regarded as a voluntary payment, intended to



overreach such decree as might eventually be made in the case; and, therefore, fraudulent—and the master properly rejected it.

Then we come to the expenditures before the bill, which were objected to by the plaintiffs, and ruled out by the master:—

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*1. 17th May, 1848, amount paid on Day's note in book, indorsed by Fisher .....	\$324 98
2. 15th July, 1848, amount paid on Day's note in book, indorsed by Fisher .....	257 35
	<hr/> \$582 33

The master disallowed these sums, not because they were not expended by Fleming, for that was conceded,—but, as he reports, because Fleming was no party on the notes,—and so not bound to pay them.

The very object of the mortgage, was in part to secure future voluntary advances. And such a purpose has been pronounced good as between the parties, and good as to creditors if the purpose was not to defraud, delay, or hinder them. The legal title of the property covered by the mortgage was in Fleming, but he was under an equitable obligation to Day, his mortgagor, to account to him; and if the money arising from the mortgage was applied to pay creditors of Day, it was certainly no fraud on them: nor on any other creditors, unless the preference given to those who were paid was a fraud. But a mere preference among creditors has, over and over again, been ruled to be no fraud.

In my opinion a mortgage or other special lien, or security, stands upon a very different footing from a general assignment made by a debtor for the payment of his debts. In the latter case any interest reserved to the assignor, or the reservation of a power of control by him, vitiates the instrument, and falsifies what it professes to be, a surrender of all the party's property for the payment of all he owes. But in every special lien, directly the contrary is intended. The intention is only to secure a particular party,—with an open reservation of every interest, beyond that purpose, to the party giving the lien.

To him the party taking the lien is accountable, and to him he must account, until some other creditor interferes, and

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by \*properly impleading those parties, enables the lien holder safely to hold his hand. The payment of these notes stood upon the same footing as if Day had given an order to pay the bank; or as if Fleming had purchased up the notes to enable him to settle with Day.

From the time of bill filed the matter stood upon a different footing; but before that time, I see no fraud in the case.

It is ordered that the decrees appealed

from and the master's report be reformed agreeably to the foregoing opinion; and in all other respects affirmed.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Decrees reformed.

## 7 Rich. Eq. \*289

\*DECIMA HEYWARD, Adm'x., et al. v.  
Ex'ors NATHANIEL HEYWARD,  
et al.

(Charleston. Jan. Term, 1855.)

[Wills  $\hookrightarrow$  555.]

Testator devised his whole estate to his wife for life, with remainder to his brother N., absolutely; "provided that N. do pay unto my brother T., or his heirs, the sum of five thousand pounds—one moiety thereof to be so paid at the expiration of one year from the decease of my wife, and the other moiety thereof to be paid at the expiration of two years from her decease." T. died in the lifetime of the widow, tenant for life.—*Held*, that the legacy to T. was not an absolute one, but that, in the event which had happened—T.'s death before the tenant for life—his heirs took directly under the will and as substitutes for him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1199–1202, 1204; Dec. Dig.  $\hookrightarrow$  555.]

[Wills  $\hookrightarrow$  633.]

*Held*, further, that T. could not receive or discharge the legacy so as to defeat his substitutes.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1484; Dec. Dig.  $\hookrightarrow$  633.]

Before Dunkin, Ch., at Charleston, February, 1853.

Dunkin, Ch. James Heyward, of Combahee, by his will bearing date 10th May, 1796, devised and bequeathed his entire estate, real and personal, to his wife, Susan Heyward, during her natural life; and then declared as follows: "And from and after the decease of my said wife, I give, devise, and bequeath all my said estate, real and personal, unto my brother Nathaniel Heyward, to have and to hold the same, and every part and parcel thereof, unto the said Nathaniel Heyward, his heirs, executors, administrators, and assigns, for ever: provided always, nevertheless, that my said brother Nathaniel Heyward shall and do faithfully and punctually pay unto my brother Thomas Heyward, or his heirs, the full and just sum of five thousand pounds, lawful money of the State of South Carolina; one moiety thereof to be so paid at the expiration of one year from and after the decease of my said wife Susan Heyward, and the other moiety thereof to be paid at the expiration of two years from and after her decease; and with the pay-

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ment \*of the said sum of five thousand pounds, in manner aforesaid, I hereby charge and make liable all my estate, real and personal, from and after the decease of my said wife." Of this will the testator's wife was

appointed sole executrix, and he shortly afterwards departed this life. His widow subsequently intermarried with Charles Baring, and survived until 1845;—on her decease, the late Nathaniel Heyward entered into possession of the estate, and held and enjoyed the same until his decease on the 12th April, 1851. The defendants are the executors of his last will and testament.

On 6th April, 1852, these proceedings were instituted, setting forth, among other things, that Thomas Heyward died in 1809, having previously executed his last will and testament, by which he devised and bequeathed his whole estate, absolutely, to his widow, Elizabeth Heyward, whom he appointed sole executrix of the same; and leaving also three children, and one grand-child, now Mrs. Elizabeth M. Hamilton, the daughter of a predeceased son. The bill is preferred at the instance of the administratrix of a son of Thomas Heyward, who survived his father, and of the grand-daughter, Mrs. Hamilton, insisting that, upon the death of Thomas Heyward in 1809, his children and grand-child "became and were entitled to the reversion of the said legacy of £5,000, lawful money of South Carolina"—and that, although "they have been informed and believe that the said Nathaniel Heyward, in his lifetime, paid or accounted for the said £5,000, either to Judge Heyward, or to his widow and executrix; yet they insist that the said sum was a substitutional gift to the children, or descendants of Judge Heyward, in case of his dying in the lifetime of the legatee for life"—and that "no payment to, or release from, Judge Heyward, or his widow and executrix, can discharge or bar the complainants' several rights;" and they aver that "they have never received satisfaction of their interest in the said legacy, either from the said Nathaniel Heyward, nor from Judge Heyward, nor his widow and executrix."

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\*The defendants submit, that, according to the just construction of the will, this was an absolute gift of £5,000 to the testator's brother, the payment only of which was postponed to a future day. To show that this, at least, was the understanding of the parties, and that they had settled in conformity thereto, certain documentary or written evidence was introduced on the part of the defence. A paper in the handwriting of Thomas Heyward (formerly and for ten years a Judge of the Court of Common Pleas of this State) was offered, which is as follows: "Memorandum—25th June, 1802—Whereas my brother, Nathaniel Heyward, has met the decree obtained by William Brailsford against me, and fully satisfied the same, amounting to four thousand one hundred and sixty-one pounds, (12.2) in consideration whereof I promise to pay to my said brother, out of the legacy of five thousand pounds given to me by my brother James, whenever

the same shall become due, the aforesaid sum of four thousand one hundred and sixty-one pounds, (12.2) with interest from 8th October, 1801; and if the interest should exceed that amount of the legacy when it becomes due, then the deficiency to be made good out of any part of my estate." Signed, "Thomas Heyward." Indorsed on this paper, and in the handwriting of the late Nathaniel Heyward, is the following: "Settled by bond and mortgage, 30th Oct., 1823. (Signed) Nathaniel Heyward."

Judge Heyward died, as has been stated, in 1809, leaving his whole estate to his widow, Elizabeth Heyward. On 30th October, 1823, an adjustment was made between her and Nathaniel Heyward, in which it appeared that she was indebted to him in the sum of fifteen thousand dollars, for which she executed to him her bond, payable in three equal annual installments, from 1st January, 1824, and secured by a mortgage of one hundred and sixteen negroes. On the same day, she executed an instrument, of which the following is a copy: "State of South Carolina—To all to whom these presents shall come, I, Elizabeth Heyward, of White Hall, widow, send

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greeting: \*Whereas James Heyward, late of the State aforesaid, Esquire, by his last will and testament, bearing date the tenth day of May, one thousand seven hundred and ninety-six, gave and bequeathed to his brother, the Hon. Thomas Heyward, five thousand pounds sterling, to be paid after the death of Mrs. Susan Heyward, now Baring, by Nathaniel Heyward, Esquire, devisee and legatee in remainder after the death of Mrs. Baring, of all and singular the estate, real and personal, of the said testator: and whereas the said Thomas Heyward was in his lifetime, and at the time of his death, indebted to the said Nathaniel Heyward in divers large sums, not exceeding the amount of the aforesaid legacy; and being so indebted, by his last will and testament gave and devised all his estate, real and personal, to me, the said Elizabeth Heyward, and appointed me executrix of the said will: and whereas, on a settlement of all matters of account between the said Elizabeth Heyward and the said Nathaniel Heyward, he, the said Nathaniel Heyward, has allowed the full amount of the said legacy to me, the said Elizabeth Heyward, executrix as aforesaid, without any deduction or discount whatsoever, although the same is not due, and will not be due, until the death of Mrs. Baring, who is yet in full life. Now know ye, that I, the said Elizabeth Heyward, for and in consideration of the premises, have remised, released, and forever quitclaimed, and by these presents do remise, release, and forever quitclaim to the said Nathaniel Heyward, all and all manner of action or actions, suit or suits, cause or causes of action, reckoning, or demand whatsoever, which



I, the said Elizabeth Heyward, may have, or claim, or which my executors or administrators, or the representatives of the said Thomas Heyward might have, claim, challenge or demand, if these presents had never been made, against the said Nathaniel Heyward, for and on account of the will of the said James Heyward, and the legacy or legacies, therein contained, or for and on account of any other matter, cause, or thing whatsoever,

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from the beginning of the world to the \*day of the date of these presents. In witness whereof, I, the said Elizabeth Heyward, have hereunto put my hand and seal this, the thirtieth day of October, and in the year of our Lord one thousand eight hundred and twenty-three. (Signed) E. Heyward. [L. S.] Signed, sealed, and delivered in presence of Henry Deas."

A letter from Mrs. Elizabeth Heyward to Nathaniel Heyward, dated 15th June, 1826, was also put in evidence, from which it appeared that he had subsequently released one half of the debt of fifteen thousand dollars.

Other matters were spoken of between the counsel at the hearing, but no distinct evidence on the points was offered—such as that the distributees of James Heyward (son of Judge Heyward) disclaimed any interest in these proceedings, and also that the granddaughter of Judge Heyward, who is one of the complainants, had received no part of his estate, directly or indirectly. It was probably not deemed necessary by either party, to make proof upon these subjects for the purpose of submitting for adjudication the principal question which arises.

It may be well, then, to consider what was the interest of Judge Heyward on the death of the testator, without reference to the words, "or his heirs." It was a legacy of five thousand pounds, payable at a future day, and chargeable on the real and personal estate of the testator. Was this legacy vested or contingent? This depends on the inquiry, whether the testator intended to annex the time to the payment of the legacy, or to the gift of it—for, as stated by Mr. Jarman, (1 Jarm. 760,) the rule is, that if futurity be annexed to the substance of the gift, the vesting is suspended; but, if it appear to relate to the time of payment only, the legacy vests instant. The case of *Cheffars v. Abell* is cited as an illustration. Bequest of stock to trustees to pay £40 per annum to testator's daughter M. for life; and after her decease to pay, assign, and transfer the sum of £1,000 stock equally among all and every the child or children of M., share and

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share alike, to be paid and transferred \*to them when and so soon as the youngest should attain his or her age of twenty-one years; and directed that after the decease of his daughter, the dividends should be ap-

plied to the maintenance of the children. At the death of testator, M. had four children, one of whom died before the youngest attained twenty-one years of age; the youngest alone survived M.; the Vice Chancellor held that the four children took vested interests in the stock. "There was," he observed, "in the first place, a clear gift to all the children in the shape of a direction to pay and transfer, followed by another direction to pay and transfer, 'when and so soon as the youngest of such children should attain his or her age of twenty-one years.'" It seems formerly to have been held in reference to pecuniary legacies payable in futuro, and charged on real estate, either primarily or in aid of the personalty, that they could not be raised out of the land if the devisee died before the time of payment. But the distinction is now well settled, that if the postponement of payment be with reference to the circumstances of the devisee of the money, as in the case of a legacy to A., to be paid to him at the age of twenty-one years, the charge fails as formerly, unless the devisee lives to the time of payment. But, on the other hand, if the postponement of payment appears to have reference to the situation or convenience of the estate, as if land be devised to A. for life, remainder to B. in fee, charged with a legacy to C., payable at the death of A., the legacy will vest instant; and consequently if C. die before the day of payment, his representatives will be entitled; the raising of the money being evidently deferred until the decease of A., in order that he may, in the meantime, enjoy the land free from the burthen. 1 Jarm. 756. In applying these principles, it is very apparent to the Court that this was intended as a legacy of £5,000 to the testator's brother, Thomas Heyward, a "clear gift, (in the language of one of the cases,) the payment alone of which was postponed, not with reference to the circumstances of the legatee, but with reference to the

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situation or \*convenience of the estate." He took a vested transmissible interest on the death of the testator, and in the event of his decease before the day of payment, his personal representative would have been entitled to receive it.

The remaining enquiry is, whether this vested interest is rendered defeasible by the superadded words, "or to his heirs." In general, the construction for which the complainants contend, has been insisted on for the purpose of preventing a lapse. "A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear." The object in many of the cases, has been to establish this intention by showing that the testator had clearly substituted the plaintiffs for the principal legatee. And so where the legacy was not to vest until a future period, and would consequently lapse by the death of the

legatee after the death of the testator but prior to the period for vesting, the Court is ready to lay hold of words indicating the intention of the testator that in such event the children, or the next of kin of the legatee, should be substituted, and thereby prevent the legacy from being altogether defeated. In order to give effect to this construction, where the intention was manifest, words have received an interpretation different from their ordinary legal signification—"heirs" have been held to mean "next of kin," and "representatives" to mean "children," &c. *Gittings v. McDermott*, 2 My. & Keene, 69, (a case much relied on by the plaintiffs,) is an illustration. The legacy to such of Elizabeth Wall's children as predeceased the testator, had clearly lapsed, unless the Court construed the subsequent words disjunctively, and declared that under the terms "or to their heirs," the testator intended to provide for an alternative bequest in the event of the death of the principal legatee in his lifetime; and so in *Price v. Lockley*, 6 Beav. 180, unless the words, "or their heirs lawfully begotten," were construed disjunctively, it might very well have been contended that only the children who survived the tenant for

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life were entitled. \*These words so construed, prevented the surviving children from taking the whole fund, but the same construction necessarily rendered the interest of Joseph defeasible. But if the primary legacy is vested, it should not be rendered defeasible by superadded ambiguous expressions. This appears to the Court to be strikingly exemplified in *Corbyn v. French*, 4 Ves. 418, decided by Lord Alvanley, and properly characterized by the plaintiffs' counsel as "a great and recognized authority." Testator devised his estate to trustees to invest in the funds, and pay the dividends to his wife during her natural life. At her decease he gave to his niece, "Elizabeth Cooper, the sum of two thousand pounds, or to her proper representative, in case she should not be living at the decease of my wife. I also give to each of the children of my sister Elizabeth, viz., John, Dorothy, William, and Christopher, or their representatives or representative, the sum of two thousand pounds."

John Barker, one of the children of the testator's sister Elizabeth, died during the life of the testator, leaving a widow and children; Christopher Barker, another son of the testator's sister, died soon after the death of the testator, but during the life of his widow.

It was contended on the part of the residuary legatee, that both the legacies to John and Christopher had failed by the death of the former during the life of the testator, and of the latter during that of his widow.

"The question is," says Lord Alvanley, "whether they are vested and transmissible to the representatives. I am very clearly of

opinion, the legacy to Christopher Barker is good; this is stronger than the common case of a legacy to A. and his representatives. There those words are surplusage: for, if the legatee dies before the day of payment, it would go to his representatives. But in this case there is a reason for inserting them; this is not an immediate legacy, but after the death of another person—there is,

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therefore, an interval in \*which the legatee might die; and, though it vested, he might not live to receive it; that addition might be inserted to put it out of doubt; and must mean, in case they die in the life of the testator's wife. I desire to be understood to determine it upon that circumstance, that there is a life intervening."

The legacy to John Barker, (who died in the testator's lifetime,) he held to be lapsed, notwithstanding the superadded words, "or to his representatives"—"for," said he, "see the preceding legacy to Elizabeth Cooper: would not that have lapsed, if Elizabeth Cooper had died in the life of the testator? Beyond all question it would. It is nothing more than saying, it shall go to her representatives, if she dies before his wife. As to the others, the children of his sister Elizabeth, I am of opinion it is nothing more than a gift to them at the death of his wife; but it was intended only as a beneficial interest to them; and must, as such, vest in them, before it could be transmissible."

It is hardly necessary to remark, that Lord Alvanley uses the word representative throughout in its strict legal sense, as when he says, "in a legacy to A. and his representatives, these words are surplusage, for, if the legatee die before the day of payment, it would go to his representatives," &c. The life estate was to the testator's widow. At the decease of his widow, he gives to Christopher Barker, or his representatives, two thousand pounds; according to the judgment of Lord Alvanley, this "was intended only as a beneficial interest to Christopher Barker, and must, as such, vest in him before it could be transmissible." But for the intervening life estate, the words, "or his representatives," would have been merely surplusage. But what is the effect of that circumstance? not to create a substitutional legatee—but "there was an interval in which the legatee might die, and, though it vested, he might not live to receive it. That addition might be inserted to put it out of doubt," &c. It was entirely consistent with a personal gift to Christopher, that the testator should di-

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rect it to be paid to his \*representative in a particular event. Christopher Barker having survived the testator, took a vested transmissible interest in the legacy of two thousand pounds, which, on his decease, passed to his legal representative like any



other personalty. When the life estate fell in, the interest thus transmitted, or the legacy became payable by law to his representative, as (to put it out of doubt) "had also been directed by the express terms of the bequest."

In commenting upon this case, Mr. Jarman reminds the reader that, in several instances, the words "representatives" and "heirs," when applied to personalty, and even "executors or administrators," have been held to be synonymous with next of kin; but the case is notwithstanding cited as illustrative of the principle stated by him, (to wit,) that "where the objects of gift in the clause are the executors or administrators, or personal representatives of the deceased legatee, such clause is considered as merely showing that the legacy is to be vested immediately on the testator's death, notwithstanding the subsequent death of the legatee before the period of distribution or payment, and not as indicating an intention to substitute as objects of gift the representatives of those who die in the testator's lifetime." And, if such construction was adopted in reference to John Barker, whose widow and children were thereby cut off from the benefit of the legacy bequeathed to him, which was held to be lapsed by his death in the testator's lifetime, much more strongly would it be held applicable to the vested legacy of Christopher, who survived the testator, but died previous to the period of distribution or payment.

Certainly it is competent for the testator, by an intention to that effect clearly expressed in his will, to declare that even a vested legacy shall be defeasible in a particular event, and in favor of others specially designated. But, where the primary legatee is the manifest object of the testator's bounty or regard, and his interest is vested and would be transmissible, it is not only necessary to show a clear inten-

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tion of substitution, but \*that the persons thus designated as substitutional legatees were in existence, in order to defeat the vested interest of the primary legatee. The presumption is in favor of the primary legatee. Where his interest has vested, it is not to be defeated by equivocal expressions, or by superadded words, perhaps only inserted to remove doubt, as to show the absolute character of his interest. Where, however, the event is distinctly indicated, and the substitutional legatees pointed out, the vested interest may be defeated by the happening of the event, and in favor of the legatees thus substituted. Such was the case of *Gray v. Garman*, 2 Hare, 268. Gift to testator's wife, for life, residue to be equally divided between her brothers and sisters; and in case any of them should be dead at the time of her decease, leaving issue, such issue to stand in their parents' place. The event is

here distinctly marked, as well as the substituted legatees who were to take in that event. It was ruled, that the legacy vested in the brothers and sisters who survived the testator; and two of them having subsequently died without issue during the life estate, the legacy was payable to the predeceased legatees' legal representatives. "The gift to the brothers and sisters who survived the testator was determinable only on one event—their death leaving issue: that event did not happen, and their interest in the gift was, therefore, not taken away." It proceeds upon the principle that, when the primary object of the testator is clearly ascertained, and can be accomplished, it shall not be impaired, unless to carry into effect his bounty in reference to others equally well indicated. *Salisbury v. Petty*, 3 Hare, 86, was that case. The primary legatee took a vested interest on the death of the testator, but his children were evidently substituted as the objects of the testator's bounty in the event of their father's death prior to the falling in of the life estate.

As in all cases, the leading object of the Court is to ascertain the intention of the testator. It has been justly remarked, that much confusion exists in the cases, in refer-

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ence to the doctrine of controlling a gift at a future time, or a direction to pay, at a future time, or on a given event, (or other expressions denoting a postponement of the vesting of a legacy,) by reason of its being a bequest in the nature of a remainder. 2 Wms. Ex'ors. 1068. But the general proposition of Mr. Jarman meets the approval of Mr. Justice Williams, as well as of Sir James Wigram, to wit, that "though there be no other gift than in the direction to pay or distribute in futuro, yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred till the period in question." Applying this principle, it appears very clear that the sole object of postponing the payment was the situation of the property. In the language of Lord Hardwicke, in reference to a similar charge of a legacy on the estate of a remainderman, *Hodgson v. Rawson*, 1 Ves. 44; "The legacy is held to be transmissible on this ground—that the remainder vested immediately by the death of the testator: and therefore the legacy vested in those to whom payable, and that the devisee must take it cum onere; it being equally intended that the legacy should be paid, as that the devisee should have the estate." Mr. Ambler, commenting on this judgment, in a subsequent argument, says Lord Hardwicke held the legacy vested, and that the time was only given to the remainderman to turn himself round—he held it vested and transmissible because the devise of the estate vested immediately, &c. In whom then did the legacy of five thousand

pounds vest, on the death of the testator, James Heyward? It cannot be said to be in the alternative, either Thomas Heyward or his heirs, for that would be either unmeaning, or so uncertain as to render the legacy void. If the legacy vested at all, as has been shown it did, it vested at that time in Thomas Heyward; and the plaintiffs have the burden of showing in the will an intention on the part of the testator that this vested interest should be defeated by his subsequent death, during the lifetime of the testator's widow. Without any such defea-

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sance, the effect would be that this vested interest would be at the disposal of Judge Heyward, and on his decease, before it became payable, it would be payable to his legal representative or representatives. On this point, the form of the will is not without significance, as illustrative of the testator's intention. His manifest object was to secure to his brother, Nathaniel Heyward, his whole estate in remainder, and to secure to his brother, Thomas Heyward, a legacy of five thousand pounds. In order to effect the former purpose, the estate is devised to Nathaniel Heyward in the most ample terms. But the testator seems scarcely less anxious to place the accomplishment of the next object beyond contingency. The gift to Nathaniel Heyward is therefore accompanied with this proviso: "Provided always, nevertheless, that my said brother Nathaniel Heyward shall and do, faithfully and punctually, pay, unto my brother Thomas Heyward, or his heirs, the full and just sum of five thousand pounds, lawful money of the State of South Carolina—one moiety thereof to be paid at the expiration of one year from and after the decease of my said wife, Susan Heyward; and the other moiety thereof to be paid at the expiration of two years from and after her decease: and with the payment of the said sum of five thousand pounds, in manner aforesaid, I hereby charge and make liable all my estate, real and personal, from and after the decease of my said wife." It is not in form a gift of five thousand pounds; but the direct devise is to Nathaniel Heyward, which he is required to take, as Lord Hardwicke says, *cum onere*; and what is the burthen? It is that he shall pay to Thomas Heyward, or his heirs, within two years after the decease of the life-tenant, the sum of five thousand pounds; and the only inquiry of any interest to the defendants is, whether that obligation has been fulfilled—that charge on the estate removed? It would not have been without precedent, if the testator had devised his whole estate, taking from the devisee an obligation to pay certain sums to different objects of the testator's bounty or affection. If the will of

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James Heyward had contained no more than the devise in remainder to his brother,

Nathaniel Heyward, who contemporaneously with the date of the will, had executed a bond to the testator, reciting the devise, and with a condition in the very terms of this proviso, it would only have put in a different form the apparent purpose of the testator, and a mode of accomplishing that purpose. Can it be doubted that the payment of the sum of five thousand pounds, *ante diem*, *ad diem*, or *post diem*, would have been equally a performance of the condition of such obligation, and a satisfactory answer to any proceeding at law, or in this Court?

In the judgment of this Court, it is manifest from the will, that as in *Corbyn v. French*, "this was intended only as a beneficial interest" to Thomas Heyward. The time of payment, and the mode of payment, were subordinate and directory—the time of payment was postponed obviously only for the convenience of the remainderman; and the mode may have been so expressed merely to remove doubt. The interest became vested in Thomas Heyward, on the death of the testator, and transmissible; and the subsequent words were probably used as words of limitation, and were not intended to impair, or defeat, that vested interest. Judge Heyward had authority, therefore, to execute the instrument of 25th June, 1802; and the release of his executrix of 30th October, 1823, was a valid discharge to the defendant's testator, "of all claim for and on account of the will of James Heyward, and the legacy therein contained."

It is ordered and decreed that the bill be dismissed.

From this decree the Complainants appealed on the ground:

That the legacy to Judge Heyward was a substitutional gift to him or his heirs, at the decease of Mrs. Baring, and not a positive gift to him.

The cause having been argued at the Jan-

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uary Term, 1854, \*before Johnston, Dunkin and Wardlaw, Chancellors, (Dargan, Ch., absent); was reargued at the present term, (Jan. 16, 17, 18, 1855,) before all the Chancellors.

Petigrew, for appellants.

Hayne, contra. The hesitation of the court must proceed, not upon any doubt as to natural equity, or of actual intent of testator, but from weight of authority.

Authorities introduced to establish three points:

1st. Effect must, if possible, be given to every word [granted.]

2d. That *ex vi termini*, the words "or heirs" imply a substitutional gift—that is, that the legacy is given either to Judge Heyward or his heirs, as he may or may not be alive at the death of the life-tenant.

3d. That Judge Heyward dying before the



time fixed for payment, a prior payment to him is no discharge to Mr. N. Heyward.

Examine two last positions;

1 Jarman on Wills, 453, (in introducing the cases of *Davenport v. Hanbury*, 3 Ves. 257, words "or her issue;" *Montague v. Micella*, 1 Russ. 165, words "or their respective child or children;" *Gittings v. McDermott*, 2 Myl. & Keene, words "or to their heirs;") states as the result of these cases that the "tendency is to consider the word "or" "as introducing a substituted gift, in the event of the first legatee dying in testator's lifetime;" and he adds, "in other words as inserted in prospect of and with a view to prevent a lapse." Now, observe, 1st. Mr. Jarman does not consider "or" as *ex vi termini* implying substitution. 2d, The "tendency" spoken of is confined to cases referring the substitution to the period of the death of the "testator." 3d, The "reason" assigned is the prevention of a lapse. This class of cases, therefore, is not conclusive. In *Gittings v. McDermott*, Lord Brougham says, "I am not aware that it has ever been judicially deter-

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mined, that 'legacies 'to A. & B. or to their heirs,' are to be read 'to A. & B., and if either predecease, then to his heirs,' so as" (adds his Lordship) "to prevent a lapse," yet he thinks "there is no doubt," &c.

When Mr. Jarman, (1 Jarman, 454,) refers to cases in which the word "or" applies to a bequest, the enjoyment not to begin at testator's death, he introduces, in parenthesis, ("admitting it," (the word "or,") "to be introductory of a substituted gift,") implying, of course, that it is not always to be so understood.

Again, 2 Jarman, 666, he says, speaking of the effect of the expression, 'in the event of the death,' "that in those cases in which the word 'or' has been construed as introductory to a substitutional bequest, (in which case it seems to be tantamount to the words, 'in case of the death,')" &c., implying, as before, that it is not always to be so construed.

The cases turn not upon the necessary effect of the word "or," but on its meaning to be gathered from the context, and a fair consideration of the whole will. *Corbyn v. French*.

One ground for so construing the word "or," in some of the cases, is, as Lord Brougham and Mr. Jarman, followed by the Chancellor in this case, express it, "to prevent a lapse," which certainly does not apply here.

Another, is that urged on this occasion, that "effect must be given to all the words," that is, as I apprehend, that the court must suppose the testator to have an intention in the use of each word, and if you cannot reasonably attribute any other intent you are driven to construe the words as intended to create a substitution. In most cases in which the devise or bequest is direct to "A, or his

heirs," you are driven to this construction, because no reasonable motive for the use of the disjunctive word "or," instead of the usual copulative "and," can be assigned. But the case is different where an estate is given with a condition to pay annexed—where a charge is created, and the estate taken cum onere. There the disjunctive conjunction is usual and natural, and suggests

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an intent similar \*to that implied by the conjunctive conjunction in a direct devise.

In such a case the words which "or" introduces must be looked to—the context and the scheme of the will. If the words introduced by the use of "or," cannot be otherwise explained than by supposing them intended substitutionally, such construction is resorted to, not *ex vi termini*, but to satisfy the supposed intent. *Salisbury v. Petty* is such a case.

That case is peculiar. It is a devise to A. for life, subject to a charge in favor of B. C. & D., "or to their respective lawful issue," to be paid twelve months after death of testator, and after death of A. devise to A.'s children, as he should appoint by will, subject again to an additional charge in favor of B., C. & D., "or to their respective lawful issue." Now no rational intent can be suggested for the use of these words, unless we suppose them used substitutionally. The fact that it is in form a charge, or a condition imposed, does not satisfactorily account for the use of the expression, "lawful issue." Suppose the same words used in a direct bequest, they would look to something more than the quality, and quantity of the interest of B. C. & D. Testator would, in such case, show a disposition to benefit some other persons besides B. C. & D. In the case at bar, the word "heirs" after "and" in a direct devise, would imply no more than a disposition to give all to Judge Heyward, and would look to him as the sole beneficiary, and "or," preceding the word "heirs," instead of "and," is accounted for by the form of the bequest, arising as it does from an obligation to pay on the part of the devisee.

*Salisbury v. Petty*, therefore, is not conclusive. No other intent is attributable there in the use of the words "or to their respective lawful issue." Here, "or heirs" shows the same intent as the use of the words "and heirs," in the direct devise to Nathaniel Heyward. In neither the direct devise, or the present case, are they necessary, and in either the gift is absolute without. In both meant to make the intent plainer.

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\*In *Salisbury v. Petty*, testator's mind is evidently dwelling on contingencies, and he is attempting to provide according to the happening of such events in the future, which he manifestly thinks may be either one way or the other. The scheme of the will makes

substitution a probable intention. James Heyward does not contemplate contingencies or alterations, but looks to events in the future that are certain; to wit, the certain death of his wife—the certain vesting of the estate after her death, in N. H., his brother, and to a certain provision for the other brother.

If the present case is not concluded by the force of the authorities cited by the complainant, let us consider it upon its own circumstances, and ascertain—

1st, The testator's real intent.

2d, Whether any rule of law forbids that this court should allow that intent to prevail.

3d, Whether in any view of the nature and character of the interest intended to be given to the "heirs" of Thomas Heyward, Nathaniel Heyward has not performed the conditions imposed on him by the will, and whether his estate is not thereby discharged?

There are apparent three objects of testator's bounty: all in esse; all recommended by the relation in which they stood, and, though in different degrees, all anxiously considered in the disposition of his property: First, his wife. Second, his brother Nathaniel. Third, his brother Thomas. To the first he devises and bequeaths everything for life. To the second everything, absolutely,—the enjoyment, however, postponed until the death of the first. To the third, a legacy of £5,000, charged on the estate of the second, to be enjoyed as soon as convenient after the second shall come to the enjoyment. As to the first object the idea of "heirs" is excluded. As to the second the devise is "to his heirs, executors, administrators and assigns for ever. To the third, the legacy being in form a charge on the devise to Nathaniel

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Heyward, the terms are that \*said Nathaniel Heyward shall "pay to Thomas Heyward or his heirs," &c. Can any one doubt that the brother Thomas was in regard to the £5000 as much the object of testator's affection as Nathaniel, in regard to the residue of the estate? Was it not as much the testator's intention to benefit Thomas to the extent of £5000, as to benefit Nathaniel by the residue? To Nathaniel Heyward the residue being given direct, it is to him "and his heirs," &c. To Thomas Heyward the benefit coming in the way of a charge, the expression from necessity is changed to the disjunctive, it is to be paid him "or his heirs."

For the convenience of the first object, the enjoyment of Nathaniel Heyward is postponed until the widow's death. For the convenience of the second object, the enjoyment of Thomas Heyward is postponed until one and two years after he shall come into possession.

All this is simple, natural, intelligible. No such absurdity ensues as leaving a brother to starve, for the benefit of unknown and un-

born nephews and neices, or grand nephews or grand neices.

Now is there any rule of law in regard to the disposition of estates, or the construction of wills to interfere with this clear intent.

On the contrary, a legal analysis of the will confirms the view presented.

The benefit intended for Nathaniel Heyward, and that for Thomas Heyward, are both contained in the one direct devise to Nathaniel Heyward. To the latter is "given, devised and bequeathed" all the estate from and after the decease of the wife, "provided always," &c., then comes a condition upon which he is to hold, and in terms a charge on the estate received and as an incident to the performance of this condition, as the result of this charge, the benefit to Thomas Heyward arises.

It is by imposing an obligation on Nathaniel Heyward that the testator undertakes to

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secure the benefit to Thomas Heyward. Surely then the primary enquiry is—what is the obligation imposed on Nathaniel Heyward? It is by ascertaining this that we arrive at the rights of Thomas Heyward. This clause then is to be construed not in analogy to direct devises to an individual, but by analogy to cases of estates taken cum onere. The burthen is that Nathaniel Heyward should pay "Thomas Heyward or his heirs," within two years after the death of life tenant. Is not a payment ante diem a discharge?

Suppose a bond payable to A. or his executors, &c., in ten years. A. dies in five years, but has received the amount, could executor of A. claim payment at the end of ten years, because he alone at that time was entitled?

It is not denied that the £5000 is a legacy, but it is not a direct bequest to Thomas Heyward.

As has been said, it is an interest growing out of an obligation imposed on the devisee Nathaniel Heyward, and the nature and character of the "interest" is determined by considering the nature and character of the "obligation." If Nathaniel Heyward had a right to discharge himself by anticipating payment to Thomas Heyward, Thomas Heyward had a right to receive.

This view renders the whole will consistent and harmonious.

The widow takes a vested life interest to be enjoyed instantan.

The first brother a vested remainder cum onere.

The second brother a vested legacy of £5000 payable in one and two years after the enjoyment of the remainder accrues.

The decree is conclusive that without the three monosyllables "or his heirs," Thomas Heyward took a vested, transmissible interest to be enjoyed in futuro. The "thin and shadowy distinction," as it was termed by



the learned counsel for complainants, at the hearing, "that a direction to pay in futuro, if the payment appear to be postponed for the convenience of the fund or property and

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has no reference to condition of the legatee, will not defer the vesting till the period in question," is recognized in the decree, and sustained by overwhelming authority.

The language of Lord Hardwicke in the case of *Hodgson v. Rawson*, 1 Ves. 44, applies directly to the case at bar. "The legacy," &c., cited in the Chancellor's decree.

The burthen is on complainants to show that "or his heirs" has the effect of divesting the vested interest of Thomas Heyward. An effect rendering the will incongruous and unnatural. This interpretation gives to the word "or" which was used because of the peculiar form of the bequest a meaning drawn from the analogy of cases in which such reason existed.

"Or," as has been shown, is not necessarily a word of substitution. Whether it is to be so construed depends on the character of the whole will.

The words "or his heirs" were intended to express in terms that Nathaniel Heyward was not to be discharged even though Thomas Heyward died before the period of payment. To make it explicit that Thomas Heyward's claim in such case would survive him, they impose on the devisee by "express terms of the devise," what "by law" would have been his obligation if they had not been used. The attempt of complainants is to prevent what really was intended to make the object more sure, into the means of defeating the object altogether. Is there here that "clear intention" which is to divest the vested interest of a brother surviving the testator, by substituting a class of persons so indefinite as "next of kin" not yet in esse.

But the points already discussed are only introductory to the 3d point, which presents the precise issue in this case.

Are the executors of Nathaniel Heyward bound to pay again to the "heirs" of Thomas Heyward the legacy already paid to Thomas Heyward in his life time, and doubly paid to his executrix and sole legatee, after his decease?

It has been taken for granted, that the

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heirs of Thomas Heyward have, as against Nathaniel Heyward, the same rights they would have had if no payment at all had been made of the amount, with which the estate received from James Heyward, stood charged. The authorities cited certainly do not cover this ground. Admit that if the legacy had not been paid at the death of Mrs. Baring, the next of kin of Thomas Heyward might have claimed as entitled to it, not through Thomas Heyward but by substitution, non constat that having been al-

ready paid to Thomas Heyward they still may claim by substitution.

Has Nathaniel Heyward discharged the estate in his hands? He has, as required, paid £5000 to Thomas Heyward, not at the day, however, but ante diem.

Would it not have been competent for the testator to have directed that Nathaniel Heyward should pay to the heirs of Thomas Heyward £5000 provided he had not already paid that amount to Thomas Heyward in his life time, but that such payment should be a discharge. I consider the condition imposed here, in effect the same.

Thomas Heyward's interest is admitted to be vested, and incapable of being divested as long as he lived. If the postponement of the payment on account of the convenience of Nathaniel Heyward was waived by him, and he allowed Thomas Heyward to anticipate the time of enjoyment of his vested interest; he had a right to do so. He simply waived his own privilege.—If the legacy in the hands of Thomas Heyward was defeated his estate was responsible to those substituted in the place of his executor or administrator. Thomas Heyward stood in the attitude of a life tenant responsible to the remainderman, or of one to whom in due course of administration, a legacy subject to be defeated by a future contingency, has been delivered.

See *Fawkes v. Gray*, 18 Ves. 131.

*Griffiths v. Smith*, 1 Ves. 97.

2 *Williams on Executors*, 1192, 1196, 1217.

*Price v. Lockley* does not meet this case.

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There the legacy \*had not been paid. The party against whom the claim was made had done nothing to discharge himself. Analogy to *Price* and *Lockley* would be nearer if the claim were made against the executrix of Thomas Heyward. Question in *Price v. Lockley* between the "issue" and one who represented the primary legatee, who was still unpaid. Suppose a bond to make titles on a given day to A., or, in case of his death, to the eldest son of A., would not titles made before the day to A. discharge the bond? And this, although, if not made before the day, the son of A. would be substituted in case of his father's death prior to that time, and his claim would defeat the other heirs.

*Memminger*, same side.

*Petigru*, in reply.

The opinion of the Court was delivered by

JOHNSTON, Ch. James Heyward, by his last will, bearing date the 10th of May, 1796, devised and bequeathed, (in the event which happened, that at the time of his decease he should leave no lawful issue,) his whole estate, as follows:

"If I die without lawful issue, I give, devise and bequeath all my estate, real and personal, whatsoever and wheresoever, unto my beloved wife, Susan Heyward; to have

and to hold the same, and every part and parcel thereof, and all the rents, issues and profits thereof, unto the said Susan Heyward, for and during, and until the end and term of her natural life,—free of waste and charges of waste, whatsoever. And from and after the decease of my said wife, I give, devise and bequeath all my said estate, real and personal, unto my brother, Nathaniel Heyward; to have and to hold the same, and every part and parcel thereof, unto the said Nathaniel, his heirs, executors, administrators, and assigns, forever: Provided, always, nevertheless, that my said brother, Nathaniel Heyward, shall, and do; faithfully and punctually pay unto my brother,

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\*Thomas Heyward, or his heirs, the full and just sum of five thousand pounds, lawful money of the State of South Carolina,—one moiety thereof to be so paid at the expiration of one year from and after the decease of my said wife, Susan Heyward,—and the other moiety thereof to be paid at the expiration of two years from and after her decease:—And with the payment of the said sum of five thousand pounds, in manner aforesaid, I hereby charge and make liable all my estate, real and personal, from and after the decease of my said wife.”  
\* \* \* “And I do hereby make and appoint my said wife, Susan Heyward, the sole executrix of this, my last will and testament.”

During the life of Mrs. Susan Heyward, (afterwards the wife of Charles Baring,) Thomas Heyward gave to his brother Nathaniel, the following instrument, viz.:

“Memorandum,—25th June, 1802. Whereas, my brother, Nathaniel Heyward, has met the decree obtained by William Brailsford against me, and fully satisfied the same, amounting to four thousand one hundred and sixty-one pounds, twelve shillings and two-pence—in consideration thereof, I promise to pay to my said brother, out of the legacy of five thousand pounds given to me by my brother James,—whenever the same shall become due,—the aforesaid sum of four thousand one hundred and sixty-one pounds twelve shillings and two-pence, with interest from 8th October, 1801. And, if the interest should exceed the amount of the legacy, when it becomes due, then the deficiency to be made good out of any part of my estate.” (Signed) “Thomas Heyward.”

Thomas Heyward died in 1809, during the life of Susan Heyward, (afterwards Mrs. Baring,) the widow of the testator James. Mrs. Baring survived until 1845.

At his death, Thomas Heyward left the following family:

1. Elizabeth, his widow, to whom he will ed his whole estate.

2. Elizabeth Matthews Heyward, (now Mrs. Hamilton,) a daughter of his oldest and pre-deceased son Daniel.

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\*3. Thomas Heyward, a son: afterwards he died intestate, and his son, T. S. Heyward, is his administrator.

4. James Heyward, a son. He died afterwards intestate, and his wife, Decima, is his administratrix.

5. Eliza Heyward, a daughter, (now Mrs. Parker).

In 1823, Elizabeth, the widow of Thomas Heyward, Sen., who was his executrix, and to whom he devised his whole estate, (charged by the memorandum of 1802,) came to an arrangement with Nathaniel Heyward, by which the legacy of five thousand pounds was set off against the sum which Nathaniel had advanced for his brother, with interest on the latter, and she gave him bond, secured by mortgage, for one-half the excess still due to Nathaniel, he remitting the other half.

In 1845, Mrs. Baring, the widow of the testator, James Heyward, died; by which her life tenure in his estate, under his will, determined; and the remainder accrued in possession to Nathaniel Heyward.

Nathaniel died in 1851; and the present bill was filed in 1852, against his executors, by Mrs. Hamilton in her own right, and by the administratrix of James, Jun., as heirs of Thomas Heyward, Sen., claiming payment of shares of the legacy of five thousand pounds.

The question is, whether the direction given, that the five thousand pounds be paid “to Thomas Heyward or his heirs,” created alternative interests between these parties, so that the heirs became substitutes, in place of Thomas, from the time of his death.

In the argument in support of the decree, it has been assumed throughout, that there was a fixed intention, on the part of the testator, to give the largest interests to his two brothers, of which the property bequeathed to them, respectively, was capable. That as the remainder given to Nathaniel was given absolutely, so it was testator’s intention that Thomas should have an absolute and unqualified right to the legacy of five thousand pounds.

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\*But this is to beg the very question before us. If this assumption be admitted, there is an end of this case.

There is an observation of Lord Hardwicke, in one of his judgments, (a) very pertinent to this point. “It has been said,” he remarks, “that if the testator had been asked, at the time of making his will, whether, in such an event as has happened, he would have the one thousand pound legacy raised for the plaintiff, he certainly would have answered, that he would not. But such a manner of arguing, by asking a question of

(a) Lowther v. Condon, 2 Atk. 130.



this sort, is a very uncertain one. Those that make the question answer it themselves: and give such an answer as seems for their purpose."

The true rule is stated by Sir Jno. Leach in another case. (b) "What the intention of the testator was, must be looked for in the words of the will. Nothing more can be supposed to be intended than what he has expressed. The expression may be, often, at variance with the real intention; and it may be so here; but a Court must decide on the expressed intention."

The observation has been correctly made, "that the statute by requiring a will to be in writing, precludes a Court of Law from ascribing to a testator any intention which his will does not express; and, in effect, makes the writing the only legitimate evidence of the testator's intention. No will is within the statute but that which is in writing:—which is as much as to say, that all that is effectual, and to the purpose, must be in writing, without the aid of words not written." (c)

"How can it be said that the will is in writing, if it be inoperative, unless the intention of the testator be proved aliunde?" (d)

And if you are not permitted to prove an intention extrinsic to the will, how are you at liberty to assume it without proof?

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\*But in all doubtful cases the construction is to be made from the whole instrument,—text and context.

The context is to be consulted upon the principle, so familiar to courts, that the words and acts of parties have a tacit reference to the circumstances under which they are uttered or performed: and that these circumstances, so far as they may serve to give construction to them, may, and should, be, appealed to for that purpose. (e) Thus if a gentleman writing simultaneously to his overseer, and to his agent for transactions in bank, should, in the same words, direct them, respectively, to sell his stock; the words, though identical, must mean very different things; in the former case referring to live stock, and in the latter to shares, stocks, or securities. The same principle is familiar in criminal courts. What is it that shows an act of homicide to be murder in one case, manslaughter in another, or excusable or justifiable in another, but the circumstances under which the act was done? The principle is universal.

And so of the context of a writing. The context is a reference to, or description of, the surrounding circumstances by the writer himself; and may be looked to for the pur-

pose of clearing up obscurities in any particular passage.

Let us, therefore, resort to the context of this will to see whether there was in the testator's mind that degree of benevolence towards his brother, Thomas, which has been assumed.

Look to the terms in which he bestows upon his brother, Nathaniel, the remainder upon which this legacy is charged. It is given "to Nathaniel, and to his heirs, executors, administrators and assigns, forever." This shows that where the testator intended to give in the amplest and most absolute manner, he knew how to accomplish his purpose. *Reddenda singula singulis*, the real estate is given to him and his heirs forever, in fee: while the personal is bequeathed to him, his personal representatives and as-

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signs: an absolute, vested, transmissible, \*assignable interest. If his purpose was to give an absolute interest in the legacy to Thomas, why did he make so sudden and marked a change in the terms of donation? Why did he not give it to him, (as he had given to Nathaniel,) his executors, administrators and assigns? Why the change to him or his heirs?

Thus the context of the will, so far from sustaining the conjecture of the defendants as to the extent of the bounty intended for Thomas, rather tends to a different conclusion. The least that can be said is, that it does not disturb, or deflect, the import of the words of the text.

Then we are to inquire what is the natural and legal effect of a direction that Nathaniel pay two thousand five hundred pounds one year from the expiration of the life estate, and two thousand five hundred pounds more, two years from its expiration, "unto my brother, Thomas Heyward, or his heirs."

The usual and natural construction of the word *or* is disjunctive (f): and we are to construe the words of every testator in their ordinary and natural sense, unless there is something in the context to impose a different meaning on them, or, unless there is something in the nature of the interest created, taken in connection with the operation of the other parts of the will, which would defeat the clear legal intention, were the usual interpretation given.

It is not necessary here to examine the precedents, where a conjunctive, and not a disjunctive, construction has been given to this word: because, as we have seen, there is nothing in the context requiring such construction.

It must, therefore, be left to its ordinary signification; which is entirely disjunctive.

It is impossible for an ordinary reader to peruse the words of this will, relating to the legacy of five thousand pounds, without the

(b) *Browne v. Kenyon*, 3 Madd. 415.

(c) *Wigram*, p. 9.

(d) *Id.* pl. 183; and see *Rosborough v. Hemphill*, 5 Rich. Eq. 107–110.

(e) *Rosborough v. Hemphill*, 5 Rich. Eq. 105–110.

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(f) 1 Russel, 171.

impression that there was an alternative in

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the \*testator's mind as to who should receive it—Thomas, or his heirs. His words show it.

Now every word in a will must be presumed to have been used with some intention, unless the context or the rules of law render it necessary to regard it as surplusage (*g*); and if it can be done without violating legal rules or principles, effect should be given to every word in the sense in which it was intended.

There is nothing illegal in a man's directing payment of a legacy to another and his heirs: but the law will, in such case, give him the sole benefit.

Nor, on the other hand, is there anything illegal in a direction that a legacy be paid, at a particular time, to one—or to his heirs, as substitutes, in case he be then dead.

If this is the meaning and legal construction of James Heyward's will, full effect should be given to it.

And here I assume, once for all, that the word heirs, when applied as in the present instance, to personality—a subject not inheritable—was meant to designate those persons pointed out by the statute to succeed to Thomas's estate. (See statute of 1791, which gives the same distribution to intestate estates, personal and real.)

The word heirs thus applied, by way of description, is as effectual a designation of persons to take by purchase, as issue, heirs of the body, heirs lawfully begotten, or any other form of description. The only difference between issue and heirs in such a connexion is that under the former all lineal descendants take; while the word heirs may exclude some of the lineal descendants, and include persons who are not lineal descendants. The difference between heirs (generally) and heirs of the body or lawfully begotten, is that heirs includes all distributees, while the other terms are not only confined to issue, but to such issue as fall within the

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table of the statute. And \*wherever heirs, or special heirs, are mentioned creating a reference to the statute, the statute exhibits the extent of their interests (*h*).

If the direction had been to pay to Thomas, or, in case of his death, to his heirs, there are many precedents to show that the heirs would have taken by substitution. But as heirship can only be predicated of persons left by an ancestor to succeed to his property; in other words to take in case of his death; these words (unless the context is to the contrary) are always implied in all gifts made to persons designated as heirs (*i*).

(*g*) P. Wms. 280; 2 Meriv. 25; Wigram, 11; 7 Ves. 368.

(*h*) See *Templeton v. Walker*, 3 Rich. Eq. 543, 550 et seq. [55 Am. Dec. 646].

(*i*) Sir Jas. Wigram, in *Salesbury v. Petty*, 3 Hare, 93.

Then we may read this will as if the words were that, at the time specified, the legacy of five thousand pounds should be paid to Thomas Heyward, or, in case of his death, to his heirs, i. e., to those persons left at his death to succeed to his estate. These words, it will not be disputed, would have given a substitutional interest. In such a text the word "or" would have been emphatically disjunctive.

The case of *Corbyn v. French*, 4 Ves. 418, 434, mentioned in the decree, and much relied on here by the defendants, is not inconsistent with the view I am taking, but in some respects tends to confirm it.

The testator in that case, after directing a sale of a portion of his estate, disposes of part of the proceeds as follows:

"And I further give and bequeath to my aforesaid niece, Elizabeth Cooper, the sum of two thousand pounds, (or to her proper representative, in case she should not be living at the decease of my wife.) I also give to each of the children of my sister, Elizabeth [Barker]—viz: John, Dorothy, William and Christopher (Barker), or their representatives or representative, the sum of two thousand pounds. The remainder I di-

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rect to \*be equally divided between Josiah Messa, aforesaid, and John (Corbyn), the son of my very worthy and much respected friend and partner, Thomas Corbyn, share and share alike."

John Barker died during the testator's life, leaving a widow and children. Christopher Barker survived the testator, but died during the life of his widow.

The bill was filed by John Corbyn, as residuary legatee, for an account of the personal estate of the testator, and, among other things, to have the legacies of John and Christopher Barker, declared to have lapsed, and fallen into the residue.

The Master of the Rolls stated the question before him thus:—"One of these children (John Barker) died in the life of the testator. Another (Christopher Barker) survived the testator, but died in the life of his widow. The question is, whether they (their legacies) are vested and transmissible to their representatives."

"As to the legacy to John, I think the question can hardly be raised upon this will. For, see the preceding legacy to Elizabeth Cooper. Would not that have lapsed, if Elizabeth Cooper had died in the life of the testator? Beyond all question it would. It is nothing more than saying it shall go to her representatives if she dies before his wife." He proceeds to argue that the interests given under the will, being intended only as beneficial interests to the legatees, must vest in the legatees before they would become transmissible; and remarks that, "The rules upon which the Court proceeds are perfectly established:—a testator is never



to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear." \* \* \* "It is perfectly clear, that when the fund is given to one for life, and after the death of that person, to several others, and in case of their deaths to their representatives, there is no reason to presume an intention that it shall not lapse by the death of the legatee in the life of the testator. It is impossible,

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without transgressing every \*rule as to vesting, to hold that this legacy vested—the legatee not having lived to take the benefit under the testator's will."

It is manifest that the Judge in this case was determining the question upon the point of lapse alone. The legacy being given to John, lapsed by his death in the testator's life, and the lapse was not saved by the extension (had there been words to that effect) of his interest to his personal representative, or executor,—the interest to John or his executor being identical. But his Lordship argues that the words "or to their representatives" did not refer to a time antecedent to the testator's death—on the contrary they referred to the period of the life estate, and although unnecessary in that connexion, were thrown in to put the legacies when vested "out of doubt."

"I am very clearly of opinion," says he, "the legacy to Christopher is good." Christopher, it will be remembered, survived the testator, and became capable of taking the interest conferred on him.

"This is stronger than the common case of a legacy to A. and his representatives. There those words are surplusage: for if the testator dies before the day of payment, it would go to his representatives. But in this case there is a reason for inserting them. This is not an immediate legacy—but after the death of another person. There is, therefore, an interval in which the legatee might die; and though it vested, he might not live to receive it. That addition might be inserted to put it out of doubt, and must mean, in case they die in the life of the testator's wife. I desire to be understood to determine it upon that circumstance—that there is a life intervening."

It is to be observed that the real question in this case was lapse or no lapse: to be determined by the consideration, in the first place, whether the legatee ever took a personal interest by surviving the testator: and if he did not, then, whether the superadded words, relating to his representatives (taking the word in its legal sense) were intended to save the lapse by referring to a time anterior to the testator's death.

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\*And it is remarkable, also, that the word in that case was representatives and not heirs; and is so considered throughout the judgment.

The difference is quite material. It is not determined in that case that if the legacy had been to Christopher or his heirs, these words would not have been construed to create alternative interests, between him and them, as there was an interval in which he might die, and "not live to receive it," there being "a life intervening." In such case, the Court might have regarded the words "or his heirs" to have been inserted for a more substantial purpose than "to put it out of doubt."

It is familiar that such words are interpreted disjunctively, and for the purpose of creating a substitution, to prevent lapse, when the legatee, named in the will, dies in the testator's life: as in *Gettings v. McDermott*, 2 Mylne & Keene, 69; S. C. 7 Eng. Cond. Ch. 263, one of the cases mentioned in the decree.

But it seems hardly possible to give such a construction to *Price v. Lockley*, 6 Beav. 180, another of the cases cited in the decree. That is a case much in favor of the plaintiffs in the present cause.

The testator by his will, after certain legacies, directed that his monies and choses should be collected and vested in public funds for the use and behoof of his wife and two children, Eliza and Joseph, during the wife's life, or widowhood, "and at the decease of my said wife, I give and bequeath the same to my said (4) children,—the survivor, or survivors of them, equally, share and share alike,—or to their heirs lawfully begotten."

The residue of the estate was also given to testator's wife, during her life or widowhood: "and after her decease, or second marriage, I will and direct that the same be

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disposed of \*by sale, and the money equally divided among my said (4) children, or the survivor of them, or their heirs as aforesaid."

Testator died in 1805. Joseph survived him and assigned his share to one James, but died during the widow's life—he having died in 1837 and she in 1841.

The contest was between James, the assignee of Joseph, and five children left by Joseph at his death.

It was contended for James, the assignee, that Joseph, on surviving the testator took a vested interest, in one-fourth of the residue: and that it passed under his assignment.

For the children it was insisted, that if testator's four children survived the tenant for life, they would have taken absolutely between them: and that on the death of any of the four, in the life of the widow, (meaning without issue) the survivor would have taken; but, if they left children, such children would take the share of the parent by substitution,—wherefore, Joseph had no interest to pass by assignment.

The case seems to have been regarded as

very plain:—"the master of the Rolls" (Lord Langdale) "was of opinion that in the event which had happened," (which I have just stated) "the children of Joseph took one fourth" (Joseph's share) "by substitution."

This case appears conclusively to establish that the word "or" has an effect much beyond that of merely saving a lapse.

When it is effectual to save a lapse, it accomplishes that purpose only by creating substitutional interests. This is permitted to carry out the intention of the testator. But as lapses are in such cases saved only by substitutional words, why should the operation of such words, when intended to create substitution, be confined to cases of lapse? and not applied in every other case and for every other purpose which the intention requires?

It has been observed that the words of description in this case of *Price v. Lockley* are heirs lawfully begotten and not heirs as in this case.

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\*I trust I have sufficiently explained, heretofore, that that does not affect the application of the principle of that case to the one before us.

Then see the case of *Girdlestone v. Doe*, 2 Sim. 225; S. C. 2 Cond. E. Ch. 394. Thomas Doe bequeathed to Mary Tattersall, the yearly sum of forty pounds, to be paid from interest and dividends of stock in the long annuities, during her life:—and after her death, he bequeathed the same to his nephew, James Holman, "or his heirs." After testator's death, and in the life time of Tattersall, Holman sold and assigned his annuity of forty pounds to Girdlestone, and then died during the life of Tattersall. On the death of Tattersall, Girdlestone filed his bill against the surviving executrix of Doe, to enforce his assignment. Demurrer to the bill.

Argued for plaintiff that the word "or" must have a conjunctive interpretation.

Vice Chancellor:—"It appears to me that "or" must be construed disjunctively here as the context requires it: and that the testator contemplated that his nephew might not be alive at the death of Mary Tattersall: and, therefore, I think that the nephew did not take an absolute interest in the annuity."

The only observation necessary to be made on this case, is that it is very obscure what the Judge could have meant by "as the context requires it." We have not the context in the report. But it is plain that the word "or" is disjunctive, unless there is a context to the contrary. And then this case is clear, that when the word is to be disjunctively interpreted, it creates alternative interests in just such a case as the one before this Court.

Then examine the case of *Salisbury v. Petty*, 3 Hare, 35. Assuming here, again, as heretofore, what no lawyer doubts, that a

gift to heirs is as good a designation as a

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gift to issue, though the \*destination of the gift is different:—then I think that the present case is decided by *Salisbury v. Petty*.

The testator in that case, John Park, by will dated, 1819, devised to his brother James all his real estate, for life, subject to the payment of two thousand pounds a piece to his nephews and niece, John, Thomas and Mary Park, twelve months from testator's death, "or" to their respective lawful issue.

On the death of James, testator devised the estate in remainder to Jame's issue, or such of them as he might appoint; increasing the legacies of John, Thomas and Mary, on that event, to five thousand pounds each, "or to their respective lawful issue."

Failing issue of James at his death, he then devises the estate to the nephew, John Park, increasing the charge to seven thousand pounds for Thomas and Mary, each.

John dying, without issue, the estate is then given to Thomas, charged with six thousand pounds to Mary, "or her issue."

Failing Thomas and his issue, the estate is finally given over, in fee, to Mary.

James, the brother, and John, Thomas and Mary, the nephews and niece, all survived the testator.

John died in 1834, without issue.

Mary died in 1839, leaving six children.

Thomas died in 1839, leaving four children.

James, the brother, died last of all, in 1841, leaving issue.

The construction of the Vice-Chancellor, Sir James Wigram, after an elaborate investigation, was, that "as to the gift of the first two thousand pounds, the issue" (of the three) "are to take in case of the death of the legatees, John, Thomas and Mary, in the life of the testator:" (so much for preventing a lapse.) "And in the other cases, it is, in the event of the death of the parties, during the life of the tenant for life, the children are to take. The children who survived the tenant for life, take as joint tenants, in substitution for the parents who died in his lifetime."

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\*It may be observed, in passing, that the Judge in commenting on the word "or," says, I interpose the words, "in case of death," for that must be the meaning of the word "or."

Here, then, we have a complete adjudication of every point that has arisen, or could have arisen in the present case. How closely it resembles the present! A devise, constituting a life estate,—successive remainders,—those remainders charged with legacies, the legacies in favor of named individuals, "or their issue," death of some with, and others without issue, in life of life-tenant. How much more could be required to make the judgment in that case bear on this?



Now, of the cases mentioned by me, *Price v. Lockley*, and *Salisbury v. Petty*, were decided, the one in 1845 and the other in 1843.

In the year last mentioned, was decided our own case of *Anderson v. Smoot*, Speers Eq. 312, to the same effect. The will in that case gave to the testator's wife the one-fourth of his personal estate for life; at her death to be "equally divided among my surviving children, or the heirs of their bodies, share and share alike."

In that case the contest, which related to slaves, was between certain of the children of testator who survived the life tenant, and the issue of the other of his children who died during the life-tenancy. And it was held that the will intended to provide for such of the children as survived, and the issue of those who died. I refer to the judgment for the reasons of that opinion, and for the construction of the word "or."

What more authority is wanting?

There were some observations at the hearing here made upon the form of this legacy. It was presented as a condition personal to Nathaniel, to whom the estate was devised in remainder; and, then, the attributes of such a condition, under the English law, as to entry of the heir for breach, &c., were

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\*ingeniously insisted on. But these doctrines are entirely inapplicable to our laws and institutions.

Then, it was argued that Thomas Heyward had a vested interest at the time he received payment from his brother Nathaniel, and so Nathaniel was discharged of his obligation.

It is not very clear to my own mind, (and I speak here only for myself,) that the interest of Thomas was vested, at least it was not vested for the purposes of this argument.

If we look to the words of the testator, there is no expression of a direct legacy. But if the testator had given to Thomas five thousand pounds at one and two years from the expiration of the life estate, without more, it would be difficult to discover in such a legacy a present vested interest. And when to this is added the fact, that the donation is only to him or his heirs, alternately, at that time, and that the charge upon the estate for securing it, is only from and after the accrual of the remainder, it would be difficult to infer a present vested right in Thomas. The mere fact that it was rendered, by the terms of the donation, dubious and uncertain who was to receive the money, when payable, gives an air of contingency to the whole legacy. Does this look

like a vested, transmissible interest in Thomas?

But again. Thomas did not, as I read his memorandum, receive payment. The instrument creates a mere debt against him for the amount advanced by Nathaniel, with a covenant to set it off against the legacy when due, and an engagement to pay any difference still owing. This is not payment, (I speak still for myself,) it was an advancement by Nathaniel on a contingent security.

But admitting everything contended for, except the discharge of Nathaniel; conceding that Nathaniel did pay the legacy in full to Thomas,—what does the argument avail? If Thomas had a right to receive and discharge, he must have had as good a right to sell and assign. But the cases I have quoted, in which the contest was between

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the assignee of the legatee named and \*his heirs, show, conclusively, that where the heirs have an alternative right, which comes into operation, no such assignment can be allowed to their disappointment.

It remains only to inquire what persons come under the description of heirs of Thomas Heyward.

We have determined in several cases, (*j*) that under this description, all who are entitled to take under the statutes of distribution, and only such, are entitled: and that these are to be ascertained at the death of the party whose heirs they are.

There are only two of these before us under this bill. The others have made no claim. It is clear that of these two Mrs. Hamilton is entitled. As to the other, the Court would prefer that further inquiry be made.

It is therefore ordered that the decree dismissing the bill be reversed; and that the case be remanded to the Circuit Court for the purpose of inquiring, through the Commissioner, who were the heirs of Thomas Heyward, at his death, and what proportions of the legacy of five thousand pounds each of the plaintiffs was entitled to, according to this opinion, with interest, and which of them have received satisfaction of their interests, or to what extent; and what balance is due to each. And that the Commissioner have leave to report any special matter, embracing, of course, the trusts for a settlement of Mrs. Hamilton's share.

DARGAN and WARDLAW, CC., concurred.  
Decree reversed.

(j) See *Seabrook v. Seabrook*, McM. Eq. 204; *Buist v. Dawes*, 4 Rich. Eq. 415, note; *Rochell v. Tompkins*, 1 Strob. Eq. 114, and *Evans v. Godbold*, 6 Rich. Eq. 26.

7 Rich. Eq. \*328

\*MARY C. DRAYTON, and Others, v. JAMES ROSE, and Others.

(Charleston. Jan. Term, 1855.)

[Wills  $\hookrightarrow$  199.]

A codicil held to be such a re-publication of the will as to pass to the residuary devisee a farm purchased by the testator after the date of the will, and before the date of the codicil, although the farm was purchased with the proceeds of a plantation which was otherwise disposed of by the will, and which the testator had in the meantime sold.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 498; Dec. Dig.  $\hookrightarrow$  199.]

[Wills  $\hookrightarrow$  578.]

The will directed that the estate be kept together during the life of testator's daughter; that she be paid three thousand dollars annually, from the net proceeds of the crops, and the net residue of the crops be applied to his debts:—Held, that the farm afterwards purchased was subject to this provision of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1259; Dec. Dig.  $\hookrightarrow$  578.]

[Executors and Administrators  $\hookrightarrow$  272.]

Held, also, that the net residue of the crops was the primary fund for the payment of debts in exoneration of the residuary estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052–1057, 1059, 1065, 1068; Dec. Dig.  $\hookrightarrow$  272; Wills, Cent. Dig. § 2154.]

[Wills  $\hookrightarrow$  587.]

Held, further, that after payment of debts, the net residue of the crops, during the life of the daughter, would go to the residuary legatee, although the will directed that after the death of the daughter the corpus be sold, and the proceeds divided among certain legatees.

[Ed. Note.—Cited in Williams v. Kibler, 10 S. C. 428.

For other cases, see Wills, Cent. Dig. § 1288; Dec. Dig.  $\hookrightarrow$  587.]

[Wills  $\hookrightarrow$  847.]

The Court refused to break in upon the scheme of the will by directing a sale of the property, for payments of debts, distribution, &c., during the life of the daughter.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2163; Dec. Dig.  $\hookrightarrow$  847.]

Before Wardlaw, Ch., at Charleston, June, 1853.

The testator, Dr. Philip Tidyman, died the 2d July, 1850, and the defendants, James Rose and Henry A. De Saussure, qualified as executors of his will. The case will be sufficiently understood from the will and codicil of the testator, and the decree of his Honor, the presiding Chancellor.

"Will.—State of South Carolina.

"In the name of God, amen. I, Philip Tidyman, of Charleston, Doctor of Medicine, being of sound and disposing mind and memory, but mindful of the uncertainty of life, do make, publish and declare this to be my last

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will and testament, \*hereby cancelling and revoking all former or other wills and testaments by me heretofore made.

"Imprimis.—I give and bequeath, to my nephew, Alfred Drayton, my watch and seals and my Manton gun and pistols.

"Item.—I give and bequeath, to my friend and cousin, John Auldjo, Esq., of England, the miniature paintings of Mrs. Tidyman and myself, by Malbone; also the painting of Louis Phillipe, King of France, beautifully executed on Sevre China; also, the drawing of Ninon de L'Enclose; also, the copy of Sir Joshua Reynold's Juvenile Academy in Crayons, by Newsam, a deaf and dumb boy, of Philadelphia, executed, when he was but seventeen years old; also, a small box, made from a remnant of the great elm tree, under which the treaty of William Penn with the Indians was signed, which box was presented to me by Judge Roberts Vaux, of Philadelphia, whose maternal uncle was a member of Penn's Council.

"Item.—I give and bequeath to the American Philosophical Society all my useful books and engravings, also letters to me from eminent men, and all my diplomas, to be deposited in their Library. The diplomas may be considered of value from the autographs of eminent men.

"Item.—I give and bequeath to the St. Andrew's Society, of Charleston, a portrait of the great tragedian, John Kemble, an original painting by Martin Shee, President of the Royal Academy; and, also, after the death of my daughter, my own portrait, by Sully.

"Item.—I give, devise and bequeath, unto my beloved daughter, Susan Tidyman, for, and during the term of her natural life, the use of my house and lot in Ladson's court, in Charleston, wherein I now reside, together with all my household and kitchen furniture, linen, plate, wine, and every other kind of property in my said establishment, as it now stands, without change or alteration in any respect; also all the house-servants usually employed by me in town and country for domestic comfort; also, my carriage and

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horses. My intention \*is that my beloved daughter, during her life time, shall reside in her own house and be attended by her own servants. And I request such one of my nieces as my daughter may select, to reside with her, and, as a friend and companion, to promote her comfort and happiness.

"Item.—I order and direct my executors to keep my whole estate together, during the life time of my said daughter; to have my plantations cultivated by my slaves, as they now are; to manage and superintend the same; and, from the proceeds of the crops, to pay to my beloved daughter, Susan Tidyman, annually, during her life time, the sum of three thousand dollars, for her maintenance and support; and to appropriate the net residue of the crops to the payment of my just debts.



"Item.—After the death of my said daughter, I give and bequeath, to my niece, Susan Deas, my silver urn (a valuable piece of family plate,) and all my other plate and plated ware, and all the jewelry in my house. To my cousin, James Rose, and his wife, Mrs. Julia Rose, or the survivor of them, my house servants, Nancy, Lucretia, Jenny and Judy, with my earnest request to protect and treat them with kindness; and also the sum of one thousand dollars, to be paid out of the sale of my plantations, as hereinafter directed.

"Item.—After the death of my said daughter, I order and direct my executors to sell and dispose of all my house and lot of land in Ladson's court, in Charleston, and the rest of my furniture, &c., &c., therein, carriages, horses, &c., upon such terms of cash and credit, as they may deem most expedient, and divide the net proceeds of such sales equally between my nieces, Hester Drayton and Maria Drayton, my nephew, Alfred Drayton, Mrs. Mary Holmes, (widow of C. R. Holmes,) and her sisters, Elizabeth Deas, Anne Deas and Susan Deas, to each, one-seventh part thereof.

"Item.—After the death of my said daughter, I order and direct my executors to sell and dispose of all my real estate, consisting of my Cedar Hill Plantation in St. James'

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Parish, \*Santee, and my plantations in the Parish of Prince George, Winyaw, (north Santee,) upon such terms of cash and credit, as they deem best, and, from the proceeds of such sales, I direct the balance of my debts to be paid; then out, of such proceeds I give and bequeath to James Rose and Mrs. Julia Rose, or the survivor of them, the sum of one thousand dollars, as herein before stated; and to the German Friendly Society, of Charleston, South Carolina, the sum of five thousand dollars, as a permanent fund, in aid of their funds, for the benefit and assistance of "indigent transient Germans;" and the remainder of the proceeds of such sales to be equally divided, between my nieces, Hester Drayton, Maria Drayton, Rose Ford, (wife of Frederick A. Ford,) and my nephew Alfred Drayton, to each one-fourth part thereof.

"Item.—After the death of my said daughter, I order and direct the remainder of my slaves to be divided in families, by my executors into seven equal parts or shares, one-seventh part whereof I give and bequeath to my nephew, Alfred Drayton.

"One-seventh part whereof I give and bequeath to my niece, Hester Drayton.

"One-seventh part whereof I give and bequeath to my niece, Maria Drayton.

"One-seventh part whereof I give and bequeath to my niece, Elizabeth Deas.

"One-seventh part whereof I give and bequeath to my niece, Anne Deas.

"One-seventh part whereof I give and bequeath to my niece, Susan Deas.

"One-seventh part whereof I give and bequeath to my niece, Mary Holmes, (widow of C. R. Holmes.)

"Item.—I give and devise all the rest and residue of my estate, of every kind and nature whatsoever, unto my nephew, Alfred Drayton.

"Lastly.—I nominate, constitute, and ap-

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point my friends \*Jacob Bond Ion, James Rose, and Henry A. De Saussure, executors of this, my last will and testament.

"Witness, my hand and seal, this twentieth day of March, in the year of our Lord, one thousand eight hundred and forty-three, and in the sixty-seventh year of American Independence.

"Philip Tidyman. (Seal.)"

### Codicil.

"I declare the following to be a Codicil to my will:

"Whereas, in my foregoing will, I gave and bequeathed to my cousin, James Rose and his wife, Mrs. Julia Rose or the survivor of them, certain house-servants, after the death of my daughter, and, among them, one named Judy; since the date of my will the said Judy has had a child. I now, therefore, give and bequeath the present and future issue and increase of my said servant, Judy, to the said James Rose and his wife, Mrs. Julia Rose, or the survivor of them, in the same manner as I have heretofore given Judy to them.

"Witness, my hand and seal, this twelfth day of March, in the year of our Lord, one thousand eight hundred and fifty.

"P. Tidyman. (Seal.)"

The decree of his Honor, the presiding Chancellor, is as follows:  
Wardlaw, Ch.

The plaintiffs are legatees of the late Dr. Tidyman, and submit to the judgment of the court various claims, depending upon the construction of the testator's will. Some of these claims have already received the consideration of this court, in a case entitled *Rose v. Drayton*, 4 Rich. Eq. 260, wherein the executors of Dr. Tidyman were plaintiffs, and Susan Tidyman, heir at law and principal legatee of testator, and Alfred R. Dray-

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ton, residuary legatee, were defendants. The present plaintiffs insist that they are not bound by the judgment in *Rose v. Drayton*, as they were not parties or privies to the suit. It is not clear that they were not so far represented by the executors as to be estopped from disputing the judgment there; but however this may be, the case is binding

on me as authority. This last remark is made with no purpose of pressing the former decision beyond its just scope, or of avoiding just responsibility on my part. Chancellor Dunkin's decree in *Rose v. Drayton* decided that the codicil of March 12, 1850, republished the testator's will, so as to pass the Greenville farm, acquired after the making of the will; and that, as to so much of this farm as the testator had contracted to sell to the railroad company, Alfred R. Drayton had the legal title, and was bound as trustee to convey to the purchaser, and was entitled as residuary legatee to an account for the estate, thus converted into personalty, from the executors, who were adjudged to be authorized to receive the purchase money. The Court of Appeals affirmed this decree, to the extent of the appeal from it, that the codicil republished the will, and carried to the residuary legatee the legal estate in so much of the Greenville farm as was contracted to be sold by testator, and of course that testator was not intestate as to this estate, so converted by contract, nor his daughter as distributee or heir entitled to take the same. Neither the Circuit nor Appeal decree adjudged anything as to so much of the Greenville farm as remained in specie, beyond the general proposition and its necessary incidents, that the codicil republished the will.

Independent of the case of *Rose v. Drayton* upon the very matter in dispute, it seems to me to be too clear for discussion, upon principle and authority, that the codicil in this case republished the will. *Pigott v. Waller*, 7 Ves. 98; *Barnes v. Crowe*, 4 Br. C. C. 2; 5 M. & S. 5. The effect of republication of a will, by codicil, is to bring down the will to the date of the codicil, and make

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the words of will and codicil as one instrument declare the disposition of his estate by testator, at the time of republication, with some exceptions as to reviving legacies in the will revoked, adeemed or satisfied. *Powys v. Mansfield*, 3 Myl. & Cr. 376, (14 E. C. R.) If, however, the language of the will, interpreted as used at the date of republication, does not include after acquired estate in its description of the subject of gift: or, if the republishing codicil be so limited in its terms of disposition, as to exhibit the intention of the testator to confine its operation to the estate embraced in the original will, after acquired estate will not pass. *Money Penny v. Bristow*, 2 Russ. & Myl. 117; *Havin v. Foster*, 14 Pick. 541. In the present instance, no such indication appears in the codicil to limit the effect of republication. The change of the state of testator's indebtedness between the dates of his will and codicil, produced by his sale of one of his plantations in Prince George, Winyaw, and his application of the proceeds to his

debts, has no bearing upon the construction of the will, for the testator is presumed to speak as to lands at the date of his codicil, and as to personalty at the date of his death.

Applying these principles to the case, it is manifest that the ample terms of the residuary clause give the Greenville Farm to Alfred Drayton, unless it be devised to another. Supposing it undevise to any other, then as every devise of land is in its nature specific, (*Broome v. Monck*, 10 Ves. 596,) we may read the clause according to its legal effect: I give and devise my Greenville farm and all the rest and residue, &c. It is suggested, in the first of the claims set forth in the bill of the plaintiffs that, as the Greenville farm was purchased with the proceeds of sale of the plantation in Prince George, Winyaw, the former place must be regarded as substituted for the latter, and as passing to the devisees of the latter. The will, fairly construed with reference to the state of testator's affairs, contains no indication of any purpose on his part to make such substitution, and extrinsic evidence of such purpose

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is clearly incompetent, and it was not offered. To admit this substitution would overrule all the doctrine of ademption by the testator's sale or conversion of the subject of devise. It was argued, under this head, that the direction by the testator, in the ninth clause of his will, to his executors, to sell after the death of his daughter all of his real estate, consisting of his Cedar Hill plantation and his plantation in Prince George Winyaw, and divide the proceeds among certain legatees, included the Greenville farm as part of his real estate, although not expressly named. But obviously the testator did not intend to embrace in this clause all of his real estate, or indeed any portion thereof not enumerated, for, in the clause immediately preceding, he had directed his executors, after the death of his daughter, to sell all of his house and lot of land in Ladson's Court, and make a different distribution of the proceeds from that prescribed in the ninth clause. It is always a mere question of construction, which of the two, general words or a specific enumeration accompanying them, shall control: and here, supposing the testator to use the words of the ninth clause after he acquired the Greenville farm, I am of opinion that he did not intend to embrace any real estate therein, besides the parcels enumerated. *Bowes v. Bowes*, 7 T. R. 482, 2 Bos. & P. 500; *Garrett v. Garrett*, 1 Strob. Eq. 96.

The second claim of the plaintiffs is that the crops or profits of the Greenville farm are chargeable with the debts of testator and the annuity given to his daughter. The sixth clause of the will directs the executors to keep the whole estate of testator together, during the life of his daughter: to have the



plantations cultivated by his slaves as they then were, and manage and superintend the same; and, from the proceeds of the crops, to pay to his daughter annually \$3000 for her maintenance and support; and to appropriate the net residue of the crops to the payment of his just debts. It seems that the executors have given to Alfred Drayton, the residuary legatee, the possession of the unsold remnant of this farm, although about

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\*\$5000 of the testator's debts remain unpaid. It is charged in the bill that the testator cultivated this farm; and this allegation is admitted by the demurrer of Alfred Drayton, and is not denied in the answer of the executors. I understand testator's direction to keep his estate together, followed by the directions to manage the cultivation and appropriate the crops, to relate to his lands yielding crops, and to the slaves and stock connected with agricultural operations. Manifestly the clause does not refer to his house and lot in Ladson's Court, and the furniture, plate, wine, &c., connected with that establishment as a residence, nor to the house servants, in town or country, usually employed for domestic comfort; for all these had been immediately given by a previous clause to his daughter. *Lawton v. Hunt*, 4 Strob. Eq. 7. But I cannot distinguish between a cultivated farm, yielding crops, and a plantation. In my opinion the crops of the Greenville farm are charged with the debts of testator; (*Rowley v. Eyton*, 2 Meriv. 128.) and the executors were not authorized, either by the will of their testator or the decree of the court in *Rose v. Drayton*, to deliver possession of the farm to the residuary legatee. Some of the plaintiffs, Elizabeth Deas, Susan Deas, Anne Deas and Mary Holmes, seem to have no interest in this question, but no objection is made for misjoinder; and none of the plaintiffs has a present interest in the question, provided the debts of testator be paid, before their right of enjoyment, at the death of the daughter, begins, unless they are entitled to intermediate profits, which will be hereafter considered. The real controversy is between the executors and the residuary legatee.

The third claim of plaintiffs is that the residuary legatee, Alfred Drayton, has no right to any portion of the estate of testator before the daughter's death, and that he is bound to refund to the executors the moneys prematurely received by him. This claim relates to the nine hundred and fifteen dollars; the purchase-money of the portion

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of the Greenville farm, \*sold by the testator to the Railroad Company, and to the money in the bankers' hands, at the death of testator: which have been paid over by the executors to Alfred Drayton. The decree, in *Rose v. Drayton*, decides that the executors

are bound to account to Alfred Drayton, as residuary legatee of the personalty for the nine hundred and fifteen dollars; and the money in the hands of the bankers, although not expressly mentioned in the former decree, is within its principles. It must be admitted that a decree to account to a residuary legatee does not absolutely direct immediate payment to such legatee; and, in my judgment, the executors would have been well authorized to retain these sums until the estate primarily charged with the payment of debts had achieved the end. But if the executors had applied these funds to the payment of debts, the residuary legatee would have had a clear equity to be subrogated for reimbursement to the situation and control of the executors over estates, antecedently liable for debts. It is insisted, however, for plaintiffs, that the will of testator is merely directory that the executors may pay the debts from the net proceeds of the crops, and creates no charge for debts upon the crops; and that, as residue strictly means the remnant after payment of debts and legacies, the residue in this case is the primary fund for the payment of debts. It cannot be disputed that a testator may prescribe as to volunteers, taking under his will, the order in which his estate shall be liable for his debts, and thus in any particular instance change the course of liability which would follow from the common law. In the present case the testator has made the law for his legatees. He has primarily charged the net residue of his crops after the payment of the annuity to his daughter, with his debts, and next directed that the balance of his debts shall be paid from the proceeds of estates directed to be sold in the ninth clause of his will. In *Warley v. Warley*, Bail. Eq. 409, it is held that, in the administration of a testator's assets for payment of debts, the first liability is upon real or

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personal estate, devised for the payment of debts, or in any manner directed to be so applied. In *Pinckney v. Pinckney*, 2 Rich. Eq. 234, this rule was followed where the charge for debts was not so distinctly expressed as in the present case.

The fourth claim of plaintiffs is that any surplus income from testator's crops, after payment of the annuity bequeathed to the daughter and the testator's debts, before the daughter's death, passes immediately or accumulates and passes ultimately to the legatees of the corpus of the estate, and does not go to Alfred Drayton as residuary legatee. The residuary legatee in this case takes every portion of the testator's estate which is not effectually given to other legatees: and this claim assumes that the direction to the executors, in the 8th and 9th clauses of the will, to sell certain real estate after the death of his daughter, and divide the pro-

ceeds among particular legatees, carries to these legatees the income not exhausted in the payment of debts and of the annuity to his daughter with which it was primarily charged. It is probable, from the direction in the 9th clause, that the balance of his debts be paid before the distribution of the proceeds of sale, that the testator did not expect there would be any net residue of his crops during the life of his daughter after payment to her of the annuity and of his debts: but he provided in the residuary clause a receptacle for possible remnant's not specifically disposed of. Treating the legacies in the 8th and 9th clauses as devises, there would be no doubt the residuary legatee would take the intermediate profits unconsumed. Where a specific devise is to take effect in futuro, so that, at the death of the testator, there is no person actually entitled to the immediate income, the rents and profits until the devise vests in possession will pass under the residuary clause. 1 Jarm. Wills, 594; Duffield v. Duffield, 3 Bligh, P. C. 621. But, when personal estate is given to A. at twenty-one, this will carry the intermediate interest; and the same result will probably follow where the testator mixes up real and personal estate in the same clause. Genery v. Fitzgerald, Jac.

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\*46S. (4 C. E. C. C. 218); Dougherty v. Dougherty, 2 Strob. Eq. 65; Brailsford v. Heyward, 2 Des. 18.

A devise of lands to be sold works a conversion of the lands into personalty from the death of the testator; and a devise of lands to be sold, after a life estate arising under the will, and that the proceeds be distributed to certain persons, is a pecuniary bequest, to these legatees, vesting from the death of the testator. If the conversion be absolutely directed, the postponement of the sale seems to be immaterial. Fletcher v. Ashburner, 1 Bro. C. C. 497; 1 White & T. L. C. 565. Granting then that legatees under 8th and 9th clauses of the will are in the more favorable position of legatees of personalty, I am still of opinion that the surplus of intermediate profits is not given to them. It is not given to them expressly, nor does the testator seem to have contemplated any enjoyment by them; nor any surplus profits in the life of his daughter, except in the residuary clause. Against all others, besides particular legatees, the residuary legatee is presumed to be the object of testator's bounty. In most of the cases which have arisen on this point, the controversy has been between the residuary legatee and the heir-at-law, and strong expressions have been used in favor of residuary legatees against intestacy. In Brailsford v. Heyward, however, the contest was between the particular and residuary legatees: but that case was determined upon the special provisions of the

will, especially upon a clause giving the executors full discretion to deal with the profits for the benefit of the children of testator. I have found no other case, in which a legatee of estate, to be enjoyed in futuro, prevailed against a general residuary legatee. It is adjudged that Alfred Drayton is entitled to the surplus income after payment of the debts of testator and the annuity given to his daughter.

The fifth claim of plaintiffs is, that so much of the testator's estate as may be necessary for the purpose be at once sold, for the payment of the debts of testator and raising

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a capital for \*paying the annuity to the daughter; and that the residue be divided amongst the legatees. The daughter and the residuary legatee do not consent to this arrangement. It is always a delicate exercise of power in the Court to disturb the arrangements of a testator's will, to be justified only where his schemes prove impracticable, and the interests of all his legatees require a departure from the prescriptions of the will. Such was the case of Lawton v. Hunt, 4 Strob. Eq. 1. In the present case, the only pretence of necessity for a sale, premature in the opinion of testator, arises from the fact that the executors have not reduced the debts of testator more than \$1000, and that \$5000 of debt still remains. The executors give a satisfactory account, in their answer, of their inability to do more in the reduction of the debts. Creditors are not pressing, and the amount of indebtedness is small, compared with the value, nay, the income of the estate. It would be a gross abuse of discretion to force a sale under these circumstances.

The sixth claim has been already considered in substance, and overruled.

I have hesitated between dismissing the bill without prejudice, and retaining it for the present on account of the second claim of plaintiffs; which I have sustained. I have concluded to take the latter course.

It is ordered and decreed that the bill of the plaintiffs be retained for the present, with leave to the defendants, the executors, and to Alfred Drayton, the residuary legatee, to move for its dismissal as soon as the debts of testator be paid, and with leave to the plaintiffs to proceed further if the debts of testator be not paid at the death of his daughter.

The complainants appealed on the grounds:

1. That his Honor erred in ruling that the Greenville Farm was not to be regarded as substituted by testator, for the plantation, sold by him, in his lifetime.

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\*2. That his Honor erred in ruling that Alfred R. Drayton was entitled to receive the monies paid over to him by the executors,



the same having been paid in contravention, it is respectfully contended, of the provision of testator's will, directing his whole estate to be kept together, until after his daughter's death.

3. That his Honor erred in ruling that, if there should be any surplus income, from testator's crops and real estate, after paying his daughter's annuity and after payment of his debts, the said Alfred Drayton was entitled to the same as residuary legatee, whereas it is respectfully contended that the same would pass, under the will, either immediately or ultimately, to the legatees of the corpus of the property.

4. That his Honor erred in refusing the application of the complainants, under the circumstances of the case, for a sale of the portion of testator's property charged with his debts and his daughter's annuity, and, after payment of his debts and securing his daughter's annuity, to pay over the residue to complainants, according to their interests under the will, and in not making some provision for the immediate payment of testator's debts.

5. That his Honor erred in not decreeing that the executors should account to complainants for their receipts and disbursements on account of the testator's estate.

6. That his Honor erred in not decreeing that, by the republication of testator's will by the codicil, the Greenville lands passed under the 9th clause of the will and not by the residuary clause.

7. That his Honor, it is respectfully submitted, should have ordered the costs to be paid out of the estate, or by others than these appellants and those in like interest with them.

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\*8. That the decree was, in the foregoing and other respects, contrary to Equity, and ought to be reversed or modified, in some or all of the foregoing particulars.

The defendants, the executors of Philip Tidyman, appealed from so much of the decree as retains the bill, and sustains the second claim of the complainants, touching the delivery of the Greenville Farm, by the executors, to Alfred H. Drayton, the residuary legatee, upon the grounds, viz.:

1. That the decree in *Rose v. Drayton*, by adjudging that the codicil republished the will of the testator, as a necessary incident, adjudged that the legal estate of the whole Greenville Farm vested in Alfred R. Drayton.

2. That the decree having ordered Alfred R. Drayton, as owner of the legal title in the Greenville Farm, to convey the part thereof agreed to be sold by the testator to the Rail Road Company, the legal title in the whole farm was indivisible, and vested in him by the same right, and the executors were legally justifiable, and bound to deliver it to him.

3. That the Chancellor was misinformed as to the facts of the case, in regard to the alleged rents and profits of the Greenville Farm. There were none such. The farm was never cultivated by the testator in his lifetime, nor were there any crops, or income derived from it by him, or his executors. He kept no negroes there beyond a few inferior domestic servants, and these were removed to the Santee plantation by the executors, after the testator's death.

Yeadon, for complainants.

Simonton, for Miss H. Drayton.

De Saussure, Memminger, Petigru, for executors.

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\*PER CURIAM. This Court concurs in the opinion expressed by the Chancellor in the circuit decree. It is, therefore, ordered and decreed that the circuit decree be affirmed, and that the appeal be dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

### 7 Rich. Eq. \*344

\*THE TOWN COUNCIL OF MOULTRIE-VILLE v. WILLIAM PATTERSON.

(Charleston. Jan. Term, 1855.)

[*Public Lands*  $\S$  169.]

The intention of the Legislature, in the several Acts in relation to Moultrieville, is not that there should be only one dwelling house to each half acre lot; but that one erecting a dwelling house should appropriate to his exclusive use no more than a half acre of land.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig.  $\S$  502; Dec. Dig.  $\S$  169.]

Before Johnston, Ch., at Charleston, March, 1854.

Johnston, Ch. This is a bill asking an injunction to restrain the defendant, Patterson, from rebuilding a dwelling house upon certain premises on Sullivan's Island; and it is necessary, to a proper understanding of the case, to examine various regulations passed, at different times, by the General Assembly of the State.

On the 31st January, 1791, it was "Resolved, that such of the citizens of this State, as may think it beneficial to their health to reside on Sullivan's Island, during the summer season, have liberty to build on the said Island, a dwelling and out-houses for their accommodation; and the person, or persons, so building, shall have the exclusive right to the same, and one-half acre adjoining thereto, (as long as he, she, or they, may require for the purposes aforesaid;) delivering up the same when demanded by the governor or commander-in-chief for the time being:—he, she, or they having the liberty of removing the buildings which they may erect."

By an Act passed the 17th day of Decem-

ber. 1817, incorporating the village of Moultrieville, it was declared that "the Intendant and Wardens shall have power, under their corporate seal, to make and establish such rules, by-laws, and ordinances, respecting the streets, beach, shores, ways, landing-places, commons, markets, buildings, car-

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riages, wagons, carts, \*drays, and police of said town, as shall appear to them requisite and necessary for the security, welfare, and convenience of the said town, or for preserving health, peace, order, and good government of the same," and "affix fines for offences against their by-laws, and appropriate the sums to the public uses of the island: but no fine shall exceed twenty pounds sterling, for any one offence;" and "shall have full power and authority to provide for the abating or removal of nuisances, and enforce the same."

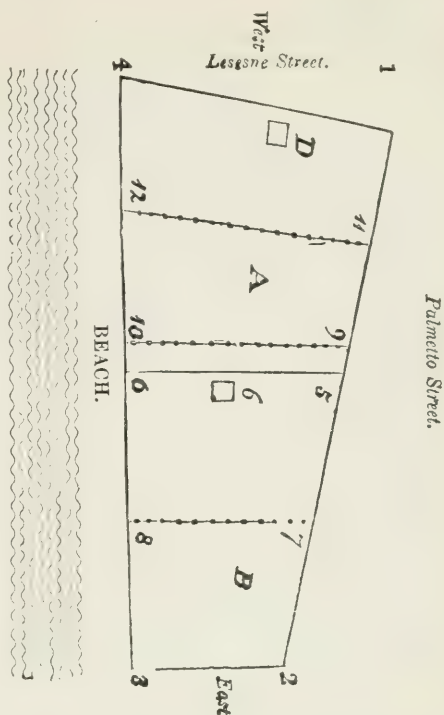
By an Act passed the 14th day of December, 1819, amending the Act of Incorporation, it is recited and enacted as follows:—"And whereas, the privilege of occupying the said island by the citizens was originally granted by the Legislature under proviso, that each citizen taking a lot for himself should actually build thereon; and it is not just, or proper, that any citizen should appropriate a vacant lot by erecting a mere shed, or by mere enclosure, and thereby prevent others from the privilege which he doth not, himself, actually use;—be it therefore enacted," "that no exclusive right to a lot on the said island shall be obtained by any citizen, otherwise than by his actually building a dwelling house thereon:—and if such dwelling house shall be removed or destroyed, the owner thereof shall have the exclusive right to rebuild, on the same lot, for one year thereafter; and if no dwelling house be built by him within that period, such lot shall again be considered as vacant."

The sixth section of the Council Corporate Act, passed the 19th December, 1827, is in the following terms:—"And be it further enacted, that hereafter no person shall erect, or cause to be erected, more than one dwelling house on each half acre lot, in the town of Moultrieville, on Sullivan's Island:—and if any person shall build, or attempt to build, such dwelling house, such person may be compelled to desist from such building, and to remove the same, by the Court of Chancery. And it shall be lawful for the Intend-

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ant, or any one of the Wardens \*of the said town, to execute such order, under the direction of the sheriff of the district, or his lawful deputy."

Early in 1851, the defendant, Patterson, acting for himself and others, enclosed an irregular piece of ground, situated on the south beach, and represented in this diagram by the lines 1, 2, 3, 4, to be used by the parties as sites for summer residences:



Whether lots were laid out to them by the town council, or by themselves, does not appear; but there is a plat before me, entitled, "Copy plat of a survey made on Sullivan's Island into lots, by Robert Q. Pinckney," in which are laid down, not only the external lines, as I have pointed them out, but dividing lines between the four persons proposing to occupy the premises. But the length or course of the lines are not laid down so as to enable me to complete the area of each lot. I have represented the dividing lines in Mr. Pinckney's plat by dotted lines, 7, 8, 9, 10, 11, 12, in my diagram.

Possession was taken of this plat of ground, 1, 2, 3, 4, as follows:—by this defendant Patterson, at A,—by Mr. Owens, at B,—by Mr. Beckman, at C,—and by Mr. Horlbeck, at D.

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\*The defendant, Patterson, built the first dwelling house, which he placed at A. At that time there were no buildings, of any description, on any of the lots except a carriage-house and stable on Mr. Beckman's lot, and some out-buildings on Horlbeck's. In this condition of his premises, Mr. Beckman, in the fall of 1851, sold them to the defendant, Patterson, who immediately erected a dwelling house at C; there was at that time a dwelling house in the course of construction at B, by Mr. Owens. Then Horlbeck built a dwelling house at D. Whether his house or Owens' was first begun or first finished, does not clearly appear.

This is the order in which the four dwelling houses were put up on the plat of ground 1, 2, 3, 4.



Originally a dividing line, (now obliterated,) was marked by a fence between Owens and Beckman; and there was a fence line between Beckman and Patterson—a little west of the line 5, 6. No line, or at least, no fence, ever divided between Patterson and Horlbeck.

A fire broke out in December, 1852, and burned down Owens' dwelling at B, and Patterson's at A. Patterson, who had as already stated, become the owner of Beckman's, thereupon sold it, with the appurtenances, to Owens; who took possession of the dwelling at C, destroyed the fence which had existed between his original lot and that just purchased by him; and, relinquishing to Patterson part of the latter, drew in his fence to a line now agreed on between them and represented by the line 5, 6,—thus, enlarging Patterson's original premises.

Patterson thereupon got timbers together to rebuild his house at A, and this is a bill to restrain him, by the authority of the statute of 1827.

I suppose whatever objections might be made to the jurisdiction of the court, independently of that statute, are completely obviated by its previous expressly delegated

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authority to it \*upon the subject: and, therefore, if the defendant is proceeding contrary to the statute, he must be stopped.

My doubt is, whether the building which he proposes to put up is an offence against the Act.

I observe in the first place, however, that there is nothing in the case authorizing an injunction independently of the Act of the Legislature itself. Though the Council, by their charter, were authorized to regulate their internal police, with reference to health, and to define nuisances and prohibit them by penalties,—it does not appear that they have ever exercised their sub-legislative powers in this respect. If they had, it will leave a question, whether their declaring that to be a nuisance, which, in its nature, is not so, would confer any authority upon this court, or make it its duty to restrain it: or render the party accused, liable, in any court beyond the fine which the council are authorized to lay.

The offence charged on this defendant, does not appear by any evidence to be a nuisance, even if he had carried his intentions into actual execution. I mean to say, that there is no evidence in the case to show, that the house at A, while it stood, was prejudicial to the health of his neighbors, or that, had he now succeeded in constructing it, the new building would be attended with any such effect,—nor does any witness offer an opinion that it is necessary to the preservation of their health that he should be enjoined. No such thing; on the contrary, the implication from the testimony of Owens and Horlbeck, who must have had experience of

the effect while the old house stood, is that they, the two nearest neighbors, had no cause of complaint. They say there was no complaint, and that the relations of all the parties were harmonious, which is hardly consistent with the idea that any ground of complaint existed.

Therefore, if the rebuilding of the house at A, under the circumstances, is an offence at all, it is an offence exclusively under the Statute of 1827: and we must look to that statute for the terms creating it an offence.

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\*If the original building at A, was not erected in contravention of the Act, it was no statutory nuisance, and the right to rebuild it is secured by the Statute of 1819.

By the legislation of 1791, no restriction whatever (relating to the extent of area on which dwellings were to be erected,) was created or declared. No title on the land built on was given. The builder was declared entitled to the privilege of exclusively using half an acre adjoining his residence, for the convenience of a summer residence. No figure was assigned to the half acre,—nor was there anything in the Act fixing the distance between dwelling-houses. If an individual had seated his house on a piece of ground less than half an acre, and surrounded by streets, his structure would not have been unlawful, though his privilege to use half an acre would have been cut down by his own voluntary choice of a location, where it could not be enjoyed. And so, if another individual had built on a strip of land, between two pre-existing mansions, so narrow so as not to allow himself the use of half an acre without infringing on the areas allowed to the prior settlers, his building would not have been illegal; although he had voluntarily narrowed the privileges he might otherwise have claimed.

The meaning of the legislature in the earlier Acts is palpable. If a citizen choose to build a summer residence, he was entitled to appropriate the exclusive use of half an acre, (perhaps in any form or figure,) of land adjoining his building, including its site; and as no other citizen could encroach upon these premises, he might, in virtue of his building, claim a lot of half an acre. He could claim no more; but it depended upon himself alone, whether he would claim an entire half acre, or put up with less. If one entitled to half an acre submitted to another person to build within a distance which restricted his occupancy on that side, it was an offence to him alone, and his consent or acquiescence, would waive his right to complain. Mr. Patterson having taken up the

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four lots in conjunction \*with those who are to occupy the contiguous lots, they must be held to have assented not only to the limits and location of his lot, but to the effect which his location produced thereon.

His building at A. was no offence against the Act of 1791, properly construed. The question remains, whether it was an offence against that of 1827? It is not, unless that Act obliges every builder to own a lot of half an acre. My opinion is, that it does not. While he may put up one dwelling-house on his lot, (the size of which is left to himself,) he is not entitled to put up two or more. This is the meaning of the Act. The intention being evidently to give a right to a summer residence to every person who might choose to build one for his own use; it was at the same time considered just that he should not abuse this privilege by erecting other residences, not for his own use, but to let out for profit. It seems that the Act of 1791 had been abused by putting up sheds instead of substantial residences; an abuse which was remedied by the Act of 14th December, 1819; a further abuse in a different form was probably guarded against by the Act of 1827.

To this view, it has been objected, that the Act of 1827 positively forbids the building on any lot of less than half an acre. This is not my reading of that Act. The Act, it is true, speaks of "each half acre lot." Does this necessarily require that each lot shall be of the extent of half an acre? I think not. This Act has tacit reference to the Act of 1791. That Act gave the maximum to which each builder might claim: and it being probably supposed that every claimant would lay out his premises to the best advantage, the lots when afterwards spoken of are spoken of as half acre lots. This accounts for the language of the Act of 1827. Its intention was simply to say, that the owner of a lot, (as defined by the Act of 1791,) should not put up more than one residence upon it.

There is a view, apart from what I have said, which affects the right of the Town

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Council to complain, provided it be a \*fact, that they laid out these lots as laid down in Pickney's map. This is not a proceeding by way of information, nor is the attorney-general a party. The defendant is not proceeded against for a purpresture upon public grounds, but for an offence, in the nature of a nuisance, against parties suing,—against private parties. A nuisance must be a damaging act: whereas, a purpresture, whether injurious or not, is a public offence. But suing as a mere corporation, for an injury, the council cannot complain of buildings put up on a lot, of whatever extent, granted by themselves for that purpose.

But suppose I am mistaken in all that I have said, still at the time that Mr. Patterson put up the original building which he now proposes to reconstruct, he committed no offence; and if he did not, he has expressly the right of rebuilding it. At that time the putting up the house he constructed, left

half an acre between him and any other building. It may be, that the building put up at C., was an offence. I think it was not. But suppose it was, it by no means follows, that the wrong recoiled upon the premises at A., so as to render the lawful structure there, (or its reconstruction,) unlawful.

It is ordered that the bill be dismissed; and that any order of injunction which may have been granted under it be dissolved and set aside.

The complainants appealed on the grounds:

1. That the intention of the legislature, as manifested in the series of Acts in relation to Moultrieville, was, that there should be only one dwelling for each half-acre space, and that the defendant, in building upon a lot of less than a half acre, was violating the law.

2. That neither by any previous act of his own, nor by any act of the Town Council, had he obtained an exemption from the application of the remedy prescribed by the statute.

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\*3. That the prayer of the complainants should consequently have been granted, and a perpetual injunction issued.

Petigru, for appellant.

Yeadon, contra.


PER CURIAM. We concur in the decree; and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DARGAN and WARDLAW, CC., concurring.

Decree affirmed.

#### 7 Rich. Eq. \*353

\*WILLIAM T. RIVES v. HENRY P. RIVES.  
(Charleston. Jan. Term, 1855.)

[Judgment  439.]

Equity will not enjoin an execution on the ground, that the plaintiff in execution is insolvent, and at the time his judgment was recovered was indebted to the defendant in execution, which indebtedness the bill seeks to set-off against the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 830; Dec. Dig.  439.]

Before Dargan, Ch., at Charleston, June, 1854.

James Rives, in the year 1833, made a deed of three negroes to James T. Wade, in trust for Agnes Wade, his wife, for life; and after her decease, for her children. Agnes Wade died in November, 1850. The negroes were then ten in number. Mrs. Rives' children were William T. Rives, Ann Elizabeth Waties, widow, Martha, wife of James T. Wade, Ainsley, wife of Edward Horibeck, Benjamin Rives and Henry P. Rives. Some of the children, viz., Mrs. Waties, Mrs. Wade, and Benjamin Rives, had had the use of some of the negroes in their mother's lifetime, by



her authority. The division of the negroes among the children became the subject of a long treaty, which was ended by an agreement: That the children should keep the negroes in their possession; that William T. Rives should purchase the others, and pay one thousand dollars to Edward Horlbeck, one thousand dollars to Henry P. Rives, and seventy-five dollars to James T. Wade; that Benjamin Rives should pay to Mrs. Waties one hundred dollars, to James T. Wade seventy-five dollars—for equality of partition, a share being valued at one thousand dollars. This agreement was carried into effect by a decree, in an amicable suit, in which one Solicitor was employed. The decree was drawn up, submitted to the Chancellor, and filed 5th July, 1853.

Henry P. Rives was at the time indebted to William T. Rives in five hundred and

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twenty dollars and nineteen cents, \*on the balance of an open account for money lent, and money had and received. William T. Rives tendered to him four hundred and seventy-nine dollars and eighty-one cents, and a receipt for five hundred and twenty dollars and nineteen cents, in payment, which he refused; whereupon William T. Rives filed his bill on the 18th day of July, 1853, and gave notice of his intention to move for leave to pay the sum of four hundred and seventy-nine dollars and eighty-one cents into Court, which defendant then received without prejudice. The bill sets forth the above circumstances, and that Henry P. Rives is insolvent, and prays that he may be restrained from enforcing his execution for one thousand dollars; and that the five hundred and twenty dollars and nineteen cents of complainant's money, in the hands of defendant, may be set off against the one thousand dollars which complainant owes for the price of the negroes. On 13th September, 1853, the motion for an injunction was made before Mr. Gray, and rejected. On the 30th August, 1853, defendant filed a demurrer, and an answer admitting the proceedings in partition, alleging that he consented to the proposal of one thousand dollars for his share of the negroes on the distinct understanding, that it should be at once paid to his solicitor for him in cash, without any abatement or discount; averring that he never would have given his consent to the proposal, if he had supposed that the complainant would not honestly and in good faith abide by the understanding aforesaid; admitting that he is very poor, and owes several debts, but not beyond what he expects to be able to pay; and denying that this is a case of mutual credit.

The motion for injunction was renewed before Chancellor Dumkin on the 10th of October, 1853,—and on the face of the bill and answer, and complainant's affidavit denying an agreement to dispense with the right of

set off, his Honor granted the injunction, on condition of security being given,—which condition was complied with.

At June Term, 1854, the cause came on to

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be heard before \*his Honor, Chancellor Dargan, on bill, demurrer, answer, and evidence. The complainant examined James Rives to disprove any supposed special agreement against the right of set off, and offered to prove the particulars of his demand—which was deemed unnecessary.

His Honor pronounced the following decree.

Dargan, Ch. The defendant has a decree of one thousand dollars against the plaintiff in a former proceeding in this Court, for the partition of an estate in some negroes, in which the plaintiff and defendant, and others were interested. In that case, the defendant agreed to have a decree for one thousand dollars against the plaintiff, in lieu of his share of said negroes, and the arrearages of hire. The decree of the Court conformed to this agreement.

In this suit, the plaintiff charges that the defendant is indebted to him in the sum of five hundred and twenty dollars, in part on open account; which debt subsisted at the time of the decree, and is barred by the statute of limitations; but the defendant has interposed no such plea. He further charges that the defendant is insolvent; and that unless this Court will lend its aid, he will be forced to pay the decree against him, without having any remedy for the recovery of his debt against the defendant.

The defendant does not deny the indebtedness set forth specifically in the plaintiff's bill, nor does he deny his insolvency; but rather seems to admit it. On this latter point he says, "his circumstances are exceedingly humble, and that he has a family dependent on him for support: that he is engaged in mechanical pursuits, and is indebted to several persons, but not beyond what he expects in the course of time to pay; and that no creditor has ever exhausted his remedy at law against him."

These are the material facts of the case: and the question is, whether the plaintiff is entitled to have the execution stayed, and to have the indebtedness of the defendant to

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him allowed \*as a set off against his decree, which the defendant has obtained against him, and is now seeking to enforce.

I think the abstract justice of the case is with the plaintiff. For certainly, in *foro conscientiae*, no man ought to claim of another the payment of a debt, without allowing as a set off what he admits to be due to his debtor. But equity is administered in this Court, not upon what may appear to the Court to be abstract justice, but upon principles and rules, which the wisdom and experience of the Court has found to be best

calculated for the advancement of the ends of justice. Hence it follows, that, neither in this Court, nor in any other well regulated human tribunal, will the decision of the Court always reach the pure equity of the particular case. It is as much as we can rationally expect, if the imperfect institutions of man shall, in their general result and operation, work out the ends of justice, and the establishment and enforcement of right. The decision of this Court is as much controlled by precedent and authority as a Court of Law.

The case presented is a novel one: no precedent or authority has been presented upon which I can satisfactorily rely, in which this Court has administered a similar equity. In an old case, cited in Francis' Maxims, p. 36, the Court does seem to have given relief on this ground. But no other case from the decisions of the English Court of Chancery, and none from our own reports, has been cited.

To speak argumentatively, what right in equity has the plaintiff to stay the defendant's execution for one thousand dollars, when he only claims a discount of one-half the amount? Then, suppose the plaintiff's demands to be litigated; the enforcement of the execution must be stayed until the termination of that litigation. Again: this plaintiff's demands are old, and anterior to the date of the decree. What was the difficulty of his obtaining a judgment at law for his demand, which is a purely legal liability, and by the process of that Court enforcing payment? He could thus, by a *capias*, have

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compelled an assignment of this very decree in satisfaction of his claim: or so much of it as was necessary. Having lost his legal remedy by laches, he comes into this Court for relief. "*Vigilantibus et non dormientibus*," &c.

It is ordered and decreed that the bill of the plaintiff be dismissed.

The complainant appealed on the ground:

That Henry P. Rives is indebted to William T. Rives not on a demand barred by the statute of limitations, but on a good and meritorious cause of action in the sum of five hundred and twenty dollars and nineteen cents; and being so indebted, a partition of certain negroes took place, by which W. T. Rives became the purchaser of the share of Henry P. Rives at one thousand dollars; which agreement was confirmed by a decree of the Court in partition. That William T. Rives paid four hundred and seventy-nine dollars and eighty-one cents, and offered to set off the five hundred and twenty dollars and nineteen cents owing to him, against the five hundred and twenty dollars and nineteen cents owing to the defendant, who is insolvent; and his offer being refused, the bill was filed, and dismissed by his Honor for want of equity. Whereas, it is

contended that the equity of the plaintiff's bill is manifest, and that the injunction which was granted on the same evidence should have been made perpetual.

Petigru, for appellant.  
Seigling, contra.

PER CURIAM. We concur in the decree; and it is ordered, that the same be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN, and  
WARDLAW, CC., concurring.  
Appeal dismissed.

### 7 Rich. Eq. \*358

\*HILLIARD J. MOORE, and Wife, and Others, v. DUNBAR PAUL, and Others.

(Charleston. Jan. Term, 1855.)

[*Perpetuities* ⇨4.]

Testatrix bequeathed personalty to M. T. "for and during the term of her natural life, and after her decease to her lawful issue, if any. But in case of her decease without lawful issue, then 'over to P. T. and W. H.,' share and share alike;"—*Held*, that there was no valid limitation to the issue of M. T. as purchasers. (a)

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. § 27; Dec. Dig. ⇨4.]

Before Dargan, Ch., at Charleston, June, 1854.

Dargan, Ch. Mrs. Mary Tamplet, formerly of Charleston, S. C., died about the 22d September, A. D., 1790, seized and possessed of a considerable real and personal estate; all of which she disposed of by her last will and testament. The will was executed on the 25th of April, 1789. Among other dispositions of her estate, she bequeathed as follows: "And it is my will, and I hereby order, di-

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rect and appoint, that as soon \*as convenient after my decease, my stock of cattle, slaves, and their future issue, and my furniture, (excepting negro Hercules, herein be-

(a) *Doun v. Penny*, 19 Ves. 545. Bequest to testator's wife for life, "and after her to Robert Doun and his male issue. For want of male issue after him, to William Doun and his male issue." Robert died without leaving any male issue, and William claimed against Robert's executors; *held* an absolute estate in Robert.

*Barlow v. Salter*, 17 Ves. 479. Bequest to testatrix's daughter, to her and her heirs, and in case she dies without issue, to be divided between his four nephews and nieces, one to take for life and her part to the survivors; *held*, that the daughter took absolutely—and the Court lays down the rule as to dying without issue, almost in the same terms with *Ch. Dargan*.

*Tate v. Clarke*, 1 Beav. 101; *Lepine v. Ferard*, 2 Russ. & M. 378; *Attorney-General v. Bright*, 2 Keene, 57; *Carter v. Bentall*, 2 Beav. 551; *Jordan v. Lowe*, 6 Beav. 350.

And see Mr. Williams's opinion, 2 Wms. Ex'ors, 952-3, margin.

*Carr v. Jeannerett*, 2 McCord, 66, that the issue take by limitation.

*Whitworth v. Stuckey*, 1 Rich. Eq. 404, a case of real estate, but issue held a word of limitation.



fore given unto my daughter Mary, the wife of William Sergeant,) be employed agreeable to the directions of my executors hereinafter named, and the survivor of them, until such time as William Henry Finden shall attain the age of twenty-one years, for the mutual benefit and sole advantage, and emolument of my legatees hereinafter named; at the completion of which time, or the decease of William Henry Finden, which first shall happen, I request my executors, or the survivor of them, the executors or administrators of such survivor, to cause a division to be made of the stock, negroes and their issue, and my furniture aforesaid, amongst my legatees hereinafter named, to whom I hereby give and devise the same in the manner following, that is to say, unto Elizabeth, the wife of Thomas Cambridge, one full moiety, or equal half-part thereof, for her separate benefit and use during her natural life, without the control and interference of her said husband, or of any other person or persons, subject nevertheless, in case of interference or control, as aforesaid, to my devise made to Gideon Dupont, jr., and John Dupont, of Goose Creek, and to the survivor of them, his executors and administrators; and after her decease, my will is, and I hereby devise and bequeath, order, direct, and appoint the same to vest in her lawful issue, share and share alike, their executors administrators and assigns respectively. And as for, touching, and concerning the other moiety or equal half-part of the stock, negroes, &c., aforesaid and increase, and issue aforesaid, I hereby give and devise the same unto Peter Tamplet Finden, William Henry Finden, and the aforesaid Mary, the wife of the said Captain John Trott, (the part and share of the said Mary, to and for her separate benefit and use, without the interference or control of her said husband, or of any other person or persons whomsoever, and subject to my devise made to Gideon Dupont, jr., and John Dupont, and the survivor of them, his executors

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and adminis\*trators as aforesaid,) for and during the term of her natural life, and after her decease to her lawful issue, if any. And the parts and shares of the said Peter Tamplet Finden and William Henry Finden therein, to and for their and each of their proper use and behoof forever, share and share alike. —But in case of the decease of the aforesaid wife of Captain Trott, without lawful issue, then I order, direct, appoint and give her part or share therein, unto the aforesaid Peter Tamplet Finden and William Henry Finden, share and share alike; and in case of the decease of the aforesaid Peter Tamplet Finden and William Henry Finden under age, and without lawful issue, then their shares, or of the one so dying without lawful issue, to vest in and fall to the survivors, or survivor of them, the said Peter, William

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and Mary Trott, either in the whole, or in part, as the case may be, share and share alike." The devise to Gideon and John Dupont alluded to in the foregoing clause, was a bequest to them of the property given to Elizabeth Cambridge and Mary Trott in trust for the preservation and protection of the separate estates of the said Elizabeth Cambridge and Mary Trott.

The plaintiffs assume, that there is a valid limitation, or remainder, given to the children or issue of Mary Trott, of the property bequeathed to her in the clause of the will which has been recited, to take effect at her death. They also claim to be such remaind-ermen.

The original bill was in the nature of a bill quia timet, Mary Trott being alive at the filing of the same. But since then, the said Mary Trott has departed this life, and the plaintiffs claim that their right to the possession has accrued if such right exists. They have filed a supplemental bill, in which the death of Mary Trott is stated, and the prayer is for a recovery of the negroes and account for hire.

The evidence as to the identity of the plaintiffs, and their relationship to Mary Trott, was voluminous, and it established

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\*this part of their case, as stated in the bill, to my entire satisfaction.

The plaintiffs charged, that a division of the estate of Mary Tamplet, described in the clause of her will which has been quoted, was made in pursuance of the directions of the said will, and that to the said Mary Trott were assigned the following negroes, namely, Binah, and her children Dolly, Phillis, and Betsey, of whom the said Binah, Dolly and Betsey are since dead, living issue as follows: Dick and Sam, the children of Dolly, and Binah and Isaiah the children of Betsey. Phillis is still alive with her issue, as follows, namely, Betsey and her two children Charity and Richard, Charles, Lucy, Sarah, Jane, Abraham, Mary and her six children, Jane, William, Sally, Rose, James and an infant, and Dinah and her four children, the names of which the plaintiffs say are unknown to them.

The plaintiffs further charge, that of the said negroes, Dick is now in the possession of James Adger, and Sam is in the possession of Mary Berney; that Dinah and her four children are in the possession of the defendant, Robert W. Seymour; that Mary Trott sold Betsey to one Andrew Manson; that her children, Binah and Isaiah, were afterwards born; that said Betsey, Binah and Isaiah, are now in the possession of the defendant, Mary Manson, the widow of said Andrew Manson; that the defendant, John Elford, is in the possession of Sally, Rose and James, children of Mary; that Phillis, Betsey and her two children Charity and Richard, Charles, Lucy, Sarah, Jane, and

two children of Mary, namely, Jane and William, are now in the possession of the defendants, Dunbar Paul and Alexander Gordon, executors of Isaac Lewis.

The evidence sufficiently establishes the following facts,—that such negroes exist, that they are of the original stock derived to Mary Trott under the will of Mary Tamplet, and that the said negroes are in the possession of the said defendants, as stated in the bill, the said defendants all claiming in their own right. The defendants do not claim

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in common. They claim \*and hold in severalty, each one claiming the individual negroes that are in his or her possession respectively. There is no privity between the defendants, except as to the executors of Lewis, and it appears to me, that it was irregular in practice to join them, as defendants in the same suit; but no objection has been made on that ground, and I pass it by without further comment.

If there be a valid limitation or remainder to the plaintiffs in the will of Mary Tamplet, as to the property given to Mary Trott in the clause which I have recited, the plaintiffs are entitled to the relief which they seek in this bill. The whole case will turn upon the construction of the said clause of the will.

The words of the direct gift are to Mary Trott "for and during the term of her natural life, and after her decease to her lawful issue, if any." And the first inquiry will be, whether these words, in and of themselves, constitute a valid limitation in favor of the plaintiffs as the issue of Mary Trott.

It has been established by innumerable decisions, that where personal estate is bequeathed in language, which applied to real estate would constitute an estate tail, or (by parity of reasoning,) a fee conditional in South Carolina, an absolute estate would vest in the immediate donee or first taker. The doctrine holds good, whether the estate tail is created by express words or by implication. It also prevails in those cases where by the operation of the rule in Shelley's case, estates tail are created. Issue is a word of very extensive signification. It embraces all the descendants to the remotest generation. Unexplained, it is a word of limitation and not of purchase. When explained by the will itself to mean issue living at the death of the immediate donee, the issue will take as purchasers. And this simple remark, I apprehend, will suffice to reconcile all the jarring decisions. When an estate is given to one and his issue, or to one for life, and after his death to his issue, the donor either means the issue in indefinite succession, or he means the issue that may

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be in esse at a particular period. To \*give the latter meaning to the word, there must be an explanatory or restrictive context, for the natural import of the word is the en-

larged sense. He who assumes that it is used in the limited sense, must show the qualification, and wherein such qualification exists.

That the estate being limited expressly to the first taker for life, and after his decease to the issue, does not qualify the word "issue," so as to convert it into a word of purchase, is established by many cases of the highest authority.

In *Shaw v. Weigh*, 2 Stra. 798, the devise was to the testator's wife for life, and after her death to his sisters, A. and G., during their natural lives, and if they should happen to die leaving lawful issue, then in trust for such issue, and in default of such issue, over. It was adjudged by the House of Lords, that the devise created an estate tail. In *Dodson v. Grew*, 2 Wils. 322, the devise was to the testator's nephew G. for life, and after his decease to the use of the male issue of his body lawfully to be begotten, and to the heirs male of the body of such issue male, and for want of such male issue, over. Held, by the Common Pleas, to be an estate tail in G. *Wilmot*, Ch. J., said, the intention certainly was to give G. an estate for life only; but the intention also was that as long as he had any issue male, the estate should not go over; and if we balance the two intentions, the weightier is, that all the sons of G. should take in succession. *Bathurst*, J., laid it down as a rule, that where the ancestor takes an estate of freehold, if the word "issue" comes after, it is a word of limitation. *Gould*, J., said that the word issue is used in the Statute de donis promiscuously with the word heirs, that it comprehends the whole generation as well as the word heirs, &c. In this case, it is to be remarked, that the super-added words of limitation "heirs, male of such issue male," did not vary the construction.

The same construction prevailed in *Hodgson v. Merest*, 9 Price, 556, where the devise

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was, to one for the term of his \*natural life only, and after his decease, then to the issue of his body, and to the heirs of the body of such issue, with remainders over.

To the same effect are the cases of *Webb v. Puckey*, 5 Durn. & East, 299; *Frank v. Stovin*, 3 East, 544; *Mogg v. Mogg*, 1 Meri. 654.

These cases, and many others that might be cited, abundantly, and conclusively show, that the words of Mary Tamplet's will, in her bequest to Mary Trott, would, if they had been applied to real estate in England, have created in Mary Trott an estate tail. Then it would seem that the conclusion is unavoidable, that the same words in a bequest of personalty, would give an absolute estate to the first taker, or immediate legatee, according to the rule before alluded to.

In the direct gift, the only circumstance relied on to restrict the word "issue," so as to make it mean issue living at a particular



time, is that the bequest to the issue was after the decease of the first taker. The gift to Mary Trott is for her life, and after her decease to her issue, if any. The gift to the issue is entirely too indefinite as to time. It does not appear at what time after the death of the immediate donee, the issue were to take. This expression is not so strong as it would have been, had the words been at her decease, or immediately after her decease. The Circuit decree in *Buist v. Dawes*, 4 Strob. Eq. 37, was brought to my notice as being favorable to the plaintiffs' construction. But that case is different from the present in several circumstances. The gift to the first taker was for life, and at his death to his issue male, "and in default of such to the issue female surviving him," the said testator.

Upon the question under consideration, there is some conflict in the authorities.

In 2 *Jarman on Wills*, 494, it is said "our next enquiry is, whether a bequest to A. for life, and after his death to his issue, operates by force of the same rule of construction, to vest the absolute interest in A."

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"Now as such a devise would clearly create an estate tail in A., and as it has been shown, that the rule which makes the legatee the absolute owner of personalty, where he would be tenant in tail of real estate, applies to gifts falling within the rule in *Shelley's case*, where heirs of the body are the words of limitation, as well as those in which an implied gift is raised to the issue," "the inevitable conclusion would seem to be, that in the case suggested, A. would be absolutely entitled."

The learned commentator then admits, that this conclusion would be opposed to the decision made by Lord Thurlow in *Knight v. Ellis*, 2 B. C. C. 570. In that case, the gift was to trustees, in trust, to permit the testator's nephew to receive the interest during his natural life, and after his decease he gave the money to the issue male of his nephews, and in default of such issue over. The question was whether the nephew was entitled for life or absolutely. The decision was that he had a life interest only.

But a more recent, and to my mind, a more satisfactory and consistent exposition of the law, has emanated from the English Chancery, by which it would seem, that *Knight v. Ellis* has been overruled. The decision in the *Atty. Genl. v. Bright*, Keen, 57, decided by Lord Langdale, is in diametric opposition to *Knight v. Ellis*.

In the *Atty. Genl. v. Bright*, the testator gave the interest of five hundred pounds of six per cent. stock to two persons, and after the decease of the survivor of them, he gave the same to Susan Thomas, to receive the interest thereon during her life, and after her decease to her issue, and in case of her death without issue, then over. It was held, that the effect of this bequest was to give

to Susan Thomas an absolute interest. It is worthy of remark, that the case of *Knight v. Ellis* was cited in the argument, with most of the other English authorities which have been brought to my notice during the present trial.

It is argued that the Court will resort to

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any, the most \*trivial circumstance, for the purpose of evading the operation of a rule, which defeats the intention of the testator. I am aware that such language has been held, and such a mode of construction has been sometimes acted on by Courts. But neither such language, nor such a mode of construction meets my approbation. It is safer and wiser to adhere to established principles, though they may sometimes be "inconvenient in their operation, than to undermine them by distinctions without a difference." It is better to wait for the Legislature to apply the remedy, if need be; or broadly and directly to overrule an obnoxious rule or decision, than to resort to illogical and inconclusive reasoning for the purpose of overthrowing it. No argument should ever emanate from a Judge which he does not think will stand the test of reason.

The conclusion of my mind is, after mature consideration and anxious investigation, that there is nothing in the terms of the direct gift, which can restrict the word issue, so as to make it mean issue living at the death of the immediate legatee, and that therefore the issue under the words of the direct gift, cannot take as purchasers.

My next inquiry will be, whether the generality of the word "issue" in the direct gift is restricted and explained by the context, so as to make it mean Mary Trott's issue living at her death. There is a limitation, or at all events, an attempt at a limitation over, in default of such issue, to Peter Tamplet Finden and William Henry Finden.

Where, after a gift to one, there is a gift to his issue expressly, but in language so general, as to render it inoperative as a purchase to such issue, and it is followed by a valid limitation over in default of such issue, this will restrict the generality of the term issue, to issue living at the time of the death of the first taker, and entitle the issue to take as purchasers. For example: if there should be a bequest or gift of chattels to A. for life, and after his death to his issue, and nothing more; this would be clearly an absolute estate in A. For as it is

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the \*intention to convey the fee in the estate, if A.'s interest is restricted to a life estate, and there should be no issue, the remainder in the estate would not pass, which would be contrary to the manifest intention. But if in the case supposed, the gift to the issue should be followed by this provision, that if A. should die without leaving issue, then that the said estate should go to B.,

this would be a valid limitation to B. in the event of A.'s dying without leaving issue. Otherwise if the limitation over had been general, on the event of A.'s dying without issue. "Leaving" is a qualifying word, and restricts the "issue" to such as should be living at the death of A. And as B. is not to have the estate if A. should leave issue, the law presumes that the issue meant in the direct gift are the issue which A. should leave at his death. It is upon reasoning like this that the general import of the word issue is explained and converted into a word of purchase. *Lampley v. Blower*, 3 Atkins, 396; *Read v. Snell*, 2 Ib. 647; *Henry v. Means*, 2 Hill, 328; *Henry and Talbird v. Archer*, Bail. Eq. 535.

But the testatrix, after giving the one-third of her estate to Mary Trott "for and during the term of her natural life, and after her decease to her lawful issue, if any," proceeds to declare, "but in case of the decease of the said wife of Capt. Trott without lawful issue, then I order, direct, appoint and give her part or share therein to the aforesaid Peter Tamplet Finden and William Henry Finden, share and share alike; and in case of the decease of the aforesaid Peter Tamplet Finden and William Henry Finden, under age and without lawful issue, then their shares, or the shares of the one so dying without lawful issue to vest in and fall to the survivors or survivor of them, the said Peter, William and Mary Trott, either in the whole or in part, as the case may be, share and share alike."

It is argued, that there is enough in this clause to restrict the generality of the word issue in the direct gift. I have scrutinized it with great attention, and I can find nothing

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ing to \*that effect. There are two distinct dispositions aimed at in this clause. The first is, where the testatrix declares that the shares given to Mary Trott, if she should die without lawful issue, should go over to Peter Tamplet Finden and William Henry Finden, share and share alike. If the limitation had been, that the estate should go over to the Findens, in the event of Mary Trott's dying without leaving issue, then the case would have fallen within the principle of *Henry v. Means*, and *Henry and Talbird v. Archer*, and that class of cases. The issue mentioned in the direct gift would have taken as purchasers. But the words "without lawful issue," in the limitation over, does not help the plaintiffs' construction, or render the word "issue" in the direct gift any more definite.

The next disposition is entirely distinct, and relates exclusively to the shares given to Peter Tamplet Finden and William Henry Finden. Their shares are limited over on the concurrence of two contingencies, namely, their dying "under age and without issue." The share of either of the Findens

so dying, was to go to the survivors or survivor of "Peter, William, and Mary Trott," who were the three grand-children of the testatrix. The share of Mary had been previously given over on the single contingency of her dying without lawful issue, to the two Findens, (her brothers,) not as survivors, but conferring, if the limitation had been valid, a contingent but transmissible interest. The shares of the Findens were given over in the event of their dying under age and without lawful issue, to the survivors or survivor of the testatrix's three grand-children. It is shown by the plaintiffs that Mary Trott was of age at the date of the will, which carried the disposition as to her share. The bill was filed 22d January, 1852. The will is dated 22d September, 1790, and the plaintiffs state in their bill, that Mary Trott was near eighty-four years of age. It was argued for the plaintiffs, that Mary Trott's share was limited over precisely as were the shares of the Findens, and that the limitation over was valid as being in favor

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of survivors, \*as in the cases of *Massey v. Hudson*, 2 Meriv. 130; *De Treville v. Ellis*, Bail. Eq. 35 [21 Am. Dec. 518]; *Stevens v. Patterson*, Bail. Eq. 42, and that then, under the doctrine of the cases arising under Thomas Bell's will, (*Henry v. Means*, *Henry and Talbird v. Archer*.) the generality of the words of the direct bequest would be explained and restricted, and the issue of Mary Trott be entitled to take as purchasers. Whether all, or any of these conclusions would follow, it is unnecessary to decide. The basis of this superstructure of argument is entirely wanting: as the share of Mary Trott was limited over to her two brothers, simply, in the event of her dying without lawful issue. And amid all the conflicting authorities on this abstruse branch of the law, there cannot one be found to favor the opinion that such a limitation over was valid.

It is ordered and decreed, that the bill be dismissed.

The plaintiffs appealed on the grounds:

1. That the words of the will of Mrs. Mary Tamplet, giving and devising the share of Mary Trott "for and during her natural life, and after her decease to her lawful issue, if any," do not convey an absolute interest in personal property to Mary Trott, as decreed by the Chancellor; but, it is respectfully submitted, of themselves, give to Mary Trott a life interest merely, with an absolute interest, at her death, to her issue, provided there be any then alive.

2. That this construction is confirmed by the context, because the words "lawful issue" in the next preceding bequest, to wit, to Elizabeth Cambridge, are used as words of purchase, and mean issue surviving at the death of the life tenant, and the same words in the bequest to William H. Finden, and



Peter T. Finden, embraced in the same clause with the bequest to Mary Trott and her issue, are used in the same restricted sense.

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\*3. It is further respectfully submitted, that the superadded words providing for the ultimate disposition of the share of Mary Trott "in case of the decease of the aforesaid Mary, wife of Capt. Trott, without lawful issue," and the disposition of the shares of William H. Finden and Peter T. Finden "in case of the decease of the aforesaid Peter T. Finden and William H. Finden, under age and without lawful issue," are the same, and are as follows, "then their shares," [that is the shares of Peter, William and Mary] "or the share of the one so dying without lawful issue, to vest in and fall to the survivors or survivor of them, the said Peter, William and Mary, either in whole, or in part, as the case may be, share and share alike," that these words constitute a valid limitation over as to personalty, and by reflection give construction to the word "issue" in the direct bequest; making it a word of purchase, and not of limitation. That the words in the first member of the sentence making the limitation over to Peter Tamplet Finden and William Henry Finden share and share alike, simply, are, in themselves, incomplete and unfinished, and are controlled by the more precise language of the subsequent member of the same sentence which disposes of the shares of the three, "Peter, William and Mary," designating them as "their shares," to be vested in the "survivors or survivor of them."

Hayne, for appellants.

To the rule laid down by the Chancellor in his decree, "that where personal estate is bequeathed in language, which, if applied to real, would constitute an estate tail or fee conditional, an absolute estate would vest in the first taker," the exceptions are so numerous, that the rule has ceased to be a practical guide. From Forth v. Chapman, through a series of English cases, the same words are construed differently as to realty and personalty. From Mazyck v. Vanderhorst, through a long succession of cases, the same thing has been ruled here.

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"Issue" is never found without a "context." Never altogether "unexplained." Takes so easily one meaning or the other, that, as the chameleon depends for its color on the substance it rests on, so the complexion is derived altogether from the context.

Mr. Fearne, 1 vol. p. 106, Butler's ed. says: "Issue, by legal construction, is a word of purchase." Mr. Jarman (2 Jar. on Wills, 329) says, that "on this point such discordancy prevails in the English decisions, that in the enunciation of any general proposition on the subject the utmost caution is requisite."

Chancellor Kent, 4 Com. 277 says, "issue

may be used either as a word of purchase or of limitation, but it is generally used by the testator as synonymous with child or children." Id. 281 et. seq.

The Chancellor's views are conceded as to realty, and the authorities touch realty only. Shaw v. Weigh, cited in the decree, surely would not apply to personalty, so as to give an absolute estate.

The authority of Mr. Jarman, cited in the decree, is met by Mr. Fearne, vol. 1 p. 493 (by Butler). He says, "A devise of a term to A. for life, and afterwards to his issue, it seems, does not enlarge the estate to A., but after his death the whole vests in the issue." And the case of the Att'y Genl. v. Bright, the only case as to personalty cited by the decree, is met by Knight v. Ellis, and, as will be presently shown, by a host of other authorities, both here and in England. The decree disapproves of the expression in Hill v. Hill, Dud. Eq. 71, to this effect: "The books are full of cases in which courts have manifested anxiety to lay hold of even the most trivial expressions to tie up, as they express it, the generality of the phrase and limit its meaning to a failure of issue at the death of the first taker." It is submitted, that if the books be really full of such cases, it would be safer and wiser to adhere to the authority of these cases, than to over-ride them on account of an imagined symmetry.

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\*The whole class of cases making a distinction in the construction of the same words, as applied to real and personal estate, are disapproved by Mr. Jarman, and by Williams on Executors. They base their hope of reform on Att'y Genl. v. Bright, and Lyon v. Mitchell. Our Courts, however, have repeatedly recognized the authority of the cases which Jarman and Williams condemn; and if any thing can be considered as settled, it is that the same words are construed more readily to favor limitations over in regard to personalty, than realty.

First ground of Appeal:

Does "issue" imply indefinite succession, as used in this case? Authorities direct that it does not. Warman v. Seaman, Ch. C. 208; Finch R. 279; Elliott v. Jekyl, 2 Ves. Sr. 682; Stoner v. Curwin, 5 Sim. 264; Pleydell v. Pleydell, 1 P. Wms. 749; Meure v. Meure, 2 Atk. 265; Turget v. Gauntt, 1 P. Wms. 432; Atkinson v. Hutchinson, 3 P. Wms. 258. Some thirty cases cited in a note as sustaining the general principle. Clare v. Clare, Cas. Temp. Tal. 21; Fearne, 486; Davis v. Gibbs, 3 P. Wms. 29; 2 Atk. 308; Knight v. Ellis, 2 B. C. C. 578, approved by Mr. Butler, Fearne, 490—three times commented on in Carr v. Porter, 1 McC. C. 90, and 2 Fonblanque, 79, approves Knight v. Ellis. Pinbury v. Elkin, 2 Vern. 758; 1 Fearne (Butler), 495 and 490.

No case to the contrary when Mr. Fearne wrote. Since the days of Fearne, we have,

per contra. Att'y Genl. v. Bright, Lyon v. Mitchell, Mr. Jarman and Mr. Williams.

The new departure taken in England has not been, hitherto, sanctioned by our Courts.

Jarman, himself, is dubious, and comments on Att'y Genl. v. Bright in 2 vol. 496, 499 and 500. At p. 492 Mr. Jarman admits that the difficulty of construing is increased by use of the word "issue" instead of "heirs of the body." He considers Lampley v. Blower, shaken by Lyon v. Mitchell. This case, Lyon v. Mitchell, constitutes the new departure. Jarman, p. 330, note (k.) admits distinction between personal and real estate.

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\*As to our own decisions, they are in accordance, certainly, with the older English cases. Lampley v. Blower is repeatedly recognized; and the reasoning in Lyon v. Mitchell expressly and elaborately condemned by Ch. Harper in Talbird v. Archer.

Cordes v. Adrian, 1 Hill, Ch. 115, turns altogether on limitation over to surviving children—but shows "anxiety"—of the Court—to give such construction. Templeton v. Walker, 3 Rich. Eq. 543, shows the same "anxiety." In Myers v. Anderson, 1 Strob. 346, the words are, "after their death to be the absolute property of the issue of their bodies for ever;" intent no stronger or plainer than in this will—on the ground that issue are made a new stock.

Chancellor, in Myers v. Anderson, refers to Kent, 4 vol. 221; there Luddington v. Kime (1 Ld. R. 203, and 1 Salkeld, 224) is cited as authority, as likewise by Ch. Harper, in Talbird v. Archer, but in the new departure this old case is considered as overruled.

McLure v. Young, 3 Rich. Eq. 539 sustains reasoning of Knight v. Ellis; Means v. Henry, 2 Hill 328, 331 and 332.

If the words themselves leave the intent questionable, context renders it certain.

Second ground of Appeal:

2 Jarman, 355 note (j.) and 419.

Rule as to words superadded as to limitation over controlling direct devise, based on the above. Talbird v. Archer.

Testator in the present case, has everywhere else used "issue," as a word of purchase. Cannot be both a word of purchase and limitation in the same will. Lord Talbot in Glenorchy v. Bosville.

If we have a doubtful word and doubtful context, shall we not be controlled by the sense in which the word is elsewhere used?

If this fails to turn the scale, then

Third ground of Appeal:

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\*2 Jarman, 434, 435. Roe d. Sheers v. Jeffrey, 7 T. R. 589, Cordes v. Adrian, Templeton v. Walker, are conclusive, if this be rightly construed in this ground of Appeal.

But if this construction be wrong, surely the limitation is personal to the Findens. The interest passes from either dying first, to the survivor.

The three grounds support each other, and may prevail, though neither, singly, would be sufficient. United must prevail, or construction of Courts a lottery.

Mary Trott claimed but a life tenancy. Purchasers never imagined that they bought more. Lawyers seemed never to differ. No difference on this ground. And why? At date of the will not a solitary decided case made it even doubtful.

Our "new departure" would date from a time when the legislature has decided that policy requires the old decisions to go still further and to extend to real as well as personal estate.

Who are issue?

Lineal descendants alive at death of life tenant? "If any," refers to that period. Rutledge v. Rutledge, distinguishable—a marriage settlement. "Issue" to be born, primary objects. Corbet v. Laurens adverts to this. Brummit v. Barber, 2 Hill. 543.

How are issue to take?

Per stirpes as would "lineal descendants," according to the Statute of Distributions. Wythe v. Thurlston, Ambler, 556.

Templeton v. Walker, 3 Rich. Eq. 543; Collier v. Collier, Ib. 555.

King, Buist, Seigling, Memminger, Petigru, Walker, contra.

PER CURIAM. We concur in the decree; and it is ordered, that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Decree affirmed.





# CASES IN EQUITY

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA, MAY TERM, 1855

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,  
“ BENJAMIN F. DUNKIN,  
“ GEORGE W. DARGAN,  
“ F. H. WARDLAW.

7 Rich. Eq. \*375

\*DUNCAN McRAE, and Others, v. JOSHUA DAVID.

(Columbia. May Term, 1855.)

[*Limitation of Actions* ⇐184.]

After a decree to account made in the Court of Appeals, the defendant, by leave of the Commissioner, amended his answer by pleading the statute of limitations;—*Held*, that the leave was improperly granted; and the Commissioner's order was set aside.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 693; Dec. Dig. ⇐184; Equity, Cent. Dig. § 572.]

[*Account* ⇐19.]

A decree to account precludes the defendant from making or insisting on any defence, as, for instance, the statute of limitations, which might have been made before.

[Ed. Note.—Cited in *Verdier v. Verdier*, 12 Rich. Eq. 143.

For other cases, see *Account*, Cent. Dig. § 105; Dec. Dig. ⇐19.]

Before Dargan, Ch., at Marlborough, February, 1855.

Amongst other matters of defence insisted on by the defendant in his answer, he submitted, whether he was “not protected by the lapse of time since the bond was taken, from accounting with the complainants;” and he prayed to be allowed the same benefit of that defence, as if preferred in a different form of pleading.

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\*In January, 1854, after the decree in this case had been pronounced by the Court of Appeals, (see 5 Rich. Eq. 475,) the complainants amended their bill by making the legal representatives of the sureties to the administration bond parties thereto; and defendant, by leave of the commissioner, amended his answer by pleading more formally the statute of limitations.

His Honor made an order that the order of the commissioner granting leave to amend the answer, be set aside, and the amended answer taken off the file.

The defendant appealed.

Dudley, for appellant.

Inglis, Thornwell, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The plea of the statute of limitations, if sustained, is a bar to the plaintiff's action. Where it is incorporated in an answer to a bill for an account, a decree to account necessarily infers that this defence has been withdrawn, or not insisted upon, or that it has been considered and overruled. In this case it is not clear that this defence was presented by the pleadings. But, if so, the defendant was entitled to have availed himself of it in the argument at the former hearing in this Court. The judgment of the Appeal Court, declaring the liability of the defendant, determined any defence which was made, and precluded any which might have been made. This has been repeatedly ruled, and is necessary for the peace of the community, and that there may be an end of litigation.

But it was supposed that the order of the commissioner might be justified by the decision in *Burden v. McElmoyle*, Bail. Eq. 378. In that case no hearing had taken place.

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The \*cause was set down for hearing on bill and answer, and had been continued until the next term. The presiding Chancellor, under these circumstances, permitted the defendant to amend by adding the pleas of the statute of limitations and an account stated.



The Court of Appeals, with some hesitation, and after animadverting upon the irregularity of the practice as not to be encouraged, sustained the order, as an exercise of judicial discretion. But in this case the defendant had been already heard, both in the Circuit and Appeal tribunals, upon all the grounds which he deemed it necessary to urge upon the consideration of the Court, and his liability had been definitely established. After this it was neither competent for the Commissioner nor a Chancellor to grant the order, which was properly rescinded by the Circuit Court.

The appeal is dismissed.

JOHNSTON, DARGAN, and WARDLAW, CC., concurred.

Appeal dismissed.

### 7 Rich. Eq. \*378

#### \*THE VESTRY AND WARDENS OF THE CHURCH OF THE ADVENT v. JAMES FARROW and Wife.

(Columbia. May Term, 1855.)

[*Frauds, Statute of* ⇨110.]

To a subscription paper by which money was subscribed by various persons to build a church, J. H. subscribed "fifty dollars and the lot to build on." After the death of J. H., the Church, a corporate body, filed a bill against his devisee for specific performance, claiming a lot of one acre for the site of the church and a place of sepulture:—*Held*, that the agreement could not be enforced—the terms not being sufficiently ascertained to be a compliance with the statute of frauds.

[Ed. Note.—Cited in *Humbert v. Brisbane*, 25 S. C. 510; *Kennedy v. Gramling*, 33 S. C. 383, 11 S. E. 1081, 26 Am. St. Rep. 676; *Peay v. Seigler*, 48 S. C. 507, 510, 26 S. E. 885, 59 Am. St. Rep. 731.

For other cases, see *Frauds, Statute of*, Cent. Dig. § 225; Dec. Dig. ⇨110.]

[*Evidence* ⇨450.]

The terms of an agreement for the sale of land must be unambiguous and definitely ascertained; and its defect in this particular cannot be supplied by parol.

[Ed. Note.—Cited in *Mims v. Chandler*, 21 S. C. 491; *Dicks v. Cassels*, 100 S. C. 351, 84 S. E. 879.

For other cases, see *Evidence*, Cent. Dig. § 2073; Dec. Dig. ⇨450.]

[*Evidence* ⇨400.]

The parol evidence offered in this case, examined, and *held* not to fix the terms of the agreement with sufficient certainty.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1778; Dec. Dig. ⇨400.]

[*Frauds, Statute of* ⇨129.]

Where the land is the wife's, part performance with the acquiescence of the husband will not bind her—semble.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292, 303, 306-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. ⇨129.]

[*Frauds, Statute of* ⇨129.]

Acts of part performance to elude the provisions of the statute must be done in strict pursuance of a specific and certain agreement.

[Ed. Note.—Cited in *Boozar v. Teague*, 27 S. C. 357, 3 S. E. 551.

For other cases, see *Frauds, Statute of*, Cent. Dig. § 292; Dec. Dig. ⇨129.]

[*Specific Performance* ⇨16.]

A specific performance will not be decreed where it would be attended with inequitable loss to defendant by impairing the value of adjoining lands.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 35; Dec. Dig. ⇨16.]

[This case is also cited in *Peay v. Seigler*, 48 S. C. 496, 26 S. E. 885, 59 Am. St. Rep. 731, and distinguished therefrom.]

Before Johnston, Ch., at Spartanburg, June, 1854.

Johnston, Ch. The bill in this case was filed by the plaintiffs, to enforce an alleged agreement on the part of the late James Edward Henry, to give them a lot, for the site of an Episcopal Church, and for a burying ground, to contain one acre. To establish their case, they produced a subscription paper in the following words, viz.: "June 18th, A. D. 1849. For the purpose of building a Protestant Episcopal Church at Spartanburg Courthouse, we, the undersigned, promise to pay to H. H. Thomson, Esq., chairman of the vestry of the Church of the Advent at that place, the sums annexed to our names; one-half thereof being payable on demand of the building committee, the other

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half twelve months after the first payment." To which James Edward Henry subscribed "Fifty dollars and the lot to build on."

From the testimony offered by plaintiffs, it appeared, that when it was proposed to build a Protestant Episcopal Church at Spartanburg, H. H. Thomson, W. C. Bennett, and James Edward Henry, each offered a lot. The merits of the respective lots were discussed, and the one offered by H. H. Thomson was rejected. Then the vestry met to decide between Bennett's and Henry's. Bennett's lot was objected to by the Rev. Mr. McCullough, on the ground that it was an old field, rough, and too small for a graveyard. Henry then said, "You must take mine;" adding that it was the only one to which no objection lay. Whereupon the subscription aforesaid was drawn and signed as stated.

It was further in proof, by the Rev. Mr. McCullough, that Mr. Henry, about a week before his death, and when very ill, requested him to have the lot run out, and furnish a plat, that he might make a conveyance. Being asked how much ground should be laid off in the lot, he replied, he supposed one acre was enough, and was the usual quantity, but if more was desired for a parsonage, he was willing to give it. No survey was made, nor deed executed. Within a few days after this, Mr. Henry died. This wit-

ness further stated, that a graveyard, though not necessary, was highly valued by his Church. There was no proof of any agreement about the quantity of land to be given, or its boundaries—some thinking it was to be an acre, and some less than an acre. No improvements of any kind were made upon the lot, prior to the death of Mr. Henry; nor were any expenses incurred by plaintiffs, on account of it. Mr. Henry, by his Will, devised this land to his daughter, Caroline P., wife of defendant, James Farrow. Subsequently to the death of Mr. Henry, after some negotiation between the parties, half an acre of land was laid off and platted. Mr. McCullough prepared a deed for it; but Mr. Farrow objected to it, on the ground that there was no provision in the

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deed to prevent the using of the lot as a place of burial. Defendants were willing to execute it with that restriction. It was in proof that the defendant's land, adjacent to this lot, would be materially injured by having a graveyard upon it.

I do not think there is sufficient evidence, (even if parol proof were admissible,) to establish an agreement, which this Court will enforce. There was no description of the extent or boundaries of the lot in the subscription, and there is no proof to supply this defect. One witness said Mr. Henry waved his cane over the land now claimed, and said it was there, and spoke of some trees and underbrush, &c.; but this is too indefinite and uncertain. Henry agreed, in the subscription, to give a lot to build on. How much was it to contain? Is a lot to build on, a lot to bury on? Where is the lot to be located? May it not be as well one place as another? May not the plaintiffs as well locate it by parol on the homestead as the place they have selected? May they not as well claim ten acres as one?

The plaintiffs, on the trial, refused to accept the deed tendered by the defendants. It is ordered that the bill be dismissed.

The complainants appealed, and now moved this Court to reverse the decree on the grounds:

1. Because the subscription of Mr. J. E. Henry was a sufficient note and memorandum in writing, to compel him, or those claiming under him, to execute a conveyance of the land referred to in the bill.

2. Because the corporation—relying upon the subscription so made—are in progress of erecting a church on the land, upon which they have expended considerable sums of money, without opposition upon the part of the defendants, which entitles the plaintiffs to the execution of the deed.

3. Because the evidence clearly showed

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that the understanding of Mr. Henry and the wardens and vestry of the Church of the Advent, at the time of his subscription,

was, that Mr. Henry was to convey an acre of land, without qualification or restriction, to the said church, and the precise location was sufficiently identified by the evidence.

4. Because the defendants—Farrow and wife—after the death of Mr. Henry, acknowledged the validity, and binding efficacy, of the subscription made by Mr. Henry, in his lifetime, and upon being applied to for titles, by the wardens and vestry of the Church of the Advent, they interposed no objection, but replied that Mr. Henry's wishes would be carried out; upon the faith of which, the wardens and vestry then acted.

5. Because, from the case made by the pleadings and the evidence, the plaintiffs are entitled to the relief prayed for in the bill.

Dawkins, Perry, for appellants.

Bobo, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. The doctrines of the decree in this case are neither so novel nor difficult as to require further support; yet as it is always satisfactory to a litigant to be enabled to know that his claim or defence has been deliberately considered by the tribunal determining his rights, we shall add to the Chancellor's reasoning, some remarks to show the appellant here, that we have not simply ignored the grounds of appeal.

The Statute of Frauds provides, that no action shall be brought to charge any person upon any contract or sale of lands, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party, or his lawful agent, to be charged therewith. The first ground of appeal in-

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sists that this requisition of the statute is complied with by the written note of agreement signed by testator of defendants. J. E. Henry, testator of defendants, subscribed the words "fifty dollars and the lot to build on," with other persons who made subscriptions of money, to a writing with the following caption: "June 18th, A. D. 1849. For the purpose of building a Protestant Episcopal Church at Spartanburg Courthouse, we, the undersigned, promise to pay to H. H. Thomson, Esq., chairman of the vestry of the Church of the Advent at that place, the sums annexed to our names; one-half thereof being payable on demand of the building committee, the other half twelve months after the first payment." The bill is filed by the plaintiff, a corporate body, against the devisee of Mr. Henry, his daughter Caroline, wife of the other defendant, to compel conveyance of an acre of land, from the tract devised to the daughter, for erection of the church and for a place of sepulture. Defendants deny any agreement of their deviser to convey any specific quantity of land, and especially resist his agreement to convey any



portion of land to be used as a place of sepulture, as diminishing the value of the adjacent lands, which are particularly valuable for residences. In their answer, however, defendants offered to convey to the plaintiff one-half of an acre of land, with express condition that this lot should not be used as a place of sepulture. This offer was sternly rejected by the plaintiff on the trial of the cause. The substantial controversy between the parties seems to be first as to the extent of the lot, and secondly, as to the use of any portion of it for burial.

The provision of the Statute of Frauds, previously recited, governs a court of equity, as much as a court of law, although exceptions have been introduced into both courts, some special to equity, adjudged to justify departure from the letter of the statute. It is settled that the required signing of an agreement is satisfied by the signing of the party to be charged, when the other party

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affirms the agreement by suit; and it is \*settled in this State, perhaps against English authority, that the consideration of the agreement need not be set forth in writing. It is, however, equally settled that the terms of the agreement shall be unambiguous and definitely ascertained. If a court be at liberty to conjecture the intention of parties, it might fall into the error of decreeing what the parties never contemplated. The common law before the statute, forbade that a written instrument should be annulled, varied, or explained by parol evidence; and the statute affirms and enlarges this principle by express requirement of writing as to contracts concerning lands. When the statute requires evidence in writing, of such contracts, it necessarily exacts that every thing which is material in the purposes of the parties shall be supported by written evidence; and not dependent on the frail memory or deceitful suggestion of witnesses. The whole purpose of the legislature in exacting written proof, is defeated, if courts allow supplementary complement of proof of the contract by witnesses. Considering, then, Mr. Henry's written agreement by its terms, what does he agree to give? Without dwelling on the material fact, that, by the caption he agrees to pay on demand to a natural person, not the plaintiff, a sum of money in instalments, (in the opinion of some of the court a fatal objection.) We are invoked to decide that to give "the lot to build on," fulfils the requirements of the statute to give an acre for general purposes of the church, including burial. An agreement to give "the lot to build on," for the purposes of a church, is utterly indefinite as to extent of the subject and as to the purposes for which it shall be employed. Is it to be the area of land covered by some structure for church purposes, or any and what greater superficies? Is it to be for a church, or a parsonage, or a vestry-room, or

a grave-yard, or any other building for the Protestant Episcopal Church at Spartanburg? If the extent be fixed, for what estate is the land to be granted? If the extent and quantity of estate be fixed, to whom is it to be granted? The terms of the agreement in

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\*itself, fix neither limits nor purposes. By the doctrine of the Court it cannot be executed.

It is against principle that a contract should rest partly in writing and partly in the memory of witnesses. All the purpose of the statute against perjury and mistaken memory would be defeated by admission of such extending testimony in parol. But if we granted the admissibility of such evidence, it is inadequate in this case to ascertain the agreement. Mr. Legg understood from the plaintiff that a lot from one-half to three-fourths of an acre was to be conveyed. Mr. Irvin states that in a stroll with Mr. Henry, after the agreement, the latter by waving his hand and mentioning certain undergrowth indicated an acre or more. Mr. McCullough, the proposed rector of the church, testifies that Mr. Henry, a few days before his death, expressed his desire that the extent of the lot should be ascertained by survey which was not made, and that the witness then inquired as to the extent of the lot; nothing was fixed, and every thing left open as to Mr. H.'s purposes concerning the church and parsonage. That all this evidence is inadequate to define the subject to be conveyed, and the purposes and estate for which any portion of it was to be conveyed, needs no argument and little authority. Story, Eq. 761, 767; Clinan v. Cooke, 1 Sch. & Lef. 22; Lindsay v. Lynch, 2 Sch. & Lef. 1; Harnett v. Yielding, 2 Ib. 549.

It is urged, however, in the second ground of appeal, that acts of part performance on part of the plaintiff take this case out of the Statute of Frauds. No act in execution of the agreement was performed by either party in the life-time of Mr. Henry, and it is not pretended that his devisee is bound by her own independent acts in execution of the testator's agreement. It is admitted, however, that the plaintiff is now proceeding to erect a church partly on land of the defendant, and partly on land purchased by plaintiff from Mr. Leftner. It would be difficult to maintain that the defendant who has the fee, Mrs. Farrow, and who can part

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with it only in a mode \*prescribed by statute, is concluded by any act of her husband, entitled to the usufruct of her land, in permitting improvements on her land. Part performance does not evade the statute unless it place the party by consent of the other contractor in a condition of fraudulent injury, unless the contract be enforced. Mere payment of money which may be reimbursed

with compensating interest, is not such act of part performance. A married woman without express proof of complicity with her husband, is not committed by his acts of fraud. Besides even against one *sui juris*, acts of part performance to elude the provisions of the statute, (an evasion not to be extended,) must be done in strict pursuance of a specific and certain agreement. Here every thing which has been done is consistent with defendants' version of the contract, and does not fix the tenure, extent and trusts of the estate to be conveyed. In *Clinan v. Cooke*, 1 Sch. & Lef. 23, where an agent was authorized to demise for three lives or thirty-one years, it was held that the agent's contract to convey could not be executed, because it did not specify whether the term of the lease was to be three lives or thirty-one years.

Besides, if the plaintiff had proved sufficiently an agreement, the suit is an application to the extraordinary jurisdiction of the court where discretion is tolerated and absolute right cannot be claimed. With every disposition to limit discretion, we should hardly be disposed to afford relief to plaintiff when the enforcement of defendants' contract (essentially voluntary although supported by the consideration of co-subscriptions) will be attended with inequitable loss to defendants, in impairing the value of adjoining lands.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON, DUNKIN, and DARGAN, CC., concurred.

Appeal dismissed.

### 7 Rich. Eq. \*386

\*SAXBY CHAPLIN v. LEWIS ROUX, and Others.

(Columbia. May Term, 1855.)

[*Husband and Wife* ⚭31.]

By marriage settlement, R. B., the husband, was entitled to receive the rents, income and profits for the joint maintenance of himself and wife during their joint lives; "and in case any creditor of R. B. should attempt to charge the said income and profits with any debt of the said R. B., then, from the issuing of any process to charge the same," the said rents, income and profits were to be paid to the wife, to her own separate use:—*Held*, that an attempt by a creditor to charge the income and profits with a debt of R. B. by filing a bill in Equity, and causing sub. ad resp. to be issued and served, did not determine R. B.'s interest under the settlement—that it could only be determined by the issuing of final process to charge the income and profits with a debt due by him.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 188; Dec. Dig. ⚭31.]

Before Dunkin, Ch., at Colleton, February, 1855.

This case will be understood from the opinion delivered in the Court of Appeals. The bill was dismissed on the Circuit, and the plaintiff appealed.

Carlos Tracy, for appellant.  
Petigru, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. By the marriage settlement set forth in the pleadings, it is (among other things,) provided, that the trustees shall permit the intended husband, Robert L. Baker, to receive the rents, income and profits of the trust estate for the joint maintenance of himself and his intended wife during their joint lives, but not subject to his debts; "and in case any creditor of the said Robert L. Baker, should attempt to charge the said income and profits with any debt of the said

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Robert \*L. Baker, then, from the issuing of any process so to charge the same, in trust, that the said trustees should pay over to the said Isabel C. Field the said rents, issues and profits, to be applied to her own separate use and behoof, and at her free will and pleasure, freed from the debts, contracts or engagements of the said Robert L. Baker." And it was expressly declared that in case the said Isabel C. Field should be minded to dispose of any portion of the said premises in any manner whatever, then that the said trustees should hold and convey the same to and for such person or persons, and subject in all respects to such limitations and conditions as she, the said Isabel C. Field should, from time to time, in her lifetime, by any deed or other instrument in writing, executed by her in the presence of two or more witnesses, or by her last will and testament duly executed, order, direct, limit and appoint.

Under this last mentioned power, Mrs. Baker, sometime after her marriage, executed deeds in favor of the plaintiff, which became the subject of judicial investigation in the case of *Roux v. Chaplin*, reported 1 Strob. Eq. 129. It was there ruled that the first clause of the marriage settlement was a grant of a life estate to Robert L. Baker, explicit and unequivocal; and that the second clause must be regarded "as giving the wife power to make any disposition subject to the joint estate for life, and to take effect after its termination; thus constituting a remainder expectant on that termination." The plaintiff was accordingly enjoined from interfering with the possession or management of the estate during the joint lives of Robert L. Baker and his wife, and the trustees were directed to pay to the said Robert L. Baker the income and profits during that period. This decree was made at February Sittings, 1847.

In November, 1854, the plaintiff instituted these proceedings, setting forth the provisions of the marriage settlement, and referring to the decretal orders heretofore made, but alleging that one Michael O'Con-



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nor had in his lifetime obtained a judgment against Robert L. Baker, and that Mary O'Connor, his executrix, had, in May, 1854, filed a bill in this Court, seeking to obtain payment of the said judgment out of the rents and profits of the trust estate, and that a subpoena ad respondendum had been issued and served on the parties—that the plaintiff was advised that the deeds of his mother (Mrs. Baker,) to himself, had thereby "become of active and immediate operation," and prayed that "the trustees might be ordered and decreed to stand legally seized and possessed forthwith, for the benefit of the plaintiff, of the property and increase thereof in the said deeds of appointment mentioned." &c.

The answer of the trustee admits the filing of O'Connor's bill, "but that the defendant was advised that the said bill was, on the face of it, destitute of equity, and must have been dismissed with costs against this defendant. But that he was advised and believed that the said Mary O'Connor had come to a compromise with the said Robert L. Baker, and wholly abandoned the said bill."

Robert L. Baker's answer admits the judgment of O'Connor, which, he avers, was for a debt contracted by his wife while she was living separate from him—that a bill was filed in the Court of Equity on 3 May, 1854, to have the judgment satisfied out of the income of the trust estate; but "that no further proceedings have been had in the said cause, and the defendant was advised that the said bill, if brought to a hearing, must have been dismissed for want of equity; and, in fact, says, that the said Mary O'Connor abandoned her said bill before it was brought to a hearing, or any answer put in, and waived the relief thereby prayed."

When this cause was heard at the Circuit, the opinion was expressed that, in no view, was the plaintiff entitled to maintain his bill—that the plaintiff's interest under the deeds of appointment was subordinate to the estate for the joint lives of Robert L. Baker and wife, created by the first clause

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of the settlement—and that, whether that estate was in Robert L. Baker, or in Mrs. Baker for her sole and separate use in consequence of the action of Baker's creditors, the result was the same—the remainder of the plaintiff was expectant upon the termination of the estate for the joint lives, and that such appeared to be the construction of the Court of Appeals in 1847, when, by the decree then pronounced, the plaintiff was "enjoined from interfering with the possession or management of the estate during the continuance of the joint lives of the said Baker and wife." Although this was sufficient to dispose of the plaintiff's case, yet it is due to the parties to meet the prelimi-

nary question made by the pleadings, and leave the other question where it is placed by the decree of 1847, when the inquiry shall become necessary as to the proper construction and effect of that adjudication.

The settlement provides that, "in case any creditor of Robert L. Baker shall attempt to charge the said income and profits with any debt of said R. L. Baker, then, from the issuing of any process so to charge the same, the trustees should pay over the said income and profits to the said Isabel C. Field," &c., "to be applied to her own separate use," &c. A rule has been already prescribed for the interpretation of this instrument. In *Roux v. Chaplin*, it is said to be "proper for the Court, collating all the provisions of an instrument for the purpose of giving it construction, if there be anything ambiguous, to make such construction as will give the whole a reasonable effect. It should incline against any construction which would operate in an unusual manner, harshly and injuriously to any party, and in favor of such as seems most conformable to the general purposes for which similar instruments are executed. It is also a rule, that, if there should be an ambiguity, the construction must be most strongly against the grantor."

The trustees were to permit Baker to receive the income and profits of the property "for the joint use and maintenance of himself and his wife for and during their joint

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natural lives." As has been already determined, this clause gave to Baker a life estate in the rents and profits. As a necessary incident this estate would be liable to the payment of his debts—the declaration of the instrument to the contrary, being, in itself, wholly ineffectual and nugatory.

"If property be given to a man for his life, the donor cannot take away the incidents of a life-estate" (a). Any interest, legal or equitable, joint or several, must be subject to the incidents of property, and may be reached by his creditors and rendered available for the satisfaction of their demands. *Rivers v. Thayer*, ante, p. 136. The only mode of preserving the property from the creditors, is by giving it to some one else. The primary object of the settlement—the declared purpose of the parties—was, that Baker should receive the income of the estate for the joint use and maintenance of himself and his wife. This purpose was liable to be frustrated by the successful interference of Baker's creditors. With a manifest view to established principles, and in order to obviate the consequences or prevent the success of such interference, the proviso was introduced.

It may be premised that clauses of this character, the effect of which is to deter-

(a) *Branden v. Robinson*, 18 Ves. 436.

mine, or defeat, an estate clearly given, are always construed strictly. And this is done although it sometimes happens that the consequences of such construction are at variance with the apparent intention of the parties.—Such is the case of *Whitfield v. Prickett*, 2 Keen, 608, where the testator's purpose was obviously to secure the enjoyment of the annuity to his nephew personally, and, therefore, limited it over to his children in the event of his voluntary alienation, or anticipation, thereof. Yet the Court ruled that, upon a commission of bankruptcy against the nephew, the limitation to the children did not take effect but that the annuity passed to the assignees in bankruptcy.

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So, where the previous estate is to \*be defeated, or the limitation take effect, in consequence of an act done by the life tenant, the Court have adopted a liberal construction of his conduct in order to maintain his estate.—*Jones v. Wyse*, 2 Keen, 285, was the case of a marriage settlement. The rents and profits were to be paid by the trustees to the husband until (among other things) he should sell, charge or incur the same, "or should attempt or agree so to do," and from and after such event, upon trust for the children of the marriage. The husband made several efforts to raise money by sale or mortgage of the property, but was prevented from effecting such sale or charge by reason of the language of the settlement. On a bill filed by the children it was insisted that a forfeiture had been committed, and that the limitation over had taken effect. But Lord Langdale, M. R., was of opinion that the conduct of the defendant did not amount to a forfeiture within the meaning of the settlement. And his judgment is sustained by the authority of *Sir Anthony Mildmay's case*, 6 Co. 40, b. 3 Jac. I. It was there resolved that a proviso restraining a party from "attempting or going about" to alien the estate vested in him, was inoperative. These words, it was said, were uncertain and void in law; for that "the law did not define quid sit conatus; and that therefore, the rule of law decided that non efficit conatus nisi sequitur effectus, and the law rejects conations as things uncertain which cannot be put in issue." And to the same effect is *Pierce v. Win*, 2 Ventr. 321, where an "attempt to alien" was held to be a void condition; "for non constat what shall be judged an attempt, and how it could be tried."

But this is no controversy between the creditors of Baker and the plaintiff claiming under the limitation, as in *Whitfield v. Prickett*; nor yet between Baker and the plaintiff insisting on a forfeiture and consequent devolution of the estate because of any act or default of the life tenant in derogation of the provisions of the deed, as in *Wyse v. Jones*, where, it may be observed,

the life tenant would have had little cause

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of com\*plaint if a less indulgent construction had been given to his own improvident acts. But the charge of the plaintiff is—such is the foundation of his bill—that Baker's estate has been extinguished by the attempt on the part of his creditor to avail himself of that interest, although the attempt may have proved abortive, or have been abandoned. To adopt this construction would seem a perversion of the meaning of the proviso for the purpose of defeating the object it was designed to accomplish, of destroying the primary estate it was intended to protect.—In answer to the position thus assumed by the plaintiff the argument in *Sir Anthony Mildmay's case* may be adopted without scruple or hesitation. The law does not define "an attempt." It is impossible to try an issue upon it. The Court cannot recognize anything as an attempt which is not effectual. But the precise language of the proviso may not be necessarily obnoxious to this nice criticism. It seems to have been prepared with care, and the Court should, in case of ambiguity, adopt such version of the terms used as will sustain the estate rather than defeat it—ut res magis valeat quam pereat. It is not declared that the life estate of Baker shall determine immediately upon the attempt made by a creditor, but that, in case of an attempt by a creditor to charge the income and profits, then, from the issuing of any process so to charge the same, the trustees shall pay over to Mrs. Baker, &c. It was not in the contemplation of the parties to restrict Baker from contracting debts. The former pleadings show that he was already deeply embarrassed. The design was to secure him in the enjoyment of the income for the joint use and maintenance of himself and his wife, during their joint lives; and to cause his interest to cease only when it could not be so enjoyed, and because it could not be so enjoyed any longer. But the plaintiff insists that, so soon as the subpoena to answer was signed, or served, Baker's interest ceased. It might be sufficient to say that the effect of such construction would have enabled the plaintiff himself, on the day after the execu-

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tion of his deed of \*appointment, in 1845, to put an end to Baker's life estate by purchasing up any claim against him, however stale, or insignificant in amount, and then filing a bill in equity, however absurd and frivolous, against the trustees. To avoid any such conclusion it is only necessary to give a reasonable interpretation to every part of the proviso. The subpoena to answer as well as all previous proceedings may well be classed as attempts to charge, which are of no consequence unless they produce effects; and, therefore, the limitation or devolution of the estate was not made to depend



on them. But, if a decree or judgment should be rendered, "then, so soon as process should issue" to give effect to the attempt of the creditors, the interest of Baker was declared to cease, and the income became thenceforth payable to another. If the conveyancer had used the expression "as soon as execution should issue to charge it," &c.,—although less apt and appropriate, no reasonable doubt could be entertained as to the event contemplated. But the term process is of very general signification, and is applied to original process, mesne process and final process. The purpose of the proviso is fully accomplished by supposing it to have been used in the last sense. Nor is it deemed requisite further to pursue the subject. In all cases of this character the view taken by Sir John Leach in *Wyatt v. Cooper*, 5 Mad. R., 293, gives the proper direction to the inquiry, and probably suggests the true test. "This proviso," says he, "is best construed by reference to the previous direction of payment, because the purpose of this proviso is merely to direct the application of the rents and profits when they can no longer be paid into the proper hands of the nephew, and for his own use and benefit." In that case the bankruptcy of the nephew intervened and prevented the application of the rents and profits as previously directed, and his interest was held to have ceased. Such was the manifest object of the proviso in this case, and no more—whatever may be the terms in which it is couched. The contingency has not arisen when the rents and

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profits can no longer \*be paid to Robert L. Baker for the purposes therein declared, and his life estate is unaffected by any of the matters disclosed in the pleadings.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON, DARGAN and WARDLAW CC., concurred.

Appeal dismissed.

### 7 Rich. Eq. \*395

\*NELSON, CARLETON & CO., et al., v.  
EDMUND J. FELDER, et al.  
(Columbia. May Term, 1855.)

[Interest ⇨22.]

A creditor by judgment recovered in a foreign court, who comes in under a creditors' bill and proves his demand, is entitled to interest on the amount of the judgment from the time it was rendered, although it does not appear whether the judgment bears interest by the law of the country where it was rendered, or not.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 46; Dec. Dig. ⇨22.]

[Interest ⇨28.]

The question reserved, whether the foreign rate of interest, or what rate of interest, shall be allowed.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 57; Dec. Dig. ⇨28.]

Before Dunkin, Ch., at Orangeburg, February, 1855.

Dunkin, Ch. John M. Felder died intestate on 1st September, 1851. On 1st June, 1852, proceedings were instituted between the distributees, (some of whom administered) for a partition and account of the estate. Edmund J. Felder, was a brother of the half blood of the intestate, and entitled to one-fourth of the estate, real and personal. Pending the proceedings thus instituted, to wit., on 7th July, 1852, the plaintiffs, Nelson, Carlton & Co., and Bright & Ledyard filed this bill, which has been declared to be "only subsidiary and incidental to the previous bill." They state that prior to 1837, Edmund J. Felder and James Bradford, were trading in Alabama under the name and style of Felder & Bradford; that they failed in business and became insolvent; that in April, 1838, Bright & Ledyard obtained a judgment against them in the County of Autauga, in the State of Alabama, for six hundred and forty-two dollars and twenty-nine cents, together with the costs of the suit, and that in April, 1839, Nelson, Carleton & Co., recovered judgment for the sum of four thousand three hundred and seventy-five dollars and fifty-three cents, with costs of said suit. The plaintiffs allege that these judgments

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are wholly \*unsatisfied, and pray payment of their demands from the distributive share of Edmund J. Felder in the estate of John M. Felder, deceased.

Chancellor Wardlaw, who heard the cause, retained the bill and granted relief to the plaintiffs to a certain extent, "restricting their remedy however, to Edmund J. Felder's distributive portion of the lands and chattels, or the proceeds of the sales thereof, and declaring that they had no right to call upon the administrators of the intestate for a general account of their transactions." The commissioner was directed to publish a notice for three months to the creditors of Edmund J. Felder, to present and prove their demands on or before a day to be fixed by the commissioner; and that he should report upon said debts. The cause was heard upon the report presented under this decretal order and the exceptions thereto.

Before proceeding to consider the exceptions, it may be well to remark, that the rule prescribed in *ex parte Hanks*, Dud. Eq. 230, seems peculiarly proper, when this Court undertakes to administer the estate of an absent debtor, and for that purpose to call in all who may have claims against him. Especially does it seem proper, when persons coming in under the notice, present demands under foreign judgments of long standing. Vindicating the caution of the Court in requiring the suppletory oath of the creditor, Sir James Wigram says in a note to *Owens v. Dickinson*, 18 Eng. C. C. R. 57,—“the affi-

avit is required to extend to the consideration of a simple contract debt, but not to the consideration of a bond or other specialty debt. The affidavit is not required, or received as evidence of the demand, but only to repel the possible implication that the creditor may be demanding that which he knows is not due." There are some thirty-five or thirty-six Alabama judgments of very long standing, embraced in the report, and it would have been far more satisfactory to the Court if the evidence had been accompanied by the supplementary affidavit.

The several judgments against Edmund J.

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Felder, reported \*by the commissioner, amount in the aggregate, as taken from transcripts, to about the sum of thirty-three thousand dollars. Some of these judgments were obtained upon demands bearing interest, and some upon demands which did not bear interest. But the judgment, in each case, is for the aggregate sum of debt, interest and costs, or debt and costs, as the case may be, and the execution is for the aggregate sum, and no more. But the commissioner has made up his report by adding to the amount of the several judgments, the interest from the time of the rendition of the same, and calculating the interest at eight per cent, which is the rate allowed by the laws of Alabama. Instead of thirty-three thousand dollars, the amount reported to be due is about eighty thousand dollars.

The principal question involved in the case, is in relation to the allowance of interest. It is conceded, that by the laws of Alabama, as at common law, and according to the law of South Carolina, anterior to 1815, judgments do not carry interest. If the original cause of action bore interest, so soon as the judgment was rendered, the original cause of action ceased to exist—transit in rem judicatum, and no interest accrued thereon from that time. It seems a misapplication of terms to speak of a judgment as a contract. The contract is merged in the judgment; and if the judgment had been kept alive for twenty years, by successive renewals of execution, the plaintiff could collect no interest. To remedy this, the Act of 1815, declaring by the preamble the existing law, provided that after judgment rendered in any Court of this State, &c., on an interest bearing demand, interest should continue on the principal sum until satisfaction of the execution. But anterior to the passage of this law, if a judgment on a note of hand had remained for ten years, the defendant on a tender of the amount of the judgment as rendered, was entitled to have satisfaction entered thereon. And such is the law now where the judgment is entered on an open account or other demand not bearing interest. If the plaintiff

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in such judgment had commenced an \*action

by scire facias, to revive the judgment, he could recover no interest or damages, nor was he entitled to costs until Stat. 8-9, Will. 3, C. 3. But if the plaintiff resorted to the remedy of a new action against the defendant, of debt upon the judgment, it has been settled that he could recover interest. But this stands upon the law. For if, as the Court say in *Pinckney v. Singleton*, 2 Hill, 344, the defendant tenders the amount due on the original judgment, without interest, on the day before the writ in debt is issued, he is entitled as of right to have satisfaction entered; but if the tender is made the day after the writ in debt is issued, in order to be effectual the interest on the judgment must also be tendered. "By bringing the action the plaintiff had obtained an inchoate right to the interest which could not be defeated by the subsequent payment." "Whether," says Mr. Justice Harper, delivering the judgment of the Court, "this diversity was conformable to good reason, is not for us to determine." It is quite clear from this that a judgment is not an interest bearing demand in the sense in which a note or bond, bears interest. The holder of a note or bond, may require the interest to be paid before he gives up his instrument or cause of action. It is a part of his debt. The plaintiff in the judgment may be compelled to enter satisfaction on payment of the principal sum without the interest. Notwithstanding some looseness of expression in some of the opinions, the law of the Courts both in England and South Carolina is accurately stated in *Pinckney v. Singleton*. So long as the plaintiff can sue out his execution, he is not entitled to bring a new action of debt upon his judgment. But this does not prevent him from resorting to a Court of equity, to subject a particular fund to the satisfaction of his demand, which fund he could not reach by an execution at law. Equity would afford him the relief to which the Law Court was inadequate, and for which he had a right to ask the aid of this Court, but no further. Because he could not collect interest under his execution at law, he would not

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be entitled to come into this \*Court, nor would this Court enlarge his legal demand, although it afforded the means to satisfy it. In the case of *Pinckney v. Singleton*, the judgment was entered against Richard Singleton, executor, February, 1830. Immediately afterwards, the plaintiff filed a bill in equity, against the representatives of Isham Moore, to subject that estate to the payment of the debt, on some special equity. This failing, the plaintiff in November, 1831, brought debt on judgment against Richard Singleton, suggesting a devastavit. "If," says the Court, "the amount of the judgment with interest on the principal sum, (under A. A. 1815,) and costs had been paid, before the bringing of the action of 1831, suggesting a



devastavit, the defendant would have been entitled to his motion to have satisfaction of the judgment entered." And again, "No doubt if the payment had been made before the action commenced, the action could not have been maintained." But suppose the plaintiff, Pinckney, had obtained a decree in 1830, on his bill against the estate of Isham Moore, no action of debt on the judgment having been then instituted, on what principle could he have interest calculated on the judgment? If prior to November, 1831, he had been paid from Isham Moore's estate, the principal of the judgment and costs, "the defendant would be entitled" (say the Court, in the case cited,) "to his motion to have satisfaction on the judgment entered." His bill against the estate of Moore successful or unsuccessful, would have given the plaintiff no title to interest on his judgment. By the Statute Law of Alabama, a plaintiff may renew his execution at any time within ten years from the entry of his judgment. Nearly all the judgments against Edmund J. Felder, were obtained about the year 1837. At any time within the ten years, it cannot be doubted, or afterwards, the defendant in the judgments might have demanded satisfaction by a tender of the principal without interest. If John M. Felder had died in 1844, and these proceedings had been then instituted in this State, to subject Edmund J. Felder's

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interest to the payment \*of the Alabama judgments, it is not perceived on what ground the plaintiffs could claim more than the amount of their judgments and costs. If they sued out execution in Alabama against their debtor, as they might then have done, they could collect no interest. But because their execution at law could be fruitless for want of a subject of levy, and they seek the aid of the Court to supply as a subject, a fund within the reach of this Court, to payment of their execution, the relief would be restricted to the satisfaction which the plaintiff might have demanded at law if his legal process could have reached the fund. It is true, there are very special cases in which equity allows interest, which could not be collected at law, as in a judgment on bond. If the defendant at law, has availed himself of the process of this Court to enjoin the collection of the debt, and has ultimately failed to sustain his equity, and in the mean time the accruing interest has exceeded the penalty of the bond, this Court in the final decree, will allow the excess of interest which could not be collected under the execution. But this and the like are exceptional cases. Then can it make any difference that the bill was not preferred in 1847, but was deferred until 1851? The plaintiffs have done nothing to entitle themselves to more than the amount of their respective judgments. By their judicious inactivity, they perhaps prevented their debtor in 1837, from availing

himself of an insolvent law, and they are entitled to the benefit of it. They now ask that his interest in John M. Felder's estate shall be subjected to the payment of their demand, and they have obtained a decree to a certain extent. They have instituted no action of debt on the judgment either here or elsewhere, and their debtor has never availed himself of the process of this Court to interpose any obstruction to their legal proceedings. The Court has treated this exception as if the case were on the part of the original plaintiffs in the judgments, and this is probably the true aspect in which the question should be regarded, to wit., as judgment creditors seeking the aid of the Court to sub-

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ject a specific fund to the payment of their demands. In that point of view, the Court is of opinion, that as by the laws of Alabama, judgments do not bear interest, this Court in ordering satisfaction, will give them the same force and effect as they would have in Alabama, and no further. But a large amount of these judgments is not in the hands of the original parties. They are held by assignees, some of whose assignments are of very recent date. One claimant became the purchaser of a judgment to a very considerable amount, since the rendition of the decree of the Appeal Court in this case. Out of more than thirty judgment creditors, two only had filed a bill. All the others were called in under the notice given by this Court. When the claim of the parties to interest on their judgments stands inter apices juris—upon the fact that they had instituted an action of debt on judgment—all these circumstances may be properly taken into consideration.

The Court is of opinion, that the first, second, and fourth exceptions to the commissioner's report are well taken and should be sustained.

Let the report be recommitted, for the purpose of being amended according to the principles of this decree.

The complainants appealed.

Hutson, De Treville, for appellants.  
Bellinger, Aldrich, contra.

The opinion of the Court was delivered by

DARGAN, Ch. The defendant, Edmund J. Felder, is one of the distributees of the late John M. Felder. And this is a creditors' bill filed by the plaintiffs in behalf of themselves and other creditors of the said Edmund J. Felder for the purpose of subjecting his share of the estate of the intestate to the payment of their claims. On the

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first hearing of the cause, the \*Court adjudged, that the creditors had no right to call the administrators of John M. Felder to an account: but decreed, that the share of Edmund J. Felder in the lands and chattels of

the intestate should be subject to the payment of his debts. And, thereupon, an order was made, that the Commissioner of the Court should publish a notice for creditors to present and prove their demands, and that the Commissioner should report thereon. The Commissioner has discharged this duty, and has submitted his report. In the Circuit Court the case came on for trial on this report, and exceptions thereto.

The debts reported by the Commissioner consist entirely of claims founded on judgments rendered in Autauga County in the State of Alabama; principally in the years 1837 and 1838; one in the year 1839, and one in the year 1845. These judgments were for the most part against Felder and Bradford, (a mercantile firm doing business in Autauga County, in the State of Alabama, of which the said Edmund J. Felder was a member,) and some of them were against Edmund J. Felder individually.

The aggregate of the judgments without interest, is about thirty-seven thousand dollars, and with interest it is about eighty thousand dollars. The Commissioner reported in favor of the allowance of interest at the Alabama rate, which is eight per cent. The defendant, Edmund J. Felder, excepted to the report on various grounds, among which is the following, being his fourth: "For that in and by the said report, the Commissioner has charged interest on the various judgments reported; whereas it is submitted that the said judgments do not bear interest at all; at least, not at the rate of eight per cent." This exception was sustained by the Chancellor who tried the cause on the Circuit, to the extent that no interest whatever was recoverable on the judgments. This is an appeal from the Circuit decree on several grounds, of which it will only be necessary for me to consider the first, which imputes error to the Circuit decree for the disallowance of interest.

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\*At common law by the concurrence of all the authorities, interest was recoverable on a judgment in an action of debt in a Court of Law; though it is equally clear, that its payment could not be enforced except by an action. By our Act of Assembly of 1815, 6 Stat. 4, the interest which should accrue upon all judgments at law and decrees in equity, rendered upon interest bearing demands, from the time of the rendition of such judgments and decrees to the time of the payment of the same, was made recoverable by the execution issued in such cases, without judgment being rendered for such accruing interest, and without further suit or action. This is in derogation of the common law, and does not extend to cases where the judgments are not founded upon interest bearing demands. As all the judgments against Edmund J. Felder presented and proved by his creditors, are founded upon

interest bearing demands, the question in this case would have been divested of all its difficulties, if the judgments had been rendered in the Courts of South Carolina. But they were rendered by the Courts of Alabama, in the County of Autauga, as I have before stated; and I apprehend, must be regarded in our Court as foreign judgments. The States of this confederacy being sovereign and independent, the judgments and other judicial proceedings of one must be regarded in the sister States as the judgments and judicial proceedings of a foreign country. The provision in the Federal Constitution upon this subject, relates merely to the mode of authentication and proof.

But the comity of States, and a just regard to the rights of contracting parties, in many instances require that our Courts in adjudicating upon contracts made in foreign countries, should have regard to the laws of the country where the contracts were made, so far as said laws have a bearing upon such contracts. The *lex loci contractus* is often necessary to be considered as incorporated in the contract by implication, and thus becomes "part and parcel" of the

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contract. Among \*cases falling within this category, are claims of interest arising by implication or express contract. It is clearly settled that our Courts will enforce the payment of interest according to the laws of the country where the contract was made. This principle has been invoked in favor of the plaintiffs; for it is said, that interest on judgments is recoverable in Alabama by a statute law of that State, similar to our Act of 1815; but still more favourable to the creditor; for the Alabama Statute makes no distinction between judgments rendered on interest bearing, and non-interest bearing demands. From a collection of the Statutes of Alabama that was exhibited on the trial of this appeal, though I may not doubt that there is a law of Alabama giving interest on judgments; the difficulty of allowing to plaintiffs the benefit of this law arises from the fact that there was no proof on the Circuit trial, that such a statute of Alabama existed. When a party to any issue before our Courts, is desirous of availing himself of the benefit of any law or statute of a sister State, or of a foreign country, he must prove it as a matter of evidence, and as any other matter of fact is proved. The Court will take notice of no foreign law or custom that is not brought to its notice and judicially established. There is no principle on which this case will depend, better established than this. The plaintiffs in this case can therefore have no benefit of the Alabama statute, allowing interest to be collected on judgments. The case must be adjudged by the laws of South Carolina—in other words, by the principles of the common law, there



being no statute law of this State applicable to this circumstance of the case.

Judgments upon non-interest bearing demands rendered in our own Courts, and foreign judgments, remain in South Carolina, as to this question of interest, as they did at common law. And the question may now be reduced to the form of an abstract proposition: is interest recoverable on such judgments according to the rules of the common law?

I have already shown that interest cannot

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be recovered on judgments without the institution of a new suit, except in the case provided for by the statute law. And I have shown that at common law interest may be recovered on judgments in an action of debt in a Court of law. And there is no difference in such a proceeding, whether the original cause of action bear interest or not. When it is said that interest on a judgment may be recovered in an action of debt on the judgment in a Court of law, I apprehend that the form of the expression apparently restricting the proceeding to the action of debt, arises from the fact that there is no other form of action in a Court of law, but the action of debt, in which a suit on a judgment may be maintained. But in that form of expression, I think a principle was intended to be asserted; and the right to recover interest is not to depend upon the form of the proceeding, but that it can be recovered in any form of judicial proceeding, upon which the principal of the judgment may be recovered. It has already been decided in this very case, that these judgment creditors of Edmund J. Felder are properly parties before the Court in this suit, for the recovery of their claims on these judgments. And the Court has awarded to them the principal sums due upon their judgments; and I see no satisfactory reason why interest should be withheld.

Interest is recoverable upon all liquidated demands; upon bonds, notes, bills of exchange, and accounts stated. A judgment is a liquidated demand, though it be rendered in a foreign Court. A sum certain, a fixed time of payment, and the parties by whom, and to whom, payment is to be made—these are the essentials of a liquidated demand; all of which belong to a judgment. Is there an exception to the rule, that interest is recoverable on a liquidated demand?

The order of the Court in this case called in all the creditors of Edmund J. Felder. If a creditor, whose demand was in a note of hand, or bill of exchange, had proved his claim, he doubtless would have been entitled to interest. None would have disputed it. Yet it would be inconsistent and absurd to

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\*allow interest on a bill of exchange or promissory note, and not upon a judgment. Such a

distinction would have no rational grounds of support.

The conclusion at which I arrive is, that the Circuit decree is erroneous in not allowing interest on the judgments of the plaintiffs. The opinion of the Court is, that the Circuit decree be modified, so that the plaintiffs be allowed to recover interest on the amounts for which their judgments were rendered, from the dates of their rendition respectively. And it is so ordered and decreed. The Court will not, at the present, determine the rate of interest. With some of the members of the Court, there is a doubt as to the rate of interest to be allowed.

It is ordered and decreed, that the case be referred back to the Commissioner, that he conform his report to this decree, and that he inquire and report whether the Alabama rate of interest, or if not the Alabama rate, what rate of interest is to be allowed on the claims of the judgment creditors against the said Edmund J. Felder.

JOHNSTON and WARDLAW, CC., concurred.

Decree modified.

7 Rich. Eq. \*407

\*F. M. McCORKLE v. C. H. BLACK and Wife and Others.

(Columbia. May Term, 1855.)

[Wills  $\hookrightarrow$  614.]

In a devise of lands to two or more persons to be equally divided among them, "to them during their lives, and after their death to their lawful issue;" followed by a provision, that if any of the said devisees should die, "leaving no lawful issue, the portion or portions of him or her so dying shall be equally divided among the survivors;" held, that the first takers or devisees named in the direct bequest, took a life estate with remainder to their issue as purchasers.

[Ed. Note.—Cited in *Gillam v. Caldwell*, 11 Rich. Eq. 80; *Markley v. Singletary*, Id., 396; *Williams v. Kibler*, 10 S. C. 425, 426; *Mendenhall v. Mower*, 16 S. C. 314; *Powers v. Bullwinkle*, 33 S. C. 300, 11 S. E. 971; *Gadsden v. Desportes*, 39 S. C. 143, 17 S. E. 706; *Selman v. Robertson*, 46 S. C. 271, 266, 24 S. E. 187; *Davenport v. Eskew*, 69 S. C. 294, 48 S. E. 223, 104 Am. St. Rep. 798; *Williams v. Gause*, 83 S. C. 267, 65 S. E. 617; *Guy v. Osborne*, 91 S. C. 293, 74 S. E. 241; *Still v. Creech*, 95 S. C. 370, 78 S. E. 1039.

For other cases, see Wills, Cent. Dig. § 1402; Dec. Dig.  $\hookrightarrow$  614.]

*Treville v. Ellis*, Bail. Eq. 40, commented on and approved.

[This case is also cited in *Powers v. Bullwinkle*, 33 S. C. 294, 11 S. E. 971, and distinguished therefrom.]

Before Dargan, Ch., at Marion, February, 1854.

Dargan, Ch. Mrs. Matilda A. McClenaghan, late of the district of Darlington, departed this life on the 20th February, A. D., 1853, seized and possessed of a considerable real and personal estate; all of which she devised and bequeathed by her last will and

testament, in manner and term as follows: "It is my will and desire after the payment of my just debts, that all my property, both real and personal, of which I may die possessed, (with the exception of two dollars hereinafter to be disposed of,) shall be equally divided between the ten following persons, in the manner hereinafter specified, to wit.: Matilda Eliza McIntyre, Richard A. McIntyre, Robert Charles McIntyre, Duncan McIntyre, George McIntyre, Archy McIntyre, Rebecca McIntyre, Joseph McIntyre, (children of my sister, Sophia McIntyre,) Mary Ann McClenaghan, (daughter of my sister, Emily McClenaghan,) and F. M. McCorkle, (now living in my house,) to them during their lives, and after their death to their lawful issue.

"Should any one or more of the children of my sister, Sophia McIntyre, above mentioned, die leaving no lawful issue, in that case, it is my will, that the portion or portions of him or her so dying, shall be equally divided between the surviving brothers and sisters.

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Should Matilda Eliza McIn\*tyre, or Rebecca McIntyre, marry, it is my will, that the property herein bequeathed to them, shall in no wise be liable to any debts of their husband, but the same shall be an estate separate, and belonging to them alone, and at their death to their lawful issue. Should Mary Ann McClenaghan marry, it is my will that the property herein bequeathed to her, shall not be liable to any debts of her husband, but that the same shall be an estate separate from his, and belong to her alone, and at her death to her lawful issue. Should she die leaving no lawful issue, it is my will that the property herein bequeathed to her shall be equally divided among her brothers and sisters. Should F. M. McCorkle die, leaving no lawful issue, it is my will that the property herein bequeathed to him, shall be equally divided between the children of my sister, Sophia McIntyre, hereinbefore named, or to such of them as are at that time surviving." The other parts of this will are unimportant as to the question involved in this cause. Richard H. McIntyre and Robert Charles McIntyre, were nominated the executors, but neither of them qualified as such; the said Richard having formerly renounced, and the said Robert Charles being under the age of twenty-one years: Whereupon the said F. M. McCorkle was duly appointed administrator with the will annexed, and took upon himself the execution thereof.

This is a bill filed by the said F. M. McCorkle, against the other devisees and legatees for a partition of the real and personal estate devised and bequeathed as before stated, and for an account. In pursuance of the prayer of the bill, a writ of partition was issued, and a portion of the negroes and a certain portion of the other chattels, have been specifically divided among the legatees,

all of which was satisfactory to the parties, and has been confirmed by the Court.

But the commissioners appointed to make the partition, returned that the lands could not be divided without injury to some of the parties, and the Court ordered a sale of the

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said \*lands for the purpose of effecting the partition by dividing the proceeds of the sale. The sale has been made, and the proceeds thereof are now in the hands of the Commissioner, subject to the order of the Court.

This is an application for an order directing that the proceeds of the said sale of the real estate, should be distributed among the parties, and that the Commissioner should pay over to each one of the said devisees, his share, respectively. But a difficulty has arisen and a question is made, whether the said devisees are entitled to have their respective shares paid over to them unconditionally. It is contended that the said devisees take but a life estate in the said lands; that the issue of each of the said devisees take a remainder after the death of his parent, and that in the event of either of the said devisees dying without issue living, there is an executory devise over to the survivors. It is said that for the Court to change the investments, (converting the lands into money,) and to put the said devisees into the possession of their several shares in the form of cash, would be to put in peril and to destroy the rights of the issue as remaindermen, as well as the rights of those who may claim under the ulterior limitation. Wherefore it is contended that the said devisees should not receive their respective shares in cash, but that there should be an investment of the fund arising from said sale; that the interest should be paid to the said devisees and the corpus preserved for the remaindermen, &c.

This renders it necessary for the Court to construe the will of the testatrix. And the question is, whether as to the real estate, the said devisees take an estate in fee or fee conditional, or whether the issue take as purchasers by way of remainder, after the termination of a life estate in the first takers.

It is conceded on all hands, that as to the personal estate the limitation to the issue is good; that the immediate devisees take but a life estate, and that at their death, their shares respectively go to their issue as pur-

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chasers. For although by \*the direct gift to the issue, they could not take as purchasers, by reason of the generality of the words employed, yet, in the limitation over the word leaving, and the limitation to the survivors are, (each of them,) sufficient to restrict and explain the word "issue," so as to make it mean "issue living at the death of the first taker." I need say no more upon this point, as it is not contested. Indeed the question could not arise upon the present pleadings,



as the negroes have been divided, and not sold, and have gone into the possession of the different legatees, where they remain subject to the limitations of the will. The question will be as to the effect of those qualifying expressions upon the devise of the lands.

The gift is to the several devisees respectively for life, and after their death to their lawful issue. These words standing by themselves and unexplained, would certainly create a fee conditional. Whether a limitation can be engrafted upon a fee conditional, by way of executory devise, is a question which was much discussed in the late case of *Buist v. Dawes*, but was left undecided, the case having been decided upon another point. (4 Rich. Eq. 421; *McLure v. Young*, 3 Rich. Eq. 559.) But it was held by a majority of the Court of Errors, in that case, that words which create a fee conditional in the direct devise, may be so explained and modified by an explanatory context, as to cut down the fee conditional imported in the first instance, to a life estate, with a remainder to the issue as purchasers. It is not my purpose to enter here into any discussion upon this topic. But assuming the principle above stated to be settled, as the result of the action of the Court of Errors in *Buist v. Dawes*, I will proceed to consider whether the fee conditional imported in the direct devise of Mrs. McClenaghan's will, has been cut down by other expressions and provisions of the will, into a life estate to the first taker, with a remainder to the issue as purchasers. I will now address myself to the consideration of the question, which has been raised and dis-

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cussed in this case. By the foregoing \*remarks, having disposed of that which may be considered as preliminary, it will be necessary to inquire whether there are any qualifying expressions in this will, which will have the effect of explaining the generality of the word issue, so as to make it mean issue living at the death of the first taker.

The word *leave*, which occurs in this limitation over, though sufficiently restrictive as to personal estate, is not so, in reference to realty. *Forth v. Chapman*, 1 P. W. 663; *Mazyck v. Vanderhorst*, Bail. Eq. 48.

It is said that the limitation over in favor of the surviving brothers would have that effect. As before intimated, this would be indisputably true, if the question related to personal estate. *Massey v. Hudson*, 2 Meriv. 130; *Nichols v. Skinner*, Chan. Pre. 479; *Ranchlaugh v. Ranchlaugh*, 2 Myln. & Keen, 441; *Treville v. Ellis*, Bail. Eq. 40; *Stevens v. Patterson*, Bail. Eq. 42. Whether the same rule applies to devises of real estate is the question.

There is no doubt that in the earlier cases a distinction existed, and that in a devise to several for life, and after their death to their issue indefinitely, with a limitation over, in

the event of the first taker's dying without issue, to survivors, did not have the effect of qualifying and restricting the generality of the words in the direct gift, as it did in cases where the subject matter was personal estate. The ground of the distinction, if obvious, is not at this day very satisfactory. In *Fearne on Con. Rem. and Ex. Dev.* 476, it is said, "though the Courts in the case of personal estates, generally incline to pay attention to any circumstance or expression in the will that seems to afford a ground for construing a limitation, after dying without issue, to be a dying without issue living at the death of the party, in order to support the devise over, yet in the case of real estate, it seems the construction is generally otherwise, for there we are to consider that the interest of the heir at law is concerned, which is always much favored by our laws." *Foster v.*

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*Ld. Romny*, 11 East, 504. Under our \*American institutions, there is no distinction between real and personal property, so far as the interest of the heir at law is involved, and there is no reason founded upon policy, why such distinction should exist. If there be a gift of personal property to two or more persons, and after their death to their issue respectively, and if they should die without issue, then to the survivor or survivors,—if, I say, in the case supposed (that of a gift of personal estate,) the disposition in favor of the survivor, so qualify and restrict the general sense of the word issue, as to make it mean issue living at the death of the immediate donee, why should not a similar construction prevail as to the real estate, given in the same terms? Why should not a similar intention on the part of the testator be presumed? Every principle of reason requires that the same construction should prevail; unless the Court be influenced by policy and reasons of State, or be fettered by precedents, that it cannot break through, without violating still more profound and general reasons of judicial polity. As to policy in England, none can be imagined for the origin of such a distinction, but that of favoring the heir at law, which cannot apply in this country, where all the persons entitled to take in cases of intestacy are equally heirs, and equally favored. And as to being bound by authority and precedents, I will now enter into an examination of them. The author already cited (*Fearne on Rem.*, 553,) says, "if personal estate is given to two or more persons for life, with a limitation over to the survivor or survivors, (simply, without adding the words *executors, administrators and assigns*,) in case of the death of any or either of such persons without issue, the presumption *prima facie* is, that the word *survivor* is used in the plain and obvious sense, as meaning such of those persons as should be living when any of them happened to die, and not as simply equivalent to the word *others*; and

that the testator did not refer to an indefinite failure of issue, but that he referred to the dying of any of them, without issue living at their death."

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\*It does not appear that the learned author any where negatives the idea (except so far as an implication may be drawn from the passage cited) that a gift of real estate in the same terms would not receive the same construction. Nor does it appear, so far as my investigation has gone, that up to the time at which Mr. Fearné wrote his incomparable treatise, any cases of this kind had arisen affecting real estate; but Mr. Charles Butler, in his edition of Fearné's treatise, appends a note at page 539. In this note, he says: "Since the first publication of Mr. Fearné's Essay, some cases have come before the Courts, in which the construction of the word 'leaving' in devises has been considered. These were preceded by the case of *Roe v. Scott and Stuart*, Easter Term, 27 Geo. 3, which Mr. Powell, in an annotation to this part of Mr. Fearné's essay, gives from a manuscript of Mr. Fearné's, and he informs us that it was in consequence of, and decided in conformity with, an opinion which Mr. Fearné delivered upon it." "In that case the testator devised certain lands to his son James, to hold to him, his heirs and assigns forever; and other lands to his son John, to hold to him, his heirs and assigns forever; and other lands to his son Thomas, to him, his heirs and assigns forever; with this express condition: that his son Thomas should yearly pay to a grand-daughter of the testator, the sum of £3 till her age of sixteen, and the testator charged the same premises with such payments; and then added, that his will and mind was, that if either of his three sons should depart this life without issue of his or their bodies, then the estate or estates of such sons should go to the survivors or survivor; and if all his said three sons should happen to die without such issue, then he devised all the said premises to his four daughters, and their heirs and assigns forever. The three sons survived the testator and entered, and John died sometime after, intestate and unmarried. And it was held, that the devise to Thomas did not give him the fee, but an estate tail which descended to his daughter, and upon her decease with-

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out issue, \*the estate went over to James the then surviving brother, and not to the heirs of the said daughter."

In *Porter v. Bradley*, 3 Durn. & East, 143, the testator devised lands to his son, his heirs and assigns forever, with a devise over in case he should die and leave no issue behind him. It was held that the leaving issue was to be referred to the time of the son's decease, and that therefore the limitation over was good by way of executory devise. This case is not exactly in point in the issue

here involved; but I cite it for the purpose of showing how easily in the English Courts, the rule, even as to realty, is made to yield to the apparent intention of the testator.

In the case of *Roe d. Sheers v. Jeffry*, 7 Durn. & East, 580, the testator devised lands to T. Friswell and his heirs forever; "but in case he should depart this life and leave no issue, then to Elizabeth, Mary and Sarah, the three daughters of W. and M. Friswell, or the survivor or survivors of them, to be equally divided betwixt them, share and share alike." It was held by Lord Kenyon, that these words were equivalent to "dying without issue living at the death of the first taker," and that the limitation over was good as an executory devise. His Lordship laid much stress on the fact, that the devise over was to persons in esse at the execution of the will. He said it was a question of intention "and it was impossible not to see, that the failure of issue intended by the testator, was to be a failure of issue at the death of the first taker, and if so, the rule was not to be controverted."

I cannot but think the language of Lord Kenyon, in *Porter v. Bradley*, as applicable to this question. In speaking of Lord Macclesfield's argument in *Forth v. Chapman*, he says: "but it is contended, that this rule is confined to chattel interests only: however, a great deal of argument is necessary to convince me, that in the case of realty, these words shall be taken to mean indefinite failure of issue. It would be very strange if those words had a different meaning, when

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applied \*to real and personal property. If such a distinction existed in the law, it certainly would not agree with the rule, *Lex plus laudatur quando ratione probatur*." We have such an anomaly in *Forth v. Chapman*, and the cases decided upon its authority. The distinction is entirely too subtle and artificial to command the assent and approbation of the unsophisticated reason. I would not dare to deny the authoritative force of *Forth v. Chapman*; but I would say, there would be no wisdom in unnecessarily multiplying such anomalies.

A distinguished American Jurist, 4 Kent, Com. 276, in summing up the authorities on this subject, holds the following language: "The series of cases in the English Law have been uniform from the time of the year Books down to the present day, in the recognition of the rule of law, that a devise in fee, with a remainder over, if the devisee dies without issue, or heirs of his body, is a fee cut down to an estate tail; and the limitation over is void by way of executory devise, as being too remote, and founded on an indefinite failure of issue. The general course of American authorities would seem to be to the same effect, and the settled English rule of construction is considered to be the equally settled rule of law in this country; though



perhaps it is not deemed of quite so stubborn a nature, and is more flexible, and more easily turned aside by the force of slight additional expressions in the will. The English rule has been adhered to, and has not been permitted, either in England or in this country, to be affected by such a variation in the words of limitation over, as dying without leaving issue; nor if the devise was to two or more persons, and if either should die, the survivor should take." I cannot but think that the learned commentator in the last proposition contained in the passage quoted, has not displayed his usual ability and accuracy of research. Some of the English authorities, which I have already brought to view, must have escaped his attention. He remarks at page 278, that "the disposition in this country has been equally strong, and in some instances,

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much \*more effectual than that in the English Courts, to break in upon the old immemorial construction upon this subject, and to sustain the limitation over as an executory devise." He admits the case of *Dur v. Schank*, 3 Hallsted, 29, and the case of *Anderson v. Jackson*, 16 John. R. 382, were directly opposed to his own views. In the last case, the devise was to the testator's two sons in fee, and if either of them should die without issue, to the survivor. The case was elaborately discussed, and the construction turned entirely upon the effect to be given to the word survivor. There was no other qualifying expression in the will to restrict the indefiniteness of the words dying without issue. It was decided by the highest appellate Court in the State of New York. (Court of Errors,) that the limitation over was good as an executory devise.

In *Cutler v. Doughty*, 23 Wendell's Rep., 513, it was declared, that a devise to the survivor or survivors of another after his death without issue, was not void as a limitation upon an indefinite failure of issue; that it was good as an executory devise; that the word survivor qualified the technical or primary meaning of the words dying without issue, which must be read, dying without issue living at the time of his death."

It seems that a contrary rule has been established in Virginia by a series of decisions in that State.

The great American Expositor (Chancellor Kent,) in note 1, 4th vol., 5th edition, page 277, admits that later cases "seem to be sufficient to change the former rule and that a limitation to the survivor may be good by way of executory devise."

In South Carolina, there is but one case reported, (so far as my researches have been extended,) in which this question has been decided as to real estate. *Treville v. Ellis*, Bail. Eq. 42. This case is similar to the one in hand, in this, that it was a gift by will of both real and personal property. Richard

Ellis by his will gave his real and personal estate to his widow and children in different proportions; and by one of the clauses of said will declared as follows: "It is my will

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and desire that \*should any of my children die without lawful heirs of their body, their part or division of my estate shall be equally divided between the surviving children, share and share alike." The case does not from the report seem to have excited much attention, or to have been elaborately discussed. Still the fact, that the question arose on a gift of real as well as personal estate, "was not passed unheeded." The fact was noticed, and was the subject of comment. Whether there might be a distinction in the application of the rule in cases relating to real estate, does not seem to have entered into the consideration of the Court. It was decided, that the indefiniteness of the expression dying without heirs of the body, was controlled by the limitation over to the survivors, and one of the testator's children, an immediate devisee, having died without heirs of his body, the limitation over to the other children as survivors, was good as an executory devise, and they took as such, both the real and personal estates.

I am free to confess, that heretofore I have not been entirely satisfied (as respects the real estate,) with the correctness of the decision in *Treville v. Ellis*. But I rise from this investigation with all my doubts removed and fully satisfied to subscribe to its correctness.

The language of the devise to Mary Ann McClenaghan, (now Mrs. Black,) is different from that of the devise to the children of Sophia McIntyre. The limitation over is, "that should she die and leave no lawful issue, it is my will that the property herein bequeathed to her, shall be equally divided between her brothers and sisters." The absence of the provision in favor of survivors, is an important variation. The brothers and sisters, if they could take under the limitation over, would take a transmissible interest. And for that very reason, they cannot take at all. The limitation over is void for remoteness, and the issue cannot take as purchasers. Mary Ann McGlenaghan (Mrs. Black) takes in the lands a fee conditional. But it is her separate estate, however. The

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devise \*to F. M. McCorkle falls into the same category with that of the children of Sophia McIntyre: the words are: "Should F. M. McCorkle die leaving no lawful issue, it is my will, that the property herein bequeathed to him shall be equally divided between the children of my sister Sophia McIntyre, or to such of them as are at that time surviving."

It is ordered and decreed, that it be referred to the Commissioner to report a fit and proper person to be appointed as trustee of the separate estate of Mrs. Black, and

that her share of the proceeds of the sale of the said real estate be paid to such trustee when he shall have been properly qualified, to be held by him for the purposes declared in the will and concerning said share.

The motion of the other devisees for distribution is deferred for the present, and it is referred to the Commissioner to report a suitable scheme for the investment of the fund in which the said other devisees of Mrs. McClenaghan are interested; so that the immediate devisees (parties to this bill) may receive the annual income thereof, and the corpus be preserved for those who are to take in remainder.

F. M. McCorkle, the McIntyres, and Davis and Wife, appealed, and now moved this Court to reverse the decree on the grounds:

1. Because the decree is erroneous, contrary to law and a proper construction of the will, in adjudging that the said devisees under the will take only a life estate with a valid remainder to their issue as purchasers; and in default of issue with a valid remainder over to the survivors: whereas, it is respectfully submitted, that, under a proper construction of the will, the devisees took either fee simple, or fee conditional estates, and that in either event the limitation over was void, and the devisees are entitled to the proceeds of the sale of the lands.

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\*2. Because the decree is contrary to law and a proper construction of the will of Mrs. McClenaghan.

Dargan, for appellants.

Law, contra.

PER CURIAM. This Court concurs in the circuit decree. It is therefore ordered, and decreed, the decree be affirmed, and that the appeal be dismissed.

DUNKIN, Ch., concurred.

WARDLAW, Ch. I join in affirming the circuit decree in this case, but as the course of reasoning which leads me to the Chancellor's conclusion differs in some particulars from that pursued by him, I add a brief explanation of my views.

The proposition of the appellants, that the devisees here take a fee conditional, seems to me to be properly deduced from the terms of the will. This is conformable to the opinion of one-half of the Court of Errors in *Buist v. Dawes*, and is sufficiently vindicated in the opinion of Chancellor Dargan in that case. 4 Rich. Eq. 430. I think, however, that there may be a valid executory devise upon a fee conditional, if limited to take effect within lives in being, and twenty-one years afterwards; and that in the present instance the limitation over does not infringe the rule against perpetuities.

My opinion upon this doctrine has been already expressed in the case above cited,

Ib. 496; and nothing will be added now except notices of three of our cases, which were there inadvertently omitted.

In *Cruger v. Heyward*, 2 Des. 94, testator devised Callewashie Island, with the slaves, &c., thereon, to his son B., "but in case he die without lawful issue, then I give it to

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my grand-son \*D., his heirs and assigns forever;" and it was held, that the limitation over was not too remote. The Court says, Ib. 112: "There is no doubt if the statute of intails was of force in this State, that B. would have had an estate tail in the land; for it is laid down clearly in the books, that if lands are devised to one, and if he die before or without issue, or not leaving issue, it is devised over, such limitation creates an estate tail: but that statute not being of force, the estate he took was a fee conditional at common law; the reversion of the estate still remaining in the testator; which he had a right to dispose of, and which he has done in this clause to his grand-son D. and his heirs." This decision might not be upheld at this day, so far as it determined that the words in the devise are adequate to restrict B.'s "dying without lawful issue" to the failure of issue at his death; and so far as it intimates that a fee conditional is a particular estate like a fee tail, capable of supporting a remainder; but why should it not be recognized within proper limits, as establishing that a devise over may be engrafted on a devise of fee conditional? To this latter extent it is a subsisting authority.

*Milledge v. Lamar*, 4 Des. 617, is a similar case. There A., by deed confirmed by his will, gave all his estate, real and personal, to B. and his heirs, on the condition that if B. should die without any heir of his body, then and in that case the whole of the then remaining property should be equally divided between the children of donor's three brothers, C. D. and E. B. left at his death no heir of his body, but left a wife. In a contest between the wife and the children of the brothers, it was held that the gift over to the children was not too remote, and that the wife, as widow of a tenant in fee conditional, was entitled to dower in the lands. The instrument of gift was treated by the Court as a will. Perhaps this case, too, may be obnoxious to criticism as to the efficacy of the words in the gift over to confine the failure of heirs of the body to the date of the first taker's death; but this error, if it be one, does not

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impeach \*the doctrine of the Court that a devise over may be limited on a fee conditional.

In *Treville v. Ellis*, cited in the circuit decree in this case, the Court of Appeals was not informed whether or not the will contained words of perpetuity in the gift to the first taker. As the law stood when the testator died, and before our Act of 1824, without



words of inheritance or perpetuity an estate for life only in lands would pass to the devisee. The Court determined that whether a life estate or a fee simple was given to the devisee, the plaintiff there was entitled. If a life estate was given, the limitation over was good. If a fee simple absolute was given, this would be converted into a fee conditional by the terms of limitation over on the condition the devisee died without lawful heirs of his body; and as the devisee had not fulfilled this condition, it would depend on the force of the words "surviving children" to fix the death of the devisee as the epoch contemplated for the extinction of issue, whether the estate would revert to the heirs of the testator or pass to the executory devisees; and in either aspect the plaintiff was entitled. The Court says: "If the words 'surviving children' are to be considered as limiting it (death without issue) to the dying without issue living at the death of the first taker, then the limitation over is good by way of executory devise, and the effect will be the same both as it regards the real or personal estate. *Barnfield v. Wetton*, 2 Bos. and Pul. 324." It is necessarily involved in the opinion of the Court, that there is nothing in the nature of a fee conditional, more than a fee absolute, to prevent an executory devise to be limited on it which is not void for remoteness.

The Chancellor's reasoning is entirely satisfactory to me as to the sufficiency of the words "surviving brothers and sisters" to tie up the generality of the phrase "die leaving no lawful issue." To the authorities cited by him may be added the recent case of *Matthis v. Hammond*, 6 Rich. Eq. 399, in which the Court of Errors was almost unanimous on this point.

Decree affirmed.

#### 7 Rich. Eq. \*422

\*HARVEY SHANDS and Wife, et al., v. ELIZABETH ROGERS, et al.

(Columbia. May Term, 1855.)

[Wills. Ⓒ461, 594.]

Testator devised his real estate to his five sons; "and if any of my sons should die before they should come of age, or without any bodily issue, the above named land is to go to the surviving ones;"—*Held*, that or must be construed and; and, therefore, that a son who had come of age had an absolute and indefeasible estate, although he afterwards died without issue.

[Ed. Note.—Cited in *Duncan v. Harper*, 4 S. C. 84; *Massy v. Davenport*, 23 S. C. 456; *Gibbes Machinery Co. v. Johnson*, 81 S. C. 14, 61 S. E. 1027.

For other cases, see Wills, Cent. Dig. §§ 980, 1314; Dec. Dig. Ⓒ461, 594.]

Before Johnston, Ch., at Spartanburg, June, 1854.

Johnston, Ch. This is a bill for the construction of the will of William Rogers; and for the division of a parcel of land which his

son, Amos Rogers, now deceased, took under it.

The testator left a widow, Elizabeth; five sons, William, Amos, Thomas, Robert and James, and five daughters, Sarah, (now wife of McDonald) Elizabeth, Jane, Tabitha and Mary; and his will, executed the 18th September, 1823, is in the terms following:

"I give, devise and bequeath unto my beloved wife, Elizabeth Rogers, the plantation whereon I now live, (including all the land I run in the new survey,) known as the Home Tract, surveyed by Lawson Thomson, as long as she remains a widow—together with all my stock, goods and chattels, to raise my children \* \* \* Also I allow my beloved wife six negroes, named as follows: Tena, Betty, Jack, Dan, Sam and Jim; and at the expiration of her widowhood, the above negroes are to go to my four youngest sons:—Jack to my son, Thomas Rogers; Dan to Amos Rogers; Sam to Robert Rogers; Jim to my youngest son, James Rogers:—and as for Tena and Betty, they are to be sold, and equally divided between my four named sons, Thomas, Amos, Robert and James.

"All my lands I allow to my sons, to wit:

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All the land I \*purchased of the estate of Robington Calvert; and all on the east of Dutchman's Creek, that I own, I give to my son, William Rogers. I leave to my son, Amos Rogers, all the land I own, east of Blackstock road, beginning on my line near W. Kennedy's and running, &c., \* \* \* and all the land betwixt that and my son William Rogers' land, (that is, the land I left him,) I leave to my son, Thomas Rogers, my Home Tract, at the expiration of her (my wife) widowhood. He, the said Thomas Rogers, is to have every privilege, as to clearing of land and improving for himself, when he comes of age, so that he does not trespass on his mother. And he, the said Thomas Rogers, is to pay his brothers, namely: Robert and James Rogers,—one hundred dollars each, when they come of age;—as I think that is deserving in his lot of land in preference to the lots left them.

"I leave all the rest of the land that I own to be equally divided betwixt my two youngest sons, Robert and James Rogers,—it to be divided by my executors equally in price, and let them draw for it. And if any of my sons should die before they should come of age, or without any bodily issue, the above named land is to go to the surviving ones.

"I leave to my daughter, Sarah A. Rogers, a mulatto girl, named Riah, together with a good horse, saddle and bridle.—Also I leave to my daughter Elizabeth, one negro girl named Linda, together with a good horse, bridle and saddle.

"Also, I leave to my daughter Jane Rogers, one negro girl, named Fanny, together

with a good horse, bridle and saddle. Also I leave to my daughter Tabitha Rogers, one negro girl named Letty, together with a good horse, bridle and saddle.—I leave to my daughter Mary Rogers, one negro girl named Pinder, also one likely horse, bridle and saddle. The above negro girls, if any of my daughters should die without leaving any bodily issue, are to return to my two youngest sons, Robert and James Rogers, together with the said negroes' issue, if they should have any.

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"Lastly, I do appoint my beloved wife, Elizabeth Rogers, executrix, and my sons, W. Rogers and T. Rogers, and brother Robert Rogers, executors," &c.

Amos Rogers, one of testator's sons, died intestate, after arriving at majority, but leaving no issue; and was survived by his mother, brothers and sisters, named in his father's will.

The surviving brothers of Amos set up an exclusive claim to the land devised to him, under the provision of his father's will, that, "if any of my sons should die before they should come of age, or without any bodily issue, then the above named land is to go to the surviving one;"—and in support of their claim, they maintain, that the conditions of the limitation over are to be construed disjunctively. In other words, they insist that the limitation takes effect in consequence of Amos having left no issue, although he did not die before he attained full age. This claim is opposed by the mother and sisters. They contend that the conditions of the limitation are to be construed conjunctively; that is to say, the limitation does not take effect unless Amos had died without issue and under twenty-one.

Unless the limitation takes effect the estate remains with Amos, the deceased devisee, and must be partitioned among his distributees, his mother and sisters taking in conjunction with his brothers. So that the only question is, whether the limitation takes effect in favor of the brothers exclusively, and that depends upon the question whether the condition was intended to be disjunctive or conjunctive.

It might have been disputed whether the condition was intended to apply to all the lands devised to the sons; or only to the residuary land devised to the two younger sons, Robert and James.

The condition was applied by the testator to the above named land; and the lands devised to these two are mentioned immediately above. But counsel argued the case upon the assumption that the reference was intended to embrace the land devised to all the sons; and perhaps that is the true meaning

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of the \*will. As the counsel appeared to agree on this point, I shall so consider it.

There is great difficulty in many cases in determining whether a disjunctive interpre-

tation shall be imposed on the word and, or a conjunctive interpretation put on the word or;—or whether these words should be left to their natural meaning and effect.

The decisions are not uniform, and do not appear generally to be governed by principle. This is wrong. Caprice should be excluded if possible, as productive of uncertainty, and not unfrequently of injustice. Where there is nothing in the will to raise a contrary persuasion, the safest as well as the justest course is to assume that testators intend their words to be taken in their common and natural sense. It is unsafe upon a mere conjecture, to assume that they meant something else; or, from some fancied injustice in giving effect to what they have said, to pervert their language, or interpolate words which they have not used. How do we know that our words, if suggested to them, would not have been rejected?

But where there is something to be inferred from the context of the will,—something to guide us in the nature of the right, about which the particular clause under consideration treats—or where there is a clear general intention which a literal construction of the particular clause would contradict or defeat,—it would be not only unjust but a gross violation of the true principles of decision, to disregard these indices of intention, and execute the will literally according to its inaccurate terms. This would be little better than entrapping the testator by mere word-catching. In all cases where the testator provides for the issue of the legatee, or makes express mention of them, and then limits the property over, on the death of the legatee, under age, or unmarried, or without issue,—there is strong reason for holding the condition to be conjunctive, and that the limitation should not take effect unless all the contingencies have occurred. For example: where, after the gift of property to A. and his issue, it is declared that it shall go

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over if \*A. shall die in his minority or without issue; and A. dies during his minority, but leaves issue, it would defeat the clear intent of the testator, to take the estate from the issue, and give it over to the ulterior devisee. Therefore Mr. Jarman remarks (a) that "it is obvious that the ground for the changing or into and exists a fortiori where children, or issue, are the express objects of the testator's bounty."

In this case, however, there is no mention of the issue of the testator's sons in the words of direct gift. It is only from the contingencies on which the property is limited over that an intention to favor their issue can be inferred; and, therefore, the principle just mentioned has no application.

But we are bound by cases of our own,—resting on high authority from other quarters,—to go beyond that principle.

(a) 1 Jarm. on Wills, 426.



Decisions seem to have settled the further principle, that where the words of direct gift do not mention issue at all, so that no intention to confer a benefit on them, as such, can be inferred from expressions in their favor; yet, if the primary estate created is of such a nature that it can, by possibility, incidentally benefit them—a limitation over of such estate, in the event that the first taker die, during minority, or without issue, shall not take effect, unless the first taker die under age and without issue. It is assumed, from the description of the events on which the estate is to go over, that the grantor could not have intended to divest the primary estate, if at the death of the first taker,—whether under or over age,—he left issue. If the first taker should die under age, but leaving issue, it is assumed that the grantor could not have intended to strip them of whatsoever benefits the nature of the estate might incidentally confer on them; and therefore, to preserve such benefits to the issue, it is held, that, in such case, or is to be construed and; and the primary estate becomes absolute and free from condition, if the owner of it leaves issue.

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\*It would seem that the reasons upon which these decisions were made would have been satisfied if the decisions had been confined to cases of the exact description just mentioned;—i. e. cases where issue were left. It might still have been competent to the Court to have adopted a different construction of the word, or, in cases where the first taker died after age leaving no issue. In such a case, or might have been allowed its natural meaning, without defeating the intention of the grantor. The primary estate need not have been held to have become absolute on its owner's attaining majority.

But it appears that no such distinction has been taken in the cases. Perhaps it was better to avoid the perplexity it would have occasioned. However this might have been, it is certain the courts have applied their reasonings, to both the contingencies without discrimination; and have held that or is to be construed and, as well when the first taker has attained full age, and then died without issue, as when he died under age, leaving issue. In the one case as well as the other, the first estate has been held, to have become absolute, and the limitation over defeated.

I have said that the construction, I have reference to has been made, wherever the incidents of the primary estate might by possibility enure to the benefit of the issue of the first taker.

Some of the cases, were cases where the primary estate was to the first taker and his heirs: expressly fee simple estates.

Such was *Adams v. Chaplin*, 1 Hill, Eq. 265, where the devise was "to my son John to him and his heirs, forever," with a limitation over to testator's son William, if John should "die without lawful heir," (construed

issue in that case) "or before he is twenty-one years old." Or was held by Chancellor Harper (*Id.* 267-8) to have been employed in a conjunctive, and not disjunctive sense, upon several authorities quoted by him; and

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he concluded that John \*took a fee simple estate; which became absolute on his attaining twenty-one (which he did) though he died afterwards without issue. To this decree the Court of Appeals agreed. 1 Hill, Eq. 275.

Substantially of the same description is the case of *Edwards v. Barksdale*, 2 Hill, Eq. 184, 194-5, and that of *China v. White*, 5 Rich. Eq. 426, the latter being subject, however, to the observation that the property involved in it was personal.

But there are other cases, where, like the case before me, the primary devise is to the devisee simpliciter without words of inheritance; and the same doctrine has obtained. One of these is *Scanlan v. Porter*, 1 Bail. 427. The words of devise in that case were; "unto my son James Scanlan, I give, devise, and bequeath my plantation, or tract of land, known by the name of Hunter's" with the condition, that "should either, or any, of my children die before they are of age, or have lawful issue, then their parts, or shares, of my estate are to be divided among the survivors, share and share alike." James having attained full age, conveyed to Porter, the defendant in the action; and then died without ever having had issue.—The action was brought by his surviving brothers and sisters, to recover the land from Porter, his alienee; and it was adjudged that the word or was intended in a conjunctive sense; and that the limitation could not divest his estate (which was held to be a fee) inasmuch as he had not died without issue and in his minority. It was asked by the Court "could the testator have intended, in the event of his son, James, dying before twenty-one, but leaving issue, that the estate should go over, in exclusion of his children?"

In all these cases authorities are quoted which seem to sustain the decisions, and to which, without setting them out, I refer.(b)

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\*It is adjudged and decreed, that the limitation over to the brothers of Amos Rogers, never took effect; but he having died after attaining full age, the land in question is distributable among all his distributees as his absolute fee simple estate: and it is ordered that a writ of partition do issue accordingly. The costs to be paid by each party according to his or her legal interest.

It is ordered that the commissioner do inquire into the facts alleged by the defendant, Mrs. Sarah A. Donald, in relation to the conduct of her husband, and if, in his judgment,

(b) 6 Johns. R. 254; 12 East, 288; *Thackery v. Hampson*, 1 Cond. Eng. Ch. R. 424; *Miles v. Dyer*, 5 Sim. 435, (7 Cond. Eng. Ch. R. 484); 1 Taunt. 122; New Rep. 26, 38.

it be proper, that he report what settlement should be decreed for her and her issue. I suppose, in any case, she would be entitled to her land, if she should survive her husband; and, of course, to have the proceeds, if it be sold, secured to her. But let the commissioner report.

The defendant, James Rogers and others, appealed, and now moved this Court to reverse the decree, on the grounds:

1. Because, from the express terms of the will, the lands did not vest in the life-time of Amos Rogers; but that the same did actually vest, at his death in his brothers.

2. Because, the whole purpose of the testator, as developed in the will, shows that the lands were to go to the sons, in exclusion of the daughters.

Bobo, for appellants.

PER CURIAM. This Court concurs in the decree; and it is ordered, that the same be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.  
Decree affirmed.

7 Rich. Eq. \*430

\*JOHN McLURE, and Others, v. JOHN ASHBY, and Others.

(Columbia. May Term, 1855.)

[Judgment ¶456.]

In 1843 a fraudulent confession of judgment was made, and in January, 1847, money applicable to that judgment was raised by the sheriff from sales of defendant's property. The plaintiff having taken steps to collect the money by attachment against the sheriff, this bill was filed in January, 1852, by other judgment creditors of the defendant to set aside the judgment for the fraud:—*Held*, that the bill was barred by the statute of limitations.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 864; Dec. Dig. ¶456.]

[Limitation of Actions ¶179, 195.]

In Equity, if plaintiff alleges in his bill that the fraud was not discovered until within four years, the statute of limitations will not commence to run until the discovery. That allegation throws the onus of proving notice on the defendant; but it will be sufficient for him to show such notice as would put a reasonably diligent man upon the inquiry.

[Ed. Note.—Cited in *Livingston v. Wells*, 8 S. C. 350; *Beattie v. Pool*, 13 S. C. 384; *McGowan v. Hitt*, 16 S. C. 612, 42 Am. Rep. 650; *Suber v. Chandler*, 18 S. C. 532; *Harrell v. Kea*, 37 S. C. 375, 16 S. E. 42; *Smith v. Linder*, 77 S. C. 541, 58 S. E. 610.

For other cases, see Limitation of Actions, Cent. Dig. §§ 415, 715; Dec. Dig. ¶179, 195; Equity, Cent. Dig. § 239.]

[Limitation of Actions ¶196.]

[Where a bill for relief on the ground of fraud alleges that plaintiff did not discover the facts constituting the fraud until within four years, defendant may prove plaintiff's

earlier knowledge of such facts by circumstantial evidence as in other cases.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 717; Dec. Dig. ¶196.]

Before Johnston, Ch., at Union, June 1854.

Johnston, Ch.—This is a bill for relief against a fraud alleged to have been perpetrated by John Ashby and his brother Stephen, upon the plaintiffs, as creditors of the latter.

In March, 1843, Stephen, "being largely indebted to the plaintiffs and others," (I quote from a former decree in this case, by Chancellor Dunkin,) "gave notice that if they would meet him at Union, he would secure them as far as he could, by confessing a judgment. A meeting took place, March 9th, 1843, of the creditors mentioned in Exhibit A. The amount due each creditor was calculated with interest to January 1st, 1843, making in the aggregate, \$6,232 96," and a note was taken for the whole, and a confession made on it.

"The property of Stephen was levied on and sold at different times, between 1844 and January, 1847. A portion of the proceeds was applied to other executions. According to a statement, furnished by the Sheriff then in office, (Mr. Macbeth,) he had in his hands, and still has a balance of \$5,339, to apply to the execution of March, 1843; and that the

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property of the \*debtor has been exhausted. The amount due on the execution at that time, exceeded \$8,000. Among the creditors proposed to be secured by this judgment of \$6,232 96, was John Ashby." "The amount for which he was set down as a creditor, was \$2,783 35. But he claimed to have subsequently paid the debts due to E. P. Porter, \$115, and to Sarah Ashby, \$264, making the amount due him about \$3,162, which amount he claimed to represent, (with interest from the 1st of January, 1843,) in apportioning the fund (\$5,339,) in the hands of the Sheriff."—Having taken steps to enforce his demand, by attachment against the Sheriff, the plaintiffs filed this bill, charging that the alleged indebtedness of Stephen to John was fictitious and fraudulent—a contrivance between the brothers to secure for themselves, or one of them, a large portion of Stephen's property; and praying "such relief" that the fund be apportioned among Stephen Ashby's bona fide creditors.

At the hearing before Chancellor Dunkin, it was proved to his satisfaction that the fraud complained of was, in fact, perpetrated. That the note taken by John from his brother, and which entered into the confession of March, 1843, was utterly unfounded—that John was always, both before and after the note was taken by him, (as the Chancellor expresses it,) "a worthless and penniless vagabond," utterly incapable of advancing the money, the loan of which was alleged by



the parties to have been the consideration of the note—and the Chancellor decreed for the plaintiffs, overruling John Ashby's plea of the statute of limitations (a).

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\*Upon appeal taken, that decree was set aside; leave was given to the plaintiffs to amend their bill, by alleging that they had not discovered the fraud complained of, until

(a) The decree of Chancellor Dunkin referred to was made in June, 1853, and is as follows:

DUNKIN, Ch. In March, 1843, one Stephen Jordan Ashby, being largely indebted to the complainants and others, gave notice that if they would meet him at Union Court House, he would secure them, as far as he could, by a confession of judgment. A meeting took place, 9th March, 1843, of the creditors mentioned in Exhibit A. The amount due to each creditor was calculated with interest to 1st January, 1843, making in the aggregate, six thousand

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\*two hundred and thirty-two dollars and ninety-six cents. One note was given for this sum, and it stated, "it being the amount due to all for notes, agreeable to the foregoing schedule, the whole amount distributable according to said schedule, to wit," &c.; and judgment was thereupon confessed and entered up, and execution lodged in the sheriff's office. The property of S. J. Ashby was levied on and sold at different times, between 1844 and January, 1847. It is stated that a portion of the proceeds was applied to the satisfaction of other executions. According to a statement furnished by the sheriff then in office, Robert Macbeth, Esq., he had in his hands, and still has, a balance of five thousand three hundred and thirty-nine dollars, to apply to the execution of March, 1843, and that the property of the defendant in the execution, S. J. Ashby, has been exhausted. The amount due on the execution at that time exceeded eight thousand dollars.

Among the creditors proposed to be secured by this judgment of six thousand two hundred and thirty-two dollars, was John Ashby, (brother of the defendant in the execution, S. J. Ashby), and himself the principal defendant in these proceedings. The amount for which he was put down as a creditor, was two thousand seven hundred and eighty-three dollars and thirty-five cents, but he claimed to have subsequently paid the debts due to E. P. Porter, one hundred and fifteen dollars, and to Sarah Ashby, two hundred and sixty-four dollars, making the amount due to him, about three thousand one hundred and sixty-two dollars, which amount he insisted on his right to represent (with interest from the 1st January, 1843,) in the apportionment of the fund of five thousand three hundred and thirty-nine dollars in the hands of the sheriff. Having taken measures to enforce his demand by process of attachment against the sheriff, this bill was filed by the complainants, charging that the alleged indebtedness of Stephen J. Ashby to John Ashby, was fictitious and fraudulent; and that it was a contrivance between the brothers to secure for themselves, or one of them, a large portion of the property of S. J. Ashby, and praying that he may be enjoined from enforcing his proceedings against the sheriff, and that the fund may be appropriated to the payment of the bona fide creditors of S. J. Ashby, according to their legal priority, and for general relief.

In order to apprehend the charges, as well as the evidence, it is proper to premise that the alleged indebtedness to John Ashby, on which the judgment was confessed, was a promissory note, bearing date 15th February, 1836, payable twelve months after date, to John Ashby, or bearer, for seventeen hundred and fifty dollars, with interest, for money borrowed. It pur-

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within four \*years before they filed their bill, (which was filed January 31, 1852,) and a new trial was directed.

I have again heard the case, (the amend-

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ment having been \*made,) upon the same proofs which were before Chancellor Dunkin, and upon additional proofs; and there is no

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ports to be \*under seal, but has neither seal nor witness. No payment was indorsed on the note, and at the time of the confession of judgment, 9th March, 1843, the sum of two thousand five hundred and ninety-two dollars and eighteen cents was apparently due on this note, including interest to 1st January previous, and for that amount the confession was made. The charge is, that at the date of this note, John Ashby was a young man of no visible pecuniary means, and of thriftless habits—that he had been always so, and so continued—that, on the other hand, his brother, Stephen J. Ashby, was, at the time, a man in business, of ostensible means, and in good credit, and so remained until shortly before the confession of judgment, in March, 1843—that John Ashby never had the means to make any such loans or advances, and that the debts to Wallace, E. P. Porter and Sarah Ashby were paid with funds of S. J. Ashby. In answer to the interrogatories of the bill, John Ashby says that the note was given at the time it bears date, and was for money loaned—that he acquired the means for this and other moneys alleged to be paid by him, "by his honest industry and enterprise, and that he derived them from various persons for whom he did business, and with whom he had dealings for years anterior to the execution of said note; and that he acquired some of the means he used in the premises from his father's estate." In conclusion, he reiterates that "he derived the money referred to from his father's estate, and from divers persons in the States of Georgia and South Carolina, for whom he did business, and with whom he had dealings, and that these moneys were the fruits of honest industry and enterprise—that he does not recollect that any one was present at the time of the execution of said note, and that the note bears the true date."

Some twelve or fifteen witnesses were examined as to the pecuniary condition of John Ashby and of Stephen Ashby for twelve or thirteen years prior to 1843. Their testimony at length constitutes a necessary part of the statement of this case. The Court can only present the general result. But in that, as it appears to the Court, there is no discrepancy in the evidence. It is positive, circumstantial, and all leading to the same conclusion. The family, of which Stephen and John Ashby were originally a part, resided in Union District, in the fork of Broad river and Tyger. Both Stephen and John were known to several of the witnesses from their boyhood. Stephen at first kept a small doggerly, (as the witness (Jeter,) stated,) until he married the daughter of D. Thomas, by whom he got property. He then continued in good credit until the close of his affairs, (in 1843 or 1844.) John Ashby, the defendant, left South Carolina about 1829 or 1830—he was then about nineteen

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\*or twenty years of age—he had no visible property except a pony and saddle and bridle—he was absent some three or four years, and returned in the fall of 1834—he had the same visible means as when he left the State, to wit, a riding horse, a little thin and jaded, "and his appearance, as to clothing, &c., about as when he went away"—he said he had been to Georgia. During 1835, he continued in this State, working with his younger brother, (L. H. Ashby,)

doubt on my mind—there can be none on any mind—that the fraud is \*fully made out. John Ashby never was able to loan money to his brother, or any body else, to the amount of the note, or to any amount worth notice.

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a little farm where his mother had been living. The little crop was principally of corn, and the witness (Ison,) said that in the fall of the year, when he took twenty-five bushels, which John Ashby owed him in the trade of a horse, there was but little left. It was cribbed in the house in which the defendant had been living. He left the country again early in 1836, and did not return until 1842. While he was here, in 1835, he was in the habit of drinking and gaming, and apparently without means. To one witness, with whom he had contracted a small account of twenty-five dollars, he offered to pay in corn, because he said he had no money—and to another witness, in the fall of 1835, he said he would swap horses, if he would take the boot (twenty-five dollars,) in corn, as money was an object, for he was going shortly to Georgia, and would need all the money he could get. Several witnesses were examined, who knew John Ashby in the State of Georgia, from 1829 or 1830 to 1835, and afterwards. Until 1833, he was in Habersham county—in 1833 and 1834, he seems to have been in Lumpkin county. The general statement of David Nichols is fully sustained by every other witness. Ashby was without any regular occupation—some times dug gold for a few days together—was loose in his habits—dissipated—idle—followed gaming and drinking—owned no property, and his credit not good for ten dollars. He ran away from Clarksville, and the witness followed him to McMinn county, in Tennessee, to collect a debt he owed him for board, but he found Ashby entirely unable to pay him. The witnesses who knew him in Lumpkin, in 1833 and 1834, say that he was entirely without property and without credit—“generally idle, fond of drinking liquor, visiting houses of ill-fame, and gambling.” Without further scrutiny of the voluminous testimony, it may be sufficient to say, that so far as such fact is susceptible of proof, it is satisfactorily established that in February, 1836, the defendant had no means to lend his brother, S. J. Ashby, seventeen hundred and fifty dollars—that he had acquired no such sum “as the fruits of his honest industry and enterprise, and derived from divers persons in the States of Georgia and South Carolina, for whom he did business and with whom he had dealings.”

What became of the defendant between the

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early part of 1837 and 1842, \*does not appear. It seems that in 1837 and 1838, he was in Georgia, and L. H. Ashby states he stood a stud horse there about those years. But in 1842 he came again to South Carolina. His father's land had been sold under proceedings in partition. (The record was reported to have been in evidence before the Commissioner, but the Court is wholly without information in relation to it.) The witness, William Wilson, referring to his visit in 1842, says he “heard the defendant frequently say that Jordan (S. J. Ashby) was owing him upwards of two hundred dollars for his interest in the land, and he must have it before he returned to Georgia.” But the witness, William McGrath, is the brother-in-law of John Ashby, his wife being Ashby's sister. Witness married in June, 1835. He said that defendant came in September, 1834, and left in the early part of 1836. He was again here in 1842. He told witness, in 1842, that he had been in here after the money Jordan Ashby owed him, several times—that Jordan had promised to pay him one hundred dollars out of the crop of cotton then on hand—that he

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He never shewed property, nor exhibited the appearance of pecuniary means. He was destitute of credit; always embarrassed, idle, dissipated, drunken, and addicted to low gaming. I therefore desire to overturn

was in fear Jordan would not do it. Witness asked how much Jordan Ashby owed him. “He said he owed him for his interest in the land, and a sorrel mare—that the whole would make two hundred and forty or two hundred and forty-five dollars, he supposed.” On cross-examination, he said “the conversation as to the amount due from Jordan Ashby occurred between the widow Stokes' and widow Jeter's, as they were riding along—no one else present. This debt was for the land and the little mare—add both sums together, and the interest, would be two hundred and forty or two hundred and forty-five dollars.” Witness said Ashby's share in the land was, as he thinks, one hundred and eighty-six dollars. It is impossible, he says, he could be mistaken as to the conversation—it took place in November, 1842. Witness has spoken of it in frequent conversations with Clinton Wilson—told it to Squire Ben Gregory in 1845—told it to McLure when he asked him six months ago. It appeared that S. J. Ashby had obtained from D. Wallace, the former Commissioner in Equity, the share of John Ashby in his father's land, and had given D. Wallace his (S. J. Ashby's) note for the money. The note had been transferred by D. Wallace to John Ashby, and it amounted, in 1842, to about the sum of one hundred and eighty-six dollars, as stated by the witness. Four months afterwards, S. J. Ashby confessed the judgment to John Ashby, not only on this note, amounting 1st January, 1843, to one hundred and ninety-one dollars and sixty-seven cents, but for an additional debt of two thousand five hundred and ninety-two dollars and eighteen cents, for money borrowed from him in February, 1836.

The defendant, John Ashby, left the State,

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finally, in 1844 or 1845—S. J. Ashby moved with his family to the State of Mississippi some time afterwards. In 1847, the defendant went to Mississippi, and resides, since that time, in the same county, (Chickasaw,) with his brother, S. J. Ashby, and about two and a half or three miles distant from him.

The Court has remarked that there was no substantial contrariety in the evidence as to the condition of the defendant John Ashby from 1829 to 1842. Except the dry statements of his own answer, and the statement of his brother, S. J. Ashby, that the transaction was bona fide, and the moneys really borrowed and advanced, as alleged, the evidence, abundant as it is, can only be regarded as accumulative. Not an individual witness was examined in this State, for the purpose even of creating a doubt as to the truth of the evidence in respect to his (John Ashby's) pecuniary condition, or his habits of life. No one could believe that, on the 15th February, 1836, this man, who, just before, had not twenty dollars to pay a store account—who could not get credit for more than twenty-five or thirty dollars, and applied for the loan of five dollars to play cards, was in a situation to lend his brother, in cash, one thousand seven hundred and fifty dollars. But was he in a condition to leave it in his hands without the payment even of interest for seven years, and until two years after the note was out of date? The whole transaction appears to the Court a bold attempt at fraud and imposition. The evidence shows that John Ashby had no means to advance money to his brother (S. J. Ashby,) or to pay his debts. It is most probable that S. J. Ashby had received John's share



his fraudulent claim, if well-settled principles of law will permit.

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\*But he interposes the statute of limitations; and I do not see how it can be gotten over.

I take it that the statute runs, at law from the time the act is done, for the protec-

of the proceeds of the land, and the Court would have inclined to sustain so much of the claim, to wit, the amount due on the note to Wallace, January, 1843, one hundred and ninety-one dollars and sixty-seven cents, if it could be done consistently with the decision of *Fryer v. Bryan*, 2 Hill Ch. 56. But upon examination it appears, both from the statement of S. J. Ashby, and the admission in the answer of John Ashby, that the interest on two thousand five hundred ninety-two dollars and eighteen cents, for the year 1843, had been received. As the defendant was entitled to no part of this amount on this fictitious demand, it may very well be put to the other account, and would nearly extinguish it.

At the close of the defendant's answer, he claims the protection of the statute of limitations. The application of the statute is not very distinctly perceived. As between the parties to the transaction, John Ashby and S. J. Ashby, the note of the 15th February, 1836, and the judgment, or any other security for it, are perfectly valid. If, (as was supposed to be the

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case,) the property of S. J. Ashby had proved sufficient to satisfy the whole amount of six thousand two hundred and thirty-two dollars, the plaintiffs would have had no ground of action, no cause of complaint. If S. J. Ashby had given separate judgments to each of the present plaintiffs, as well as to John Ashby, and the funds in the hands of the sheriff had been sufficient to pay all, the plaintiffs would have no cause of action in consequence of the turpitude infecting the defendant's judgment. If the defendant had demanded and received from the sheriff, his alleged share of the fund, the plaintiffs would certainly be barred in four years from that time, unless from some other cause they were exempted. But until the defendant interposed his claim to the deficient fund, it is difficult to say that the plaintiffs' rights were attacked. Suppose A., in possession of a large estate, should sell a small tract of land to B., which B. holds for five years, and then his land is levied on under a judgment in favor of C. against A., the vendor, could B. be precluded by the statute of limitations from showing that the judgment was fraudulent? Would the fraud of the parties be sanctified because C. had, through carelessness or design, refrained from provoking attack until four years had elapsed? The object of the statute is to give repose—to quiet the possession, but not to give aid to fraud which was only obnoxious to others when it became aggressive. If the statute could protect the defendant, his judgment was beyond attack before the sales under the execution were completed. It has been frequently repeated that the statute of limitations does not, in terms, apply to proceedings in this Court; but that lapse of time in Equity, in analogy, has been held to bar relief for fraud. In one of our cases it is said that "to entitle a party to relief from a fraud in Equity, he must show that he is prejudiced by it; and in consequence of this prejudice or injury, it is that the Court proceeds to decree against the fraud." The cause of action to the party would seem, then, to arise only when he is injured, or the attempt is made to injure him. If a fund were in this Court, to be marshalled among the creditors of an insolvent, and a judgment creditor presented

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tion against which it is necessary to invoke its bar; and that, at law, it matters not at what time the party, injured by the act, comes to the knowledge of it. Whether he was aware of the injurious act or not, the statute runs.

But—except as to matters strictly legal—the rule of this Court is different. With respect to merely legal rights, this Court applies the statute just as a Court of Law applies it. But in matters of an equitable nature—the terms of the statute not extending to them—this Court is not imperatively bound

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to apply it; and only applies it by analogy to the practice at law: and, then, it does not

a demand which could be proved to be fraudulent, would the statute bar the inquiry because four years had elapsed since the judgment was entered? The case seems not materially different. The fund is now in the custody of the law. The defendant has never had any adverse possession. He interposes a claim to the fund, which creates a legal lien, but which, the Court is satisfied on the evidence, is founded in fraud. He says no inquiry can be made, because four years have elapsed since the judgment was confessed. In *Bond v. Hopkins*, 1 Scho. & Lef.

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428, Lord Redesdale says: "The question is not whether the statute shall operate in a case not provided for by the words of the Act." He holds that if the party has been guilty of such laches in prosecuting his equitable title as would bar him if his title was solely at law, he shall be barred in Equity, but that this is all the operation the statute has, or ought to have, in proceedings in Equity; and that it should not prevent a Court of Equity from doing justice according to good conscience, where the equitable title is not barred by the lapse of time.

If the Court had been of opinion that the statute applied, leave would be given to the complainants to amend the pleadings by alleging that they were not aware of the fraud until within four years. Until they learned from the Georgia witnesses the character, course of life, and destitution of means of the defendant while residing in Georgia, from 1829 to 1835, the plaintiffs could not have known the defendant's inability to make a loan of this large amount in February, 1836, and this is, of course, the principal fact by which they are enabled to fix the charge of fraud upon the defendant.

It is ordered and decreed, that the defendant, John Ashby, be enjoined from further proceedings by attachment, or otherwise, against his co-defendant, Robert Macbeth, late Sheriff of Union District, and that the funds reported by the said Robert Macbeth to be in his hands, and applicable to the execution of John McLure and others v. S. J. Ashby, or so much thereof as may be necessary, be applied to the payment of the amount due to the plaintiffs in these proceedings, and such other of the plaintiffs in said execution as are yet unpaid, with the exception of the defendant, John Ashby, as representing the note to himself and D. Wallace, and as assignee of the claim of E. P. Porter and Sarah Ashby—that the other plaintiffs in said execution, who have not made themselves parties to these proceedings, have leave to do so by presenting their demands on oath before the Commissioner—that the balance of the fund in the hands of the defendant, Robert Macbeth, after payment as aforesaid and deducting the plaintiffs' costs, be paid to the Commissioner of this Court, to await the further order of the Court.

apply it when sound conscience would be offended by its application.

This matter of fraud is of purely equitable cognizance, and the doctrine of this Court is to apply the statute thus: In the absence of averment by the injured party, as to the time when the fraudulent act became known to him, the Court assumes that he had notice of the act when it was committed, and therefore holds that the statute runs from that time—but when, from the circumstances, the Court is persuaded that he came to the knowledge of the act afterwards, and not at the date of the fraud, the statute runs only from the time he obtained information.

But it is, generally, impossible for an aggrieved party to show his ignorance of the fraud of which he complains. He may show that he received information of it within the statutory period; but how is it possible for him to show that he had no information before? in other words, that he was ignorant of it until that time? Unless he can throw the burden of proving notice to him upon the opposing party, he must be content to remain subject to the general proposition, that in the absence of proof, the party aggrieved by a fraud, is presumed to have notice of its perpetration—and therefore the statute must run from that time.

Now, it is well known that a party may be defrauded, and yet be ignorant of the fact. In compassion for such a case,—which is very common,—the Court allows parties to allege in their bill that they did not discover the facts constituting the fraud, until within four years—and as that averment is the allegation of a negative fact, which the party making it cannot prove, the Court, upon such an averment, throws the burden upon the other party, of proving earlier knowledge—which proof, being of an affirmative, he is capable of making.

I have stated my view of this doctrine.

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in *Thrower v. Cureton*, 4 Strob. Eq. 155 [53 Am. Dec. 660], and shall content myself with a reference to that case for my reasons.

In this case, the plaintiffs have made the averment to which I have alluded—and it became the duty of the defendant to show that his fraud was known by the plaintiffs, at least four years before they filed their bill.

I think proof that a party has notice of circumstances calculated to awaken suspicion to such a degree as would induce ordinary men to go into an inquiry, is sufficient in such a matter as this, provided the party has the means of investigation in his power, or the notice gives a clue to the means of investigation. Besides, knowledge of facts need not be proved directly upon a party. You may prove his knowledge circumstantially, as in any other case. In this case, some of the plaintiffs lived within such distance of John Ashby, while he was in this State, as probably to have had an acquaintance with his

condition and habits. But the most fatal testimony to the plaintiffs was from one of their own witnesses, in whom all confidence can be placed. Dr. Dogan, who was one of the creditors defrauded, but whose debt has been satisfied by a third party, states, that he was greatly interested in taking the confession. He was surprised at the demand of John Ashby, and consulted with the other creditors, who were taking it, whether they should object. They thought John had no means here to make the advances. They knew his apparent circumstances, and doubted his means to make them. They began immediately to inquire. Everybody whom they inquired of, told them that John could not make the advances—that he was worth nothing. They concluded it was not worth while to object; for if they did, Stephen might decline to confess. They concluded to let John's claim come in, and said, among themselves, they could as well assail it at a future time as then.

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\*In the view I take of this matter, this testimony is conclusive upon the plaintiffs.

It has been supposed that though the claim of John, which was let into the judgment, was fraudulent, and the plaintiffs had reasonable information of the fraud, yet they were not obliged to proceed to avoid it until he became active in enforcing its collection. I am of a different opinion. It was differently ruled in *Shannon v. White*, 6 Rich. Eq. 96 [60 Am. Dec. 115]; and in *Whaley v. Whaley*, 3 Bligh, 2, an opinion is given by Lord Eldon, on the very point, that the statute runs from the perpetration of the fraudulent act, and its being discovered.

It is ordered that the bill be dismissed—the defendants, John and Stephen Ashby, to pay the costs.

The plaintiffs appealed, and now moved this Court to reverse the decree on the grounds:

1. Because, from the case made, the plaintiffs were entitled to the relief prayed for.
2. Because the statute of limitations formed no bar to the plaintiffs' right to recover.
3. Because the decree is, in other respects, erroneous.

Dawkins, for appellant, cited *Gratz v. Prescott*, 6 Wheat. 481; *Micon v. Girod*, 4 How. 503; *Bond v. Hopkins*, 1 Sch. & Lef. 428.

Herndon, contra, cited *Prescott v. Hubbell*, 1 Hill. Ch. 217; *Far v. Far*, 1 Hill, Ch. 391; *Eickelberger v. Kibler*, 1 Hill, Ch., 121.

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\*The opinion of the Court was delivered by

DARGAN, Ch.—It would be supererogation to add much to what has been said by the Chancellor, who heard this cause on circuit. For the facts, I refer to the state-



ment of the Circuit decree. Nor has the reasoning of that decree left me much to say on the principal question involved in the cause.

In a court of law, the statute of limitations runs against the party aggrieved, from the time when the injury is committed; and the rule is the same, whether the aggrieved party has a knowledge of the trespass or injury, or not such knowledge.—This is a positive institution of the law, and is based upon policy, and a social necessity of having some well defined limits as to the time in which legal actions may be instituted. The statute of limitations does not annul the causes of action. It is a part of the *lex fori*, and simply withholds the remedial proceedings of the forum for the enforcement of contracts, and the reparation of injuries, after the lapse of the particular periods prescribed. Hence, they are obligatory only in the Courts, and to the extent that the law ordains. And hence, they are not obligatory upon this Court, and do not apply to proceedings in Equity, except so far as the Court has thought it conducive to the ends of justice to apply them, in analogy to the rules which prevail in a Court of Law. And as the Court only acts on this analogy, because of its subserviency to the ends of justice, it withholds such action, when it would be obviously subversive of equity. From these reasons principally, have arisen the differences which are to be observed in the Courts of Equity, and of law, as to the application of the statute.

In actions at law, where fraud is the question, and the statute of limitations has been pleaded, no such rule prevails, as that the statute does not commence to run until the discovery of the fraud. The party injured must be barred by the positive prescriptions of the law, unless he can bring himself within some of the exceptions. But this has long been the familiar doctrine of this Court, and it is certainly equitable.

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\*When a party comes into this Court by bill or petition, in a case of fraud, and apprehends that the defendant will plead the statute of limitations against him, he may by way of anticipation, and the proper course for him to pursue is, to state in his bill, or petition, that the fraud has been discovered within four years previous to the commencement of his suit. In the case now before the Court, no such allegation was made in the original bill, and the defendant pleaded the statute of limitations. The plaintiffs had leave to amend their bill, by making the proper averments; which they did. The issue was thus made up between the parties, and the case tried on these allegations.

When the plaintiff alleges that the fraud has been discovered within four years, he states a material fact, which, if true, ex-

empts the case from the operation of the statute. But upon which of the parties devolves the burthen of proving the truth of such material allegation? This is a question which, though it must often have occurred in practice, has not heretofore been very clearly settled.

A general rule that pervades the whole system of pleading, is, that a party who makes an affirmative proposition must prove it. Negatives, for the most part, are incapable of proof, and to require them to be established as necessary to the recovery of one's rights, is unreasonable and absurd. When the plaintiff alleges that he has discovered the fraud within four years, he makes a negative proposition, and one which it is impossible for him to prove. To exact such proof, is to withhold from him the benefit of the rule; it is, in fact, to abolish it altogether. The question is, did the plaintiff have notice? It is obvious that the affirmative is with the party who asserts the fact of notice, and whose interest it is to establish that fact. It is just and reasonable, therefore, to cast the *onus probandi* upon the party with whom is the affirmative.

This was the rule which prevailed in the trial of this cause. The fraud was most sat-

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isfactorily made out by the evidence. \*The defendants, under the plea of the statute of limitations, were required to prove that the plaintiffs had a knowledge of the fraud more than four years prior to the commencement of their suit. This fact was proven to the satisfaction of the Chancellor who tried the cause, and this Court concurs in that conclusion upon the evidence. The whole proof of the fraud consists not in its being shown positively that a fraud was committed, but in the violent and irresistible presumptions of fraud, arising from the penniless and vagabond condition of John Ashby, who could not possibly have had a just claim of two thousand seven hundred and eighty-three dollars and thirty-five cents, against Stephen Ashby. By the report of the Chancellor, "he never showed property, nor exhibited the appearance of pecuniary means. He was destitute of credit; always embarrassed, idle, dissipated, drunken, and addicted to low gaming." How could such a man have a just claim against his brother to the amount stated? Now of these facts, the plaintiffs were as fully cognizant in March, 1843, when they made the arrangement, as they were when they filed their bill. This is not left to conjecture. It is fully proved by the evidence of Dr. Dogan, one of the plaintiffs' witnesses, whose testimony is fully stated in the circuit decree. In the issue of notice within four years, giving the plaintiffs the benefit of the rule, as above stated, this Court is of opinion, as was the Circuit Court, that they have not rebutted the plea of the statute of limitations.

It will be as well to remark in this connexion, that the notice of the fraud, the want of which will prevent the statute from running, is not alone positive information that a fraud has been actually committed. The notice will be sufficient to prevent the suspension of the statute, if it be such, as would put a reasonably diligent man upon the inquiry. Nor must the aggrieved party wait until he has discovered evidence by which he may establish the fraud in a court of justice. If he has knowledge that a fraud has been committed, though that knowledge

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be \*confined to himself, he must proceed diligently; for the statute in such case will not be suspended.

It is ordered and decreed, that the circuit decree be affirmed and the appeal be dismissed.

JOHNSTON and WARDLAW, CC., concurred.

DUNKIN, Ch., dissenting. The facts of this case are substantially as follows: The sum of five thousand three hundred and thirty-nine dollars is now in the hands of the Sheriff of Union District, arising from the sales under execution of the property of Stephen J. Ashby. The amount apparently due to the eldest execution creditors exceeds eight thousand dollars. Of this amount, about one-half is claimed by the defendant, John Ashby, who, in 1851, obtained a rule against the Sheriff, to show cause why he did not pay over as much as was necessary to satisfy his demand. In January, 1852, the other execution creditors filed this bill, alleging that the demand of John Ashby was wholly fictitious and fraudulent; and they have established their allegation to the entire satisfaction of every member of the Court: Such was the announcement of the Appeal Court at the former hearing; and, in the decree of the Circuit Court recently made, the Chancellor uses this language: "I have again heard this case upon the same proofs which were before the former Chancellor, and upon additional proofs, and there is no doubt on my mind; there can be none on any mind—that the fraud is fully made out. John Ashby never was able to loan money to his brother, or any body else. He was destitute of credit, always embarrassed, idle, dissipated, drunken, and addicted to low gaming"—and the Chancellor concludes by expressing his "desire to overturn his fraudulent claim if the law would permit it." But the Chancellor was of opinion that the

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statute of limitations precluded the \*plaintiffs from obtaining the interference of the Court to stay the hand of the defendant.

The judgment to the defendant, John Ashby, as well as to the plaintiffs, was confessed 9th March, 1843. There were other and el-

der executions in the Sheriff's office against the debtor, Stephen J. Ashby. His property was levied on and sold at various times between 1844 and January, 1847. According to a statement furnished by the Sheriff, the property of the defendant was then exhausted, and the balance of five thousand three hundred and thirty-nine dollars was in his hands after satisfying the admitted prior liens. But among the executions in his office against S. J. Ashby was one against him as surety of D. A. Thomas to De Graffenreid, which was to a large amount, was elder than the execution of March, 1843, and was apparently unsatisfied. The creditors of Thomas insisted that the judgment of De Graffenreid was paid, and a litigation was then pending on the subject, which was not terminated until 1851, when the Court held that nothing was due on De Graffenreid's judgment, and consequently the balance in the Sheriff's hands was no longer liable to this claim. The exact amount of the De Graffenreid execution does not appear, or whether it would, or would not, have absorbed the balance in the Sheriff's hands if the execution had been in truth unsatisfied. It does not appear from the evidence that, while the money was in the Sheriff's hands pending the controversy as to the De Graffenreid execution, any injunction was issued to restrain him from paying to the junior executions, nor would any seem to have been necessary; nor, on the other hand, is there any evidence of any demand on him by the junior execution creditors until the result of the controversy was ascertained in 1851, when the rule on the part of the defendant, John Ashby, was taken out.

In an evil day for the plaintiffs, they took the trouble to apply to this Court. If, when John Ashby took out his rule against the Sheriff, the plaintiffs had also taken out a rule, as permitted by the Act of 1821, to test

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the validity of John \*Ashby's lien, it might have been summarily and promptly decided by a court and jury. It was so ruled in Posey v. Underwood, 1 Hill, 262, where an attaching creditor was permitted to file a suggestion impeaching a judgment on the ground that it was fraudulent and not founded on a bona fide consideration, and the plaintiff, in the confession of judgment, was required to plead by a thirty day rule. But Sutton v. Pettus, 4 Rich. 163, is still more significant. The judgment was entered by confession in October, 1830. The plaintiff had issued a scire facias to revive the judgment, and at Spring Term, 1849, Sutton, who had, in 1846, become a purchaser from the defendant in the execution resisted the application, and obtained an order to impeach the judgment of 1830 as fraudulent and not founded on bona fide consideration. The plaintiff in the judgment filed his plea, and upon the issue made up, the jury found



against him. Various objections were made in the Appeal Court to the verdict thus rendered. Among others, it was said that the judgment was on record, and Sutton must, therefore, have purchased with notice. The reply of the Appeal Court is, that, "upon the foundation of the verdict of the jury, Sutton is entitled to say that the judgment he assails is no judgment at all as to him: that, if he had notice of its existence, he had notice also, and at the same time, that it was fraudulent and void." No one seems to have supposed that the rights of Sutton would be impaired, or in any manner affected, by his knowledge of the mere existence of a lien which he at the same time knew to be fictitious. Nor was the inherent infirmity of the lien in any manner improved by the length of time during which it was permitted to lie dormant. Sutton interposed (not when he first knew of the fictitious character of the judgment, for, say the Court, he knew that it was fraudulent so soon as he knew of its existence, but) so soon as the attempt to revive and enforce this fraudulent lien interfered with his rights—and this is the true test. It is not enough that the transaction may be tainted with fraud and may be so

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\*known to the community. No third person can impeach it until his own interests are attacked. Until that time he has no cause of action, and the statute can never commence to run until his rights are assailed, and he has knowledge of the fraudulent character of the attack.

Now, as between John Ashby and his brother, Stephen J. Ashby, the judgment, though gratuitous, was valid. If the property of the debtor was sufficient to satisfy the plaintiffs as well as John Ashby, they would have no cause to complain.

The amount of their joint demands at the date of the judgment, was six thousand two hundred and thirty-two dollars, and ninety-six cents. In March, 1843, the plaintiffs had reason to suppose that the property was sufficient; for although it was sold at the Sheriff's block, and previous liens satisfied, the surplus in January, 1847, was five thousand three hundred and thirty-nine dollars. At that time, and from that time, the fund was in the hands of the Sheriff, and is there now. All had a common interest to defeat the De Graffenreid execution, and until the result was known, the rights of the junior execution creditors could not be ascertained. In the meantime, no proceedings had been taken by the defendant against the Sheriff. So soon as that lien was removed and the defendant moved against the Sheriff, these proceedings were promptly instituted. Although the plaintiffs may always well have suspected and confidently believed that nothing was, in fact, due to the defendant by Stephen J. Ashby, yet they did not know that the en-

forcement of his demand would interfere with their interests until the debtor's property was exhausted; nor could they know the extent of their claim, if any, until De Graffenreid's lien was removed. As has been elsewhere said, the statute of limitations does not, in terms, apply to suits in this Court. What laches can be justly imputed to the plaintiffs? What repose of the defendant is sought to be disturbed? What quiet possession to be interrupted by the action of this Court? He is actively endeavoring by

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means of his legal process, to \*obtain possession of funds to which he has not the shadow of right, and his monstrous fraud against the honest creditors of his brother and confederate in guilt will not be, in truth, consummated until, by the judgment in this cause, the fraud shall be declared not open to inquiry, and the fund shall pass into his hands.

I am of opinion that the plea of the statute has no application and should be overruled, and that the defendant, John Ashby, should be enjoined in his proceedings against the sheriff, and that the funds in the hands of the sheriff, should be paid to the plaintiffs so far as may be necessary to satisfy their demands.

Decree affirmed.

#### 7 Rich. Eq. \*450

\*BENJAMIN J. BOULWARE, and Others, v.  
JAMES H. WITHERSPOON,  
and Others.

(Columbia. May Term, 1855.)

[Execution  $\S$  348.]

In October, 1847, and March, 1848, the sheriff gave the defendant in execution loose receipts for moneys—in the aggregate over three thousand two hundred dollars—to be applied to the credit of executions in the sheriff's office. Credits given by the sheriff, dated the 1st January, 1849, appeared on the executions, for over four thousand five hundred dollars:—*Held*, in the absence of all other proof, that it was right to conclude, that the sums for which the receipts were given were included in the credits afterwards entered.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1086; Dec. Dig.  $\S$  348.]

Before Johnston, Ch., at Lancaster, June, 1854.

It was referred to Mr. Moore, as special referee, to ascertain and report, to what executions in the Sheriff's office against Wm. G. Raines, a fund of about four thousand dollars in the Commissioner's hands, arising from sales of the property of Raines, was properly applicable. Of the executions produced at the reference, the eight oldest were owned by the bank of the State of South Carolina. One of these, in the name of H. T. McGee, of which the bank was the assignee, was lodged on the 31st October, 1846; the other seven, all in the name of the bank,

were lodged on the 18th September, 1847. A question made on the reference was, whether these executions should not be credited with two payments made by Raines to sheriff Cockrell, one for two thousand six hundred dollars on the 28th October, 1847, and the other for six hundred and fifteen dollars on the 27th March, 1848. For these payments loose receipts were given by the sheriff's deputy or clerk, stating that the moneys were "to be applied to the credit of executions in the sheriff's office." Upon the executions themselves no credits as of those dates appeared; but it did appear upon the executions that on the 1st of January, 1849, the

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sheriff paid \*to the plaintiffs sums amounting to over four thousand five hundred dollars.

On this matter Mr. Moore reported as follows:

"Two receipts for money, of Cockrell, who was then sheriff of Fairfield, to William G. Raines, were offered in evidence;—the money to be applied to executions in the sheriff's office, against Raines—one for two thousand six hundred dollars, dated 28th October, 1847; and the other for six hundred and fifteen dollars, dated 27th March, 1848. But as no evidence was offered, showing that Raines intended the money to be applied to these executions of the Bank against him, or that such application was, in fact, made, I presume that the sheriff did his duty, and applied the money to other older executions against Raines; or then, that the credits which I find upon the executions, although entirely subsequent, to the date of the latter receipt, are made up, in part, of the money thus received by the sheriff. I therefore, cannot allow these payments, as additional credits upon the executions of the bank against Raines."

Various exceptions to the report were taken by the plaintiffs and were heard before his Honor, the Chancellor, who made the following decree:

JOHNSTON, Ch. There is scarcely a single exception taken, which serves the genuine purpose of an exception, which is to point out the error complained of, and exhibit the nature of the error. A general complaint is not an exception. An exception should set forth distinctly and specifically the ground of complaint.

I would exemplify what I mean by referring to the first exception before me. This asserts that the referee should not have allowed the four executions against Raines, which he has allowed. Now if I ask why he should not have allowed them,—I expose the defect of the exception taken; which is that the ground upon which this exception should

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have been disallowed is not set forth. I might apply the principle of these remarks to most of the exceptions.

Taking up the substance of what was said before me. I find that the plaintiffs insist upon the three following points:

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3. Point; which is that the plaintiffs are entitled to have the executions credited beyond the amount of credits actually given, with the amounts specified in the loose receipts given to Raines by sheriff Cockrell.

I agree with the referee. The sheriff, in the absence of proof, must be presumed to have done his duty, and to have properly applied the money he received for.

It was Raines' fault to have done business so loosely, if he intended to have a specific application made of the money.

The plaintiffs had full opportunity to get Cockrell's testimony on this point. The plaintiffs live in his district, and have full access to his office; and perhaps know that there are many executions against Raines to which the money was applicable or has, by special direction, been applied. Why then did they reserve this testimony until it was too late for the bank to rebut it, (if it was its duty,) unless indeed, at the expense of another twelve months addition to the proceeding— which the plaintiffs had already spun out to an intolerable extent.

I do not regard it as a duty, to protract a case carried on in the spirit that has characterized this in its whole course, where so much has been fished after, and strongly charged without being proved; and I overrule the exceptions and confirm the report; and it is so ordered. I'm inclined to dismiss the bill with costs, but reserve that point lest there should remain some further order necessary to be taken.

The plaintiffs appealed on the ground, *inter alia*, because his Honor should have ruled that the receipts of Cockrell, sheriff, should be entered as credits on the executions.

Hammond, for appellants.

Buchanan, contra.

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\*The opinion of the Court was delivered by

JOHNSTON, Ch. In affirming the decree, it does not seem necessary to say anything, except in relation to the receipts given by Mr. Sheriff Cockrell.

One of these is for two thousand six hundred dollars, and bears date in October, 1847; and the other for six hundred and fifteen dollars, and dated in March, 1848.

Let it be conceded, now, that there were no executions in the sheriff's office older than those produced before the referee, to which these monies should have been applied; what is the consequence?

We find from the report, that at a time subsequent to the reception of these sums of money by the sheriff, he applied a much larger sum to the different executions of the bank, in his hands. The question arises



whether this application does not account for the money included in these receipts?

If the sums thus credited upon the executions tallied exactly in amount, with the sums previously receipted for by the sheriff, we should naturally conclude that the credits were for the identical sums mentioned in the receipts;—though, indeed, the question might arise whether the interest on the executions should not be adjusted, by ante-dating the credits, so as to correspond with the payments made to the sheriff. But, I think, that unless there was proof showing funds in the sheriff's hands, funds in addition to those acknowledged by his receipts, we should be justified in considering the credits were given on account of the monies for which he had receipted.

The credits entered on the executions do not, however, correspond exactly with the sums contained in the receipts of the sheriff. They are for a larger amount. How does that circumstance affect the question? Unless we were shown that he received monies from other sources, to an amount sufficient to have produced the credits, independently of, and in addition to that mentioned in the receipts, we should still be bound to regard this latter money as having entered into the

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credits. If in the \*absence of a such a shewing this would be the natural and justifiable conclusion; then, of course, it follows, that he who would have a different conclusion drawn, must shew grounds for it by proof of funds to an amount sufficient to account for the credits endorsed on the executions, without resorting to those mentioned in the loose receipts.

In this case we have no proof of any source whence the sheriff derived the monies which he applied, except that which arises from the receipts given by him;—at all events, no proof of additional funds of sufficient amount to produce the credits, independently of the money acknowledged in the receipts.

This proof it was the duty of the plaintiffs to give, if it existed; and having failed to give it, the referee was justified in the conclusion which he drew.

Suppose Raines, himself, was now calling the sheriff to account for the monies received by him,—would not the credits which he put on the executions be a sufficient account, on his part, for all the monies he is proved to have received? Certainly. And I suppose it is as good an account when the demand is made by his creditors, as if it were made by himself.

Nor is this all. The money was receipted for in 1847 and 1848. The application was made in January, 1849. Would Raines have been quiet all this time, if the whole of his payments had not been credited? Would his creditors have been quiet? More than this,—is it natural to suppose that the bank herself,—which these plaintiffs now contend was

entitled to this money,—would the bank have been quiet? Would that creditor, who has been driven to the long and tedious process which this suit exhibits, have submitted to this delay and vexation in getting in her demand, if she had nothing to do but to call on the sheriff and get the money?

It is ordered that the decree be affirmed, and the appeal dismissed.

DUNKIN and DARGAN, CC., concurred.  
Appeal dismissed.

7 Rich. Eq. \*455

\*THE BIVINGSVILLE COTTON MANUFACTURING COMPANY v. DR. JAMES BIVINGS.

(Columbia. May Term, 1855.)

[Account ⇨20.]

Motion to set aside a report and send the accounts back to the Commissioner, on the ground that the solicitor of the plaintiffs who attended to the reference was dead, and that plaintiffs being deprived of his information, were incapable of sifting the report without an investigation of the whole account de novo;—Motion, under the circumstances, refused.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 125; Dec. Dig. ⇨20.]

[Reference ⇨57.]

Questions as to closing or continuing a reference are proper for the consideration of the Commissioner.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 87; Dec. Dig. ⇨57.]

[Equity ⇨410.]

Exceptions should point out the particulars in which the errors complained of consist, and not be couched in general terms.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 910; Dec. Dig. ⇨410.]

Before Johnston, Ch., at Spartanburg, June, 1854.

The defendant had been the agent of the plaintiffs for about six years prior to December, 1843, when he was dismissed from their service; and this bill, filed the 20th April, 1844, was for an account. On the 1st February, 1842, the plaintiffs, on settlement of defendant's accounts, had given him their note for twelve thousand two hundred and twenty-eight dollars, as for a balance then due him, payable one day after date. The bill prayed an account for the whole time of defendant's agency. It, however, specified no errors in the settlement made when the note was given, but merely stated the plaintiffs' belief that in some way that settlement must have been erroneous. When the Company dismissed the defendant from their service, they appointed Messrs. Simpson Bobo, J. W. Miller, and A. W. Thompson, a committee to investigate the books of the Company. Mr. Thompson did not act, and on the 6th April, 1844, Messrs. Bobo and Miller reported, as the result of their investiga-

tions, that the defendant was indebted to the plaintiffs in a large sum of money—over forty-three thousand dollars—and thereupon this bill was filed.

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\*The matters of account were referred to the Commissioner, and on the 7th June, 1853, he submitted his report upon the accounts, in which

plaintiffs were charged (including	
the note) with.....	\$344,234 75
And defendant with.....	\$329,232 09

Leaving plaintiffs in debt to defend-	
ant .....	\$15,002 66

On the 9th June, 1853, Chancellor Dunkin passed the following order:

"The report of the Commissioner was filed on June 7, the reference having been closed twelve months since. It is ordered that the complainants and defendant have thirty days to file their exceptions to said report, that the Commissioner appoint a time for hearing said exceptions so that the same shall be heard prior to the first day of October next—that the Commissioner then proceed to make up his report on the exceptions, and that his final report be filed of record, and notice given to the solicitors, on or before the first day of February next."

On the 7th July, 1853, the plaintiffs filed seventeen exceptions to the Commissioner's report; and on the 29th January, 1854, the Commissioner filed his report on the exceptions. On the three first exceptions the report is as follows:

"Exception 1st, of complainants, is, 'that the report gives only the amounts of the Commissioner's calculations, when it should specify the items making these amounts, in order to be intelligible and comprehended.'"

"In reference to this exception, the Commissioner would report, that by an agreement of the solicitors of the parties, three blank books were obtained, which were laid off into columns with appropriate captions, such as merchandize, yarn, cloth, &c., with reference at the top of each page, to the number and pages of the several day books. Under these different heads, the amount of every item, or items, contained in the several day books are entered, in figures, without specifying the particular articles of mer-

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chandize, yarn and cloth, which were \*omitted, as the several items were examined by the counsel carefully, and passed upon. This course was adopted by the parties with a view to save trouble, time, labor and expense, which would have been required to mention the particular items.

"These books containing, as they do, transcripts in figures from the day books kept by the Company, are numbered books, No. 1, 2, and 3, to which all the parties have had access, and of which they have copies kept by

themselves. This exception is, therefore, overruled.

"Complainants' 2nd exception. 'In order to ascertain the amount of yarn spun at the factory, it was necessary to have reference to the book in which these entries were made, called the doff book, and which was excluded, in the reference, from all the calculations.' The doff book was the book in which entries were made of yarn spun before it was trimmed, bunched and baled. The defendant insisted, on the reference, that this book should be used in making up accounts. It was objected to, however, by the complainants' solicitors, on the ground that it was not a Company book, but the agent's own private memorandum book. The Commissioner, however, reports that he has examined, alone, the doff book—has found the aggregates of yarn made and cloth—of the first from the year 1837 to 1843, and aggregated himself the yarn made for the year 1843, and the first month of the year 1844, and finds, on comparison of that with the amount he has reported, a difference in favor of the doff book of six thousand one hundred and sixty-nine pounds. That this difference of yarn reported is minus the amount of yarn exhibited in the doff book.

"Taking the average price of yarn to be twenty cents per pound, it will make, in cash, the sum of one thousand, three hundred and thirty dollars and eighty cents.

"The doff book exhibits an amount of cloth made less by five hundred and thirty-seven yards, than the report charges. Taking the average price of cloth to be nine cents

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per yard, \*would make, in favor of the defendant, the sum of forty-eight dollars and thirty-three cents.

"Exception overruled.

"Exception 3rd. No evidence exists before the Commissioner, showing that the defendant is not charged with all the amounts of merchandize, yarn and cloth received by him as the agent of the Company. The books of the Company were kept by its own clerks; and, if there were any errors, in the opinion of the Commissioner, they should be designated before he can correct them. Exception overruled."

On the 6th June, 1854, the defendant filed two exceptions to the report, as follows:

1. "That the Commissioner should not have credited the three items of credit on the note of complainants in favor of defendant, the same having been allowed as a charge against him by the Company in making up a statement of the accounts.

2. "That the Commissioner should have allowed interest on the note due James Bivings, for twelve thousand two hundred and twenty-eight dollars, from the time when it was made until the filing of the bill in this case; and on the balance then found to be due until this time."



These exceptions the Commissioner also overruled, remarking as to the second, that he regarded the question respecting interest, as one for the Court.

The case came before the Court in June, 1854, upon the report and exceptions; and, also, upon a motion grounded upon affidavits to set aside the report and send the accounts back to the Commissioner.

The affidavits are, as follows:

"I do hereby certify that I have, at the instance of E. C. Leitner, added up several of the columns of the book of aggregates, which, I am told, is the basis of the report

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of the Commissioner in Equity, in this case now pending in Equity between the Bivingsville Cotton Manufacturing Company and Dr. James Bivings, and have found large inaccuracies. In four pages I found the aggregate inaccuracies to amount to thirty thousand four hundred pounds of yarn, it being that much more than aggregated on the page added, and I found several inaccuracies on another page widely differing from the additions in said book. May 7, 1854.

D. C. Judd.

"J. B. Tolleson, Clk. and Magt. Ex. off."

"Personally came S. Bobo, and made oath that he saw the book in the hands of Dr. James Bivings, in which the settlement was between him and the Company, of his property sold to the Company, in which it appears there were about twenty-one thousand pounds of yarn, and eleven thousand yards of cloth which he had on hand and sold to the Company. This he understands to be no where found in the Doff Book, and is than much more than the Doff Book will show.

Simpson Bobo.

"January 8, 1854.

"O. E. Edwards, N. P."

"Personally came before (me) E. C. Leitner, one of the complainants in this case, who, being duly sworn, made oath, that Maj. J. E. Henry had in charge the investigation of the accounts in which was involved the cause of action. This investigation was commenced under his care, and prosecuted to very nearly a consummation, and (he) died before its completion. Major Henry kept a private book for his guidance, and in many places made annotations. To complete and carry on the investigation, the complainants employed S. Bobo, Esq., but he declares he cannot do so understandingly, because he knows not the track, or course, which originated the objections which Major Henry entertained; and therefore cannot avail him-

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self of any helps from his notes, and that Mr. Bobo not having been present in the investigation before the Commissioner, declares he cannot understand the fairness or unfairness of the various claims and credits, without reinvestigating the whole matter,

nor does deponent know of any solicitor who was present, and who could understand them, without reinvestigation.

"E. C. Leitner.

"Sworn to and subscribed before me, this 8th June, 1854.

"T. O. P. Vernon, C. E. S. D."

"Simpson Bobo makes oath, that after the death of Major Henry, he was required to take his place in the investigation of the accounts—that he moved to open the investigation de novo, which was refused. He then, with the assistance of Major Dean, undertook to pursue the matter alone, and found it out of his power to understand it. This deponent does not believe that the case can be investigated, for the complainants, properly, without opening the reference.

"S. Bobo.

"Sworn to and subscribed before me, this June 8th, 1854.

"T. O. P. Vernon, C. E. S. D."

"H. J. Dean makes oath, that he did join Mr. Bobo in making an effort to look through the books, with a view to see if errors were made; and became, and now is satisfied, that he cannot understand them without opening the reference generally, and going through all the books page by page.

"H. J. Dean.

"Sworn to and subscribed before me, this 8th June, 1854.

"T. O. P. Vernon, C. E. S. D."

"H. J. Dean makes oath, that, after the

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death of Major Henry, he examined the invoices and bills of goods, which it was alleged defendant had paid out and not charged to the Company. This deponent by making the calculation of interest, and comparing the amount charged in the cash book at different times, was satisfied that Dr. Bivings, in many instances, had been credited twice for the same thing. But upon appearing before the Commissioner on the exceptions, he was informed that the charges against Dr. Bivings had been made entirely from the books of the Company, (not from the cash book,) and that these bills and invoices had been carefully examined, and none of them being found on the books out of which the credits to Dr. Bivings were taken, Major Henry had allowed every one of them. This cash book was not kept all the time of Dr. Bivings' agency.

"H. J. Dean.

"Sworn to and subscribed before me, this 9th June, 1854.

"O. E. Edwards, N. P."

The decree of his Honor, the presiding Chancellor, is as follows:

Johnston, Ch. It will at once occur to the mind that most of the grounds, set forth in these affidavits, are, properly, grounds of exception to the report, and not grounds for opening the reference again. Of this nature

is the inaccuracy stated by Mr. Judd. With proper specifications, his statements might well have been converted into an exception; and certainly the Court will never open and send back a report where there is good ground to except, and the party omits to make an exception or to put it in proper form, by pointing out the precise errors complained of, so as to enable the Commissioner and the Court to see whether they exist, and to what extent. The same observation applies to the affidavit of Mr. Bobo taken before Edwards the 8th of June. Was the book by which the settlement was made, of-

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ferred in evidence, or secondary evidence \*of it offered? If it was not, whose fault was it? If it was offered, then the failure to give proper effect to its contents, was ground of exception. The affidavit of Mr. Dean, of the 9th of June, shows what would have been ground of exception, if the cash book had been made the basis of the charge against the Company, but this not being the case, the affidavit shows no error.

This brings us to the affidavit of Mr. Leitner and the remaining affidavit of Bobo and of Dean. These may be understood to state that Mr. Henry, in his lifetime, had attended to the account, and that by his death, the plaintiffs were deprived of his information, and were incapable of sifting the report without an investigation of the whole account de novo.

The first observation upon this is,—either Mr. Henry had died before the report of 1853, or he was then alive. If alive, at that time, he contented himself with excepting to that report. If he was dead, then the plaintiffs were in the same condition in 1853, as they represent themselves to be in now; and they either made the same application to Chancellor Dunkin that they make to me, or they omitted to make it. If they made it, he failed to grant it, and the parties are concluded by his judgment. If they omitted to make such an application then, they are equally concluded, and not to be heard now. The effect of hearing them now, would be to give them an advantage by a delay arising from their own neglect.

The next observation is; that if this application is granted on the ground that the plaintiffs have lost their first counsel, it will be difficult hereafter, in every case, to prevent the death of counsel being made a ground of going over every prior proceeding from the beginning;—and when would cases end on such terms?

Another observation is: that the knowledge of the facts of a case (whether relating to accounts or otherwise) must be ascribed to the parties to the suit, and not exclusively to their counsel. These parties filed their bill on the ground that there was error

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\*in the settlement they had made. Either

they knew the facts which would exhibit the error, or they ventured recklessly to allege error without knowing whether the allegation was well founded or not. In the former case, the death of Mr. Henry has not destroyed the knowledge they had, and which brought them into Court; and, therefore, has not prejudiced them. In the latter case, they are entitled to no consideration; they brought a bill without knowing the grounds of it, or whether, in fact, they have been injured, and seek to prolong it, in order to fish up something to sustain it, of which they yet remain ignorant. The fact is, I believe, that all the affiants (with the exception, perhaps, of Mr. Judd,) were members of the Company, when the bill was filed, and were the very persons who should have known whether or no their settlement was erroneous, before they filed it. Mr. Leitner swore to the bill—Mr. Bobo was one of the most prominent agents of the Company in making the settlement, and was afterwards, a member of the committee appointed to investigate its correctness, and reported errors to the amount of many thousand dollars. This report led to the bill. How, then, can he be at a loss? But a very remarkable fact is, that during the investigation which took place under the bill, this report itself was abandoned as untenable; and yet the parties seek further time to seek out ground on which to stand.

When I consider the nature of the bill filed by these parties; that it is a fishing bill, not alleging any specific errors in their settlement with their agent, but merely seeking an account for the purpose of finding out whether there were errors or not; and that this suit has been kept on foot for ten years, during all which time the defendant has been kept out of the money, which they, by their voluntary and deliberate act, had promised to pay him; and that, now, after all this delay they come forward, and state that they are yet in the same state of uncertainty in which they filed their bill,—and ask that the defendant be still kept in suspense, while they make that investigation

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\*which they should have made before they came into Court,—and that this indulgence should be extended to them, notwithstanding their own neglect, in not bring the account to a close in the lifetime of the late counsel; and their further neglect to make this motion before Chancellor Dunkin, but reserving it until this time,—by which a whole year has been lost,—when I consider all these matters I cannot hesitate to dismiss the motion; and it is ordered that it be dismissed.

I may add, however, that the same motion would appear, from one of the affidavits, to have been made before the Commissioner, and to have been refused by him. Questions as to closing or continuing a reference are



proper for the consideration of that officer. He has considered and refused the motion, as it was competent for him to do; and I conceive his decision was no abuse of his discretion: on the contrary, I am of the opinion his judgment was sound.

This brings me to consider the report and exceptions.

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In deciding this case, I shall first, briefly, dispose of the defendant's exceptions.

By Chancellor Dunkin's order, he was not entitled to except to the report, after the time limited in that order. If it were proper, however, to consider these exceptions, I stated at the hearing, that I should, for the most part, agree with the Commissioner.

But, under the equity reserved, I am at liberty to decree interest to the defendant, on the balance of his note, and on so much of what was due him as is not embraced in that note; and I shall attend to that matter hereafter.

With regard to the plaintiffs' exceptions, I may remark that, in general, they are well disposed of by the Commissioner's report upon them.

In the argument of them, I allowed a range to counsel utterly against strict and wholesome rule. There was nothing really insisted on, but that the Court should permit

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these parties to \*come forward, at the hearing, and orally specify the errors which they had alleged in general terms in writing; as for instance, under the third exception, to state the particulars in which they conceived the Commissioner had miscarried in his calculations;—and so of others of a like character.

Nothing is clearer, in the practice of this Court, than that a party, dissatisfied with a report of the Commissioner, must point out in his exceptions, the particulars in which the error complained of consists, in such way as to enable the Court to lay its finger on the very point where the inaccuracy lies, and correct it by a judgment confined to that point. But instead of doing this, (without which it was impossible for the Commissioner to apprehend the complaint of the parties, and to correct his errors, if he had inadvertently fallen into any,) the plaintiffs thought fit to couch the exceptions in general terms,—reserving themselves for oral explanation before the Court. This was unjust to the Commissioner,—because, he was furnished with no means of rectifying his judgment, if it was wrong. It was unjust to the opposite party;—because it was calculated to surprise him, and perhaps get an advantage of him, when, if he had been forewarned by a proper exception, he could have shown there was, in fact, no injustice in the report. And it was unjust to the Court;—because such a course, if allowed, would compel the Chancellor, to do the duties appropriate to the auditing officer of the

Court, in addition to his own—always quite heavy enough—and would serve, notwithstanding all his diligence in the discharge of these extra duties, to betray him into the grossest errors—if from no other cause, simply from the hurry in which he would be obliged to take the account.

But I did feel much anxiety to relieve these parties, (in a matter where such an amount was involved,) from all suspicion of mistake;—and I, therefore, permitted them to designate some of the points at the hearing. It was alleged by them, that the addition of the items, composing charges of

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yarn, &c., \*merchandise, &c., against the defendant, was grossly defective; and that the books, from which the Commissioner had extracted the charge, would shew that the defendant was greatly undercharged by the report. It will be remembered, as the Commissioner states, that three blank books were procured, one for each party, and one for the Commissioner, into which, under appropriate heads, were transferred, in figures, the amounts of merchandize, cotton, yarn, cloth, &c. charged in the different day books, with reference to the number and page of the day book. As these entries were made in these books, they were constantly compared, and the different columns then added up, and the results compared; and then, the footings of these columns were aggregated, under proper heads, and carried ~~in~~ to the report. It appears that after Mr. Henry's death, and, as I understand, after the report was made out, one of the plaintiffs' counsel obtained the book of aggregates kept by the Commissioner,—and from his hands it passed into the hands of Mr. Leitner. The defendant still retained his own book,—and that of the plaintiffs still remained in the possession of Mr. Henry's family. At the hearing, the book of the Commissioner,—which he had let go out of his hands,—was produced and appealed to by plaintiffs' counsel, to show that the items set down in its different columns, exceeded, largely, the additions at the foot; and that by this means the charges in the report against the defendant fall far short of what they should have been. The items were looked into, and it did, at first, appear that the footing in the book was wrong, and, of course, the report, based on it, must be erroneous. But, upon a suspicion being expressed, that that book had been altered, Mr. Henry's book was sent for,—the defendant produced his book,—and, above all, the original entries, day books, &c., were looked up, and it was demonstrated, that the book, brought forward to show the errors in the report was, itself, grossly altered. The book of the defendant and the book of Mr. Henry agreed together; and both agreed with the

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original \*entries; and the footings in these two corresponded with the column of figures

above them, and with the footings of the Commissioner's book. But the items in this last book had been altered, so as to disagree with the foot additions of them. Thus was demonstrated one of the basest falsifications, (by somebody,) of evidence ever presented in a court of justice. After this, I gave no further credit to that book; and, of course, all efforts to specify errors in that manner ceased.

I ordered, that all the books be kept in the custody of the Commissioner; and in case of an appeal, they must, (in his custody,) accompany the case into the Court of Appeals.

In all other matters, I believe the observations of the Commissioner, in his report on the exceptions, are sufficient to sustain his original report; and the exceptions are hereby overruled. This point alone required to be set out, as it occurred in Court. The Commissioner had no interest to falsify the book. The effect of the alteration, was, to set aside, and not sustain his deliberate judgment;—attained after much labor and careful investigation; and, independently of this consideration, no one who knows him, would, for one moment, couple him name with the suspicion of such an act. The defendant had an interest directly against the falsification of the book; and besides, he had no opportunity, (as I understand the facts,) to make the alterations. Who made them, no one but the perpetrator certainly knows: and it is only to be regretted, that one guilty of such an offence cannot be dragged forth to the punishment and infamy he so richly merits.

I have remarked that I should attend to the question of interest, in the judgment I am about to pronounce in this case. The note was given in settlement up to the 1st of Feb., 1842, as appears from its terms, which are as follows:

"\$12,228 00: One day after date the Bivingsville Manufacturing Company promises to pay James Bivings twelve thousand two hundred and twenty-eight dollars; being the

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\*amount due for cash borrowed, his services, negro hire, &c., after deducting the amount (per account) of the company against him. This entered as a settlement up to date, Feb. 1, 1842.

David Dantzler, Pres't.  
Simpson Bobo, Sec't. B. M. Co."

The following credits are endorsed on it:  
\$168 29. Feb. 8, 1842, received one hundred and sixty-eight dollars and twenty-nine cents of this note; [entered by Bobo.]

\$45 72. Feb. 1, 1842; error in settlement, forty-five dollars and seventy-two cents.

\$962 03. April 1; amount of property purchased as set forth in the account and entered on the book, nine hundred and sixty-two dollars and three cents.

\$3,617 40. Feb. 26, 1844; received on the within three thousand six hundred and seventeen dollars and forty cents.

It appears that the defendant remained in the service of the Company sometime after this note was given, before he was dismissed. The account now taken by the Commissioner, extends up to the time he quitted their service, and at the latter time a balance is struck in his favor of fifteen thousand and two dollars and sixty-six cents. From this, if the amount of the note be deducted, which was a merger of the account pro tanto, the Company owed him, besides the note, the sum of two thousand seven hundred and seventy-four dollars and sixty-six cents. This latter sum he is entitled to; and it would be easy to decree it to him, but that it may be subject to some modification arising in the following way, which is connected with the note.

It will be remembered that at the date of the different credits on the note, the defendant was still in the Company's service.

It may be, (and the probability arising from the times in which the credits on the

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notes are endorsed is,) that a portion, \*of all of the credits, except perhaps that of April 1, arose from the application to the note of property or funds of the Company in defendant's hands, as agent. If this is so, (and it can only be made to appear by farther inquiry how this matter is,) the defendant should not be charged, by so much, for the funds or property in his hands, as has been done. The amount should be deducted from the charges against him, or the credits should be taken off the note. Justice will be done by directing a further inquiry to ascertain the facts,—and, as far as the credits are shown to have originated in the application of funds or money included in the charges against the defendant in the account, by allowing the amount to be deducted from those charges,—at the same time permitting the credits to remain on the note to extinguish it and to stop interest on it pro tanto. This inquiry is hereby directed. The account already taken is to stand: and to be in no respect altered or affected, except as it may be affected by the result of this limited inquiry. The credits on the note may diminish the amount set out on its face; but the result may be to add to the two thousand seven hundred and seventy-four dollars and sixty-six cents, due him at the foot of the account. Whatever balance is due on the note, at the last credit, must be computed, with interest, up to the date of the supplemental report hereby directed. The balance at the foot of the account, as above explained, to be then added, reserving the question of interest on it, or any part of it, for his time, services, &c., till the coming in of said report.

For these sums the defendant will be entitled to a decree against the Company: with the right to use the bond heretofore directed to be given by them as a condition of going



on with this suit, and all the regular process of this Court, to enforce his demand.

The costs to be paid by the Company,—excluding from that liability the defendant who was sued by them.

The defendant to be at liberty to move for

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any order proper, \*or necessary to compel performance of, or carry into effect this decree.

It is ordered that the foregoing stand as, and it is hereby made, the decree of the Court.

The complainants appealed, and now moved this Court to reverse the decree on the grounds:

1. Because, by the decree, the defendant gets more than he claimed either by his answer or his own accounts, kept while agent of the company.

2. Because the case should have been sent back to the Commissioner to have the book of aggregates, made out by the Commissioner, added correctly, as it appeared to the

Court most evidently incorrect to a large amount.

3. Because the Commissioner ought to have been required to charge the defendant with the difference in the amount of cotton yarn and cloth sold, and the amount made as appeared by the books kept by the defendant himself.

4. Because from the whole case made by the complainants, the reference should have been re-opened and the accounts re-examined.

5. Because the decree is in other respects erroneous, and ought to be modified or reversed.

Perry, Thompson, Bobo, for appellants.  
Young, Dawkins, contra.

PER CURIAM. This Court concurs in the decree from which the appeal is taken: and it is ordered, that the decree be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and  
WARDLAW, CC., concurring.  
Appeal dismissed.

# CASES IN EQUITY,

ARGUED AND DETERMINED IN THE

## COURT OF ERRORS OF SOUTH CAROLINA

COLUMBIA, DECEMBER TERM, 1854.

ALL THE JUDGES AND CHANCELLORS PRESENT, EXCEPT MUNRO, J.

7 Rich. Eq. \*471

\*Ex parte THE TRUSTEES OF THE  
GREENVILLE ACADEMIES.  
(Columbia. Dec. Term, 1854.)

[Corporations ⚡381; Schools and School Districts ⚡5.]

Petition by the trustees of the Greenville Academies, a body corporate, for leave to transfer their land and trust to the Baptist State Convention, also a body corporate, on condition that the transferee perform the trusts on which the petitioners held their land. The Circuit Court passed an order authorizing the transfer:—On appeal, *held*, that the petitioners required no aid or authority from the Court to make the transfer of the land, and that the change of trustees was unnecessary and inexpedient. Petition dismissed.

[Ed. Note.—Cited in *Gibbes v. G. & C. R. Co.*, 13 S. C. 242; *Chamberlain v. Northeastern R. Co.*, 41 S. C. 404, 19 S. E. 743, 996, 25 L. R. A. 139, 44 Am. St. Rep. 717.

For other cases, see Corporations, Cent. Dig. § 1541; Dec. Dig. ⚡381; Schools and School Districts, Cent. Dig. § 6; Dec. Dig. ⚡5.]

[Corporations ⚡298.]

The act of a majority of the trustees upon any matter within their competency, is the act of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1302; Dec. Dig. ⚡298.]

[Corporations ⚡524.]

An appeal lies from an order of the Circuit Court for the change or substitution of trustees.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2131; Dec. Dig. ⚡524.]

[Corporations ⚡381.]

A corporation may be appointed trustee.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1541; Dec. Dig. ⚡381.]

Before Wardlaw, Ch., at Greenville, July, 1854.

This was a petition by the trustees of the Greenville Academies, a body corporate, in which the petitioners prayed "that they may be allowed to transfer their land which they hold in trust for the Academies, to the Baptist Society, for the

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purpose of endowing a Female College, on condition that the said Baptist Society will forever keep up in the village of Greenville, both a male and female

school, where all the branches usually learned in a male and female academy, shall be taught by competent and able teachers, and which shall be open to the whole community."

The prayer of the petition was strongly opposed by a minority of the trustees.

His Honor made the following order:

"On hearing the petition, answer, evidence, and argument in this case, it is adjudged and decreed, that the petitioners have leave to transfer their trust and trust estate to the Baptist Convention of South Carolina, or to the Trustees of Furman University, who, thereupon, shall be substituted as trustees in place of the existing Board of Trustees; on the express condition, however, that such substituted trustees shall, in all respects, execute the trusts declared in the deed of V. McBee, dated August 12, 1820, and particularly shall keep up and maintain at, or near, Greenville, C. H., institutions of learning for the instruction of boys and girls in all the departments of education usually taught in male and female academies, for the use of the community, and without preference as to terms of admission of any particular sect of Christians. Parties have leave to apply at the foot of this decree for an order confirming the transfer and substitution when negotiated, or for other order in execution of the decree."

George F. Townes, one of the trustees, appealed, and moved the Equity Court of Appeals to reverse the order, on the grounds

1. Because the male and female academies of Greenville were endowed, by private contributions, with money and land, secured in trust for the use of the community at large, without regard to religious sects or creeds of

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any kind, and made per\*manent by an Act of Incorporation; and the transfer of the trust and trust estate, to the Baptist State Convention of South Carolina, or to the trustees of the Furman University, never was contemplated by the founders of said academe-



mies, and is in violation of said trust and their charter of incorporation.

2. Because one corporation has no power, except by legislative grant, to transfer its franchise and property to another corporation; and by so doing it forfeits its charter, and causes a reversion of its estate to the founders.

3. Because neither the Baptist Convention, nor the Furman University, having been made a party, nor any assurance given by either of them that the trust and trust estate would be accepted, the case before the court was merely a speculative one, in which no binding judgment could be pronounced, and the petition ought to have been dismissed.

4. Because the decree is in other respects contrary to equity and good conscience, and in violation of the law of the land.

By an order of the Equity Court of Appeals, the case was transferred to this Court, where it was now heard.

Sullivan, for appellant.

Perry, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. On 12th August, 1820, Vardry McBee, "for the consideration of having a Male and Female Academy established near Greenville Courthouse," conveyed to Jeremiah Cleveland and others, the then "acting Trustees of the Greenville Academy," thirty acres of land in that vi-

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cinity, to be held \*by them, their successors in office, (or a majority of them,) or their assigns forever. By an Act passed in December of the same year these trustees were incorporated under the name and style of "The Trustees of the Greenville Academies." The charter of incorporation has been renewed, and by the Act of December, 1851, it was renewed for fourteen years with power of holding real estate to the value of twenty-five thousand dollars.

At the period of the grant by Vardry McBee the lands were of comparatively inconsiderable value, not exceeding (it was said) three hundred dollars. But other persons had subscribed liberally for the same purpose—valuable buildings were erected on the lands, and for many years the academies thus established were ably conducted and successfully maintained. For reasons very fully set forth in the petition these institutions have gradually declined—the buildings are in a state of dilapidation and pupils have ceased to attend. The establishment of a male academy in the village, under the superintendence and patronage of the Baptist Convention of South Carolina, with a staff of learned and able professors, has not only superseded the necessity of any other male academy at that place, but has rendered the success of any other hopeless, if it were

desirable. For some time past the Baptist Convention had it in contemplation to establish also a female seminary which according to the construction of their charter given by this Court they had authority to do. In order to induce the convention to locate the seminary at Greenville the Board of Trustees of the Greenville Academies proposed to transfer to the Baptist Convention, what are called, the Academy lands, "for the purpose of endowing a female college, on condition, that the said Baptist Convention would forever keep up in the village of Greenville both a male and female school, where all the branches usually learned in a male and female academy shall be taught by competent and able teachers and which shall be open to the whole community." It has been said that this was the proposition

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of \*the board of trustees. It is true that some members of the board objected and for reasons which they have set forth in their answer. But, as well from the express terms of McBee's deed, as upon general principles, the action of the majority of the trustees upon any matter within their competency is the act of the corporation. The trustees state in their petition the conviction of their board that they have the right to make the proposed transfer under the deed of V. McBee and the terms of their charter, but that in deference to the objections that have been made as well as to avoid involving the Baptist Convention in any litigation, they had deemed it proper to ask the permission of the Court to do so.

Upon the hearing of this petition and answer, and the evidence submitted, a decretal order was made, on 15th of July, 1854, "that the petitioners have leave to transfer their trust and trust estate to the Baptist Convention of South Carolina, or to the trustees of the Furman University, who, thereupon, shall be substituted as trustees in place of the existing board of trustees; on the express condition however, that such substituted trustees" shall, in all respects, execute the trusts declared in the deed of V. McBee, dated August 12, 1820, and particularly shall keep up and maintain, at or near Greenville Court House, institutions of learning for the instruction of boys and girls in all the departments of education usually taught in male and female academies, for the use of the community, and without preference as to terms of admission of any particular sect of Christians." From this decretal order an appeal was taken, upon the various grounds submitted in the brief.

In the argument of the cause here the decree pronounced at the Circuit has been treated by the appellees as no more than an ordinary act of the Chancellor for the change or substitution of trustees, and it has been intimated that it was an application ad-

dressed to the discretion of the Judge, from whose decision an appeal would not properly lie. Upon motions for a continuance, or any

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such question arising in the \*carriage of the cause, this Court, principally from considerations of convenience, never interferes with the decision of the Circuit Court. But it is certainly a misapprehension to suppose that upon questions addressed to the judicial discretion of a Chancellor, an appeal will in no case be entertained from his decision. No motion can be more emphatically for the discretion of a Chancellor than an application for an issue at law. But, in *Hampton v. Hampton*, 3 Ves. & Bea. 41, Lord Eldon held, that "a refusal to send a cause to a jury was a just "ground of appeal if the Court of Appeals should think that the contrary decision would have been a sounder exercise of discretion;" and so it was ruled in this Court in *Jaggers v. Estes*, 3 Strob. Eq. 34, following *Drayton v. Logan* [Harp. Eq. 67], decided in 1824. In *Jaggers v. Estes*, the Appeal Court refused to interfere with the judgment of the Chancellor on the question of continuance, but reversed his decision on the motion for an issue. But the amation and substitution of a trustee is sometimes the most difficult question in a cause, and, it may be, the most important, involving not only property, but character. 'A trustee may be removed for misconduct, or incapacity, and for other reasons. The principal object of proceedings is sometimes to remove an executor, or other trustee, for incompetency. Supervening insolvency is sometimes regarded as sufficient cause to change the trustee. But if a son known to be insolvent, should be appointed executor by his father, and should afterwards be removed by order of the Chancellor on the ground of insolvency, it might be said, and properly, that the removal and substitution of trustees is for the discretion of the Chancellor, but it is, nevertheless, a proper subject of appeal, and if, as in the case supposed, in the opinion of the appeal tribunal he has miscarried in judgment, it is their duty to revise the same and re-instate the executor.

I think no doubt is entertained that a corporation may be appointed trustee, either by an individual or by the act of the Court, provided the duties to be discharged are within

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the \*powers granted by the charter. The general principle is stated by all the modern elementary writers, and is well illustrated by Mr. Justice Story, in *Vidal v. Mayor of Philadelphia*, 2 Howard, 128 [11 L. Ed. 205]—a case involving the validity of Stephen Girard's will. But it is insisted on the part of the appellant that this is only nominally an order for the change and substitution of trustees—that it is, substantially, and in effect, a transfer of one incorporation with all its rights and privileges to another and different

corporation, a power which it is not competent for this Court to exercise, but is essentially a political power and belongs to another department of the government. In this view some members of the Court concur, but it is not deemed necessary to express any definite opinion on that construction of the order.

Corporations are divided into ecclesiastical (or religious) and lay. Lay corporations are again divided into civil and eleemosynary. Among eleemosynary corporations are classed colleges and academies established for the promotion of learning and piety, and endowed with property by public and private donations. The State Convention of the Baptist denomination was incorporated essentially as a religious society, although vested with large powers in relation to education. The Trustees of the Greenville Academies are a lay corporation of an eleemosynary character. It is conceded that by the decretal order the Baptist Convention become the Trustees of the Greenville Academies, become the Corporation established by that name in 1820, and entitled, as such, to the escheated property in Greenville District, granted by the Act of 1822, and to all other rights and privileges appertaining to that Corporation. If it may be gravely questioned whether it be within the scope and purview of the charter incorporating the Baptist Convention that they should be permitted to accept this additional charter: it is very clear that such amalgamation should only be sanctioned from considerations of pressing necessity. It is not perceived that any such necessity exists.

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\*The prayer of the petition does not seek it. They ask for leave to transfer the property for the consideration stipulated, and not for a change of trustees. The subsequent resolutions of the Convention, to which the Court was referred by the appellees, treat the proposal as an offer to transfer the lands on stipulated conditions in which they formally acquiesce.

By the deed of V. McBee, the title to the land is vested in the trustees and their successors, or a majority of them; and by the charter of incorporation, the trustees have authority in the most ample terms, to lease, sell, alien and convey the real estate belonging to the Corporation. The purposes of the trust were to maintain and keep up a male and female academy in the vicinity of Greenville. In carrying out these objects the trustees were unrestricted.

In the choice of instructors, in the amount and mode of compensation, the will of the majority of the trustees was necessarily the only rule of action. They might select for teachers, Baptists, Episcopalians, Roman Catholics, or persons of any other religious denomination; and they might stipulate to pay them by the quarter, by the year, or in any other mode upon which they could agree.



If they could find a corporation or individuals who would undertake to keep up the schools in a satisfactory manner for a term of years, or in perpetuity, the trustees are not restrained from making a contract to that effect, or from compensating the contracting party by a transfer of so much of the corporate property as they may deem an adequate equivalent. But the party contracting may fail in his stipulations. In that event, the trustees of the Greenville Academies have a plain and adequate remedy. But if the trustees of the Greenville Academies are merged in the Baptist Convention—if the two corporations are united under the decretal order which has been made—although this Court has the power to correct any abuse of a trust, it is not very easy to perceive upon whose motion the application would be made. As a matter of expediency and in furtherance of the objects

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of the trust, it is better that the Baptist State Convention and the Trustees of the Greenville Academies should continue to exist as separate and distinct corporations—that the petitioners should be left to make their own arrangements with the Baptist Convention, and to see to the fulfilment of them. Being of opinion that the petitioners required no aid or authority from this Court in making the transfer of the lands, and that the change of trustees was unnecessary and inexpedient, it is the judgment of this Court that the petition should be dismissed, but without costs. It is so ordered and decreed.

WARDLAW, WITHERS, and GLOVER, JJ., concurred.

WARDLAW, Ch.—I concur in the result which has been attained in this Court, as I believe that the process preferred here will achieve the end aimed at in the Circuit Decree, and that it is not substantially different from the scheme of the decree. (a) I propose, however, to say something in vindication of the precise plan adopted by the Chancellor.

Upon the petition of the trustees of the Greenville Academies, the Chancellor gave the trustees leave to transfer their trust estate and the trusts connected with it, to either of two other corporations, the Baptist Convention of South Carolina, or the trustees of Furman University, on the condition that

(a) When this opinion was prepared, I understood the judgment of the majority of the Court to be, that the petition should be retained, and the petitioners be instructed that they already possessed the power, by conveyance of their estate on the same trusts to their proposed successors, of achieving substantially the object of the petition. It seems to me that the doubts and obstructions in the way of the petitioners as to the transfer of their estate and trusts, entitled them as trustees of a charity to apply to a Court of Equity for advice and aid. If I had supposed the Court intended to dismiss the petition, I should not have intimated acquiescence in the result.

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the trusts originally declared concerning the estate, should be fully executed; with further leave to the trustees to apply at the foot of the decree, when the transfer of estate and substitution of trustees should be nego-

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tiated, for the order of the Court confirming the substitution or other order in execution of the decree. The Chancellor did not definitely confirm any particular substitution; but he did adjudge that the trustees of the Greenville Academies had the right to transfer their trust and estate, and that both the Baptist Convention and the Furman University might receive the trust estate, and execute the trust. The trust estate in question consists of the remnant of a tract of land conveyed by Vardry McBee, August 12, 1820, to six persons described as "the present acting trustees of the Greenville Academy," and to their successors in office, or a majority of them or their assigns; and of buildings which have been erected on this land, at the expense and by the contribution of many persons of different religious belief.

The deed of V. McBee purports to be executed on "the consideration of having a Male and Female Academy established near Greenville C. H.," and on the "trust for the use of the said Academy." The persons named in this deed did not at the time constitute a corporation; but they, with others added to their number, were incorporated as trustees of the Greenville Academies, in December, 1820, with the usual powers of corporate bodies, and with express power to hold and alien real estate.—8 Stat. 312.

First, as to the power of the Court to make the decree in question. Independently of the Act of 1796, (5 Stat. 278,) the Court of Equity has inherent jurisdiction to appoint new trustees, in substitution of former trustees, wherever application is properly made, and the circumstances make the change advantageous. This jurisdiction is equally exercised, whether the instrument creating the trust contains a power to appoint new trustees, or is silent on the subject. *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *In re Fauntleroy*, 10 Sim. 252; *Finlay v. Howard*, 2 Dr. & W. 490. And the fact that the original trustees were appointed by an Act of the Legislature, imposes no limit to the power of the Court to

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substitute other trustees. \**Buchanan v. Hamilton*, 5 Ves. 722. The Act of 1796 simply provides for the substitution of new trustees, in exoneration of former trustees, where the beneficiaries consent to the substitution; and it does not apply to the cases, in which the jurisdiction is frequently exercised, of the death and misconduct of the trustees. In the present case, resort is necessarily had to the prior and inherent jurisdiction of the Court. The beneficiaries cannot be individually ascertained, and of course cannot consent to a substitution of trustees,

for all the people in the Commonwealth are interested in the subject of education, and incidentally in the establishment of a Male and Female Academy at Greenville C. H. In this predicament, the voice of the trustees speaks not only the consent of the corporation, but the consent also of the beneficiaries. In a corporation, the voice of the majority is declarative of the will of the whole: for a corporation is one artificial person, and can have one will only, manifested by the resolution of the majority. *Insurance Co. v. Sebring* 5 Rich. Eq. 342. Dissentients from the majority can be noticed by Courts, only as they present facts operating on the discretion of Courts, in executing the regular applications of the corporation. In the case of natural persons appointed as trustees, it is against the usage of the Court of Equity to remove them, without their consent, even where the beneficiaries desire the removal, unless the trustees be dead or resident without the State, or be shown to mismanage the trust, or to be otherwise unfit for the office, *Gibbes v. Smith*, 2 Rich. Eq. 131. But the authority of the Court to remove and substitute at judicial discretion, is unquestionable. In an old case, in the reign of Charles 2, (*Uvedale v. Patrick*, 2 Ch. Ca. 129,) a trustee was removed, and another substituted, although he was desirous of acting, because his co-trustees declined to act with him. The Lord Chancellor remarked, that he liked not that a man should be ambitious of a trust, where he can get nothing but trouble by it, and declared that, without any reflection on the trustee, he should meddle no further with the trust.

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\*It is clear that the trustees of the Greenville Academies have the power to alien the estate belonging to them, and of course to impose conditions and trusts in any particular alienation.—All corporations, if not disabled by statute, have by law a general right of alienating their property; and their consequent power of appointing trustees, on any disposition made by them, is co-extensive with this right. *Att'y Gen. v. Aspinwall*, 2 M. and Cr. 613; *Att'y Gen. v. Wilson*, 1 Cr. and P. 1. In the case before us, the estate was conveyed to the trustees, and to their assigns, and when afterwards incorporated, express power was conferred on the corporation to alien the estate: a fortiori, the corporation may appoint trustees and impose trusts on any alienation.

It seems to me equally clear, that both of the corporations, to one of which it was proposed to transfer the estate and surrender the trust, were competent to accept the trust, and compellable to execute it, if excepted. The Baptist Convention of South Carolina was incorporated in 1825, (8 Stat. 346,) with the usual powers of corporate bodies, and with express power to take and alien real or personal estate; and its objects

and purposes were declared to be “to erect and establish an academical and theological seminary, for the education of youth generally, and of indigent, pious young men particularly, who may be designed for the gospel ministry, and for all other purposes necessary for carrying the foregoing objects into effect.” It is quite obvious that the promotion of education was the general purpose of this corporation, and that it had express power to establish a “seminary for the education of youth generally,” without limitation to the male sex. The Furman University was incorporated in 1850, (12 Stat. 37,) with express power to take real or personal estate to the extent of thirty thousand dollars, and to prescribe the course of study to be pursued by students, and to do all things for the benefit of the university, as amply as a private person or a body politic could do. Here again, the business of the corporation is

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education, and there is \*no restriction as to sex. A chartered university has authority to teach all knowable things, and as a necessary incident, to establish subordinate schools for this purpose.

It was faintly suggested that a corporation could not be a trustee. It is the familiar doctrine of the Court, that a trust shall not fail for lack of a trustee. All persons capable of taking a beneficial interest in property, and some others, may hold as trustees for the benefit of other persons. Femmes covertes, infants, idiots, lunatics, and other persons not sui juris, may be trustees, subject of course to their legal incapacity to deal with the estate vested in them. In early times, it was held that none but those who were capable of being seised to a use, (and under the statutes of mortmain, not of force here, a corporation was not thus capable in England,) could be a trustee; and that a corporation was further disqualified as trustee, as lacking the requisite of confidence in the person; but this doctrine has been long exploded as too artificial and unsound. It is now settled that a corporation may be a trustee, in the same manner and to the same extent as any private person. *Green v. Rutherford*, 1 Ves. Sen. 468; *Att'y Gen. v. Foundling Hospital*, 2 Ves. jun. 46; *Att'y Gen. v. Landfield*, 9 Mod. 287; *Vidal v. Girard*, 2 How. 187 [11 L. Ed. 205]. In truth, nearly all corporations are trustees; as an incorporated Bank for the stockholders.

If a particular trust be inconsistent with the purposes for which the corporation was created, the corporation is an unsuitable trustee, and not compellable to execute the trust; but if the purposes of the trust be germane to the objects of the incorporation, if they relate to matters which will promote and perfect those objects, a corporation is as fit a trustee as any natural person, and equally under the control and direction of the Court. As Judge Story remarks, in de-



livering the opinion of the Supreme Court of U. S., in *Vidal v. Girard*, "there is no positive objection, in point of law, to a corporation taking property upon a trust not strict-

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ly within the scope of the direct \*purposes of its institution, but collateral to them; nay, for the benefit of a stranger or of another corporation." Thus in *Green v. Rutherford*, 1 Ves. 462, where there was a devise to St. John's College, in Cambridge, of the perpetual advowson of a rectory in trust that the presentments to the church should be made in an order prescribed, it was determined that the College, although having a visitor appointed by the founder, was obliged to execute this additional trust under the direction of the Court. So too, in *Vidal v. Girard*, it was held that the city of Philadelphia, incorporated with ordinary powers for municipal government, was competent to receive and execute a trust for the establishment of a college. In the case of *Thomas v. Ellmaker*, Parson's Select Cases in Equity, 113, it is said that a corporation cannot be a trustee in a matter in which it has no interest; but counsel misapprehend this doctrine when they insist that it imports any restriction on the acquisition of further property, in trust, not existing at the date of the charter. A corporation cannot have an interest in estate until acquired; but no impediment to the acquisition of further estate for corporate purposes, in trust or otherwise, could be imposed by a Court. The whole force of the dictum is, that a corporation cannot be a trustee for objects and purposes in which it has no interest. For example, a bank would be an unfit guardian for an infant. But in the case before us, both of the corporations suggested as substitutes for the trustees of the Greenville Academies, were incorporated for the same general purpose of education as the original trustees were, and have full power to execute the trusts under the direction of the Court.

It was gravely argued, that the substitution proposed in the circuit decree involved an utter perversion of the trust, and overran the provision of the Constitution of the United States inhibiting the passage, by a State, of any law violating the obligation of contracts. The case of *Dartmouth College v. Woodward*, 4 Wheat. 518 [4 L. Ed. 629], which was principally relied upon, con-

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tains sound \*and approved doctrine, but it has no application to the present case. There the legislature of New Hampshire undertook to set aside provisions previously made by legislative authority in favor of special trustees, and conferring a beneficial interest on the trustees, against their consent. Here the old trustees consent to the substitution and apply for it, and have no beneficial interest in the trust. The obli-

gation of no contract is infringed. It is supposed that, as the contributions for the erection of the Academy buildings were made by persons of variant faith, it defeats the wishes of the contributors, and violates freedom of opinion, to devote the lands and buildings to the supervision of a particular sect of Christians. Undoubtedly, under our constitutions, there should be no ratification or preference by Courts of any particular creed. But the placing of a school under the patronage and supervision of a particular sect, implies no preference of this sect. The decree attempted to provide carefully against such preference. It is always desirable to enlist, in support of a school, many persons associated by any common bond or tie. I have no special fondness for the sect to which the benefit of my decree might enure; and I frankly avow, that under the proof given of the advantages of the substitution, I should, under like circumstances, have directed a substitution to the College of Jesuits, the Sisters of Mercy, the Abolitionists of Slavery, or any other person, natural or artificial, capable of executing the trust. A school, under the patronage of a particular denomination of Christians, is not necessarily sectarian. Teachers of different faith are frequently employed, and students of all classes are earnestly invited. In my private opinion, denominational schools are more likely than any others to be successful in our State, and that any evils from them may be corrected by our College, which admits and brings into communion persons of every faith, who possess competent scholarship.

It is further objected to the circuit decree, that it amounts to the extinction or complete

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transfer of the original charter, \*which can by rightfully effected by the legislature alone. It may be conceded that the Court has no authority to diminish the powers of one corporation, or add to those of another; but it is a misconception of the decree to suppose it contemplates any such thing. It simply deals with particular estate, and the trusts connected with it, and does not tamper with charters. The trustees of the Greenville Academies are left, with all their powers, to acquire other estate by escheat or otherwise, and if the Baptist Convention, or the Furman University, did not have competency, before the decree, to accept and execute an educational trust, neither can do so now. The Court did no more than, in the exercise of an established jurisdiction, to change the trustees, with their consent, who held a tract of land in trust.

If the Court had the power to decree the substitution of trustees, and if the one corporation could surrender and the other could receive and execute the trust, as I have endeavored to show, then the selection of the new trustees was altogether within the dis-

cretion of the Chancellor, and is not a subject for review by an appellate tribunal. It would be easy, if necessary, to show that this discretion was judiciously exercised in this instance, particularly as it was desired by the founder of the charity, and demanded by the interests of the local community most immediately concerned in the charity.

In conclusion, I repeat that the order on circuit was inchoate, and that it was contemplated, when the final order for substitution should be proposed, to secure, by the appointment of a visitor and other

guards, the faithful execution of the trust by the substituted trustees.

DARGAN, Ch., concurred.

O'NEALL, J., being a trustee of the Furman University and of the Baptist State Convention, gave no opinion.

MUNRO, J., was sick, and therefore absent.

Motion granted.





# CASES IN EQUITY

ARGUED AND DETERMINED IN THE

## COURT OF ERRORS OF SOUTH CAROLINA

CHARLESTON—JANUARY TERM, 1855.

ALL THE JUDGES AND CHANCELLORS PRESENT.

7 Rich. Eq. \*487

\*C. L. BURCKMYER, Administrator, v. E. M. BEACH.

(Charleston. Jan. Term, 1855.)

[*Assignments for Benefit of Creditors* 391.]

A. was the assignee, and B. the agent for the creditors, under an assignment for the benefit of creditors. The sheriff, under a judgment and execution older than the assignment, in favor of a firm of which A. was a member, the validity of which was contested by B. for the other creditors, sold the goods of the assignors, and, after a decision of the Circuit Court of Law sustaining the judgment as valid, and pending an appeal therefrom, paid the proceeds to the plaintiffs in execution, under a bond of indemnity. Pending the appeal, but after the payment by the sheriff, B. died, and when the appeal was heard the judgment was set aside as void. After the judgment was set aside, A. acknowledged the receipt of the money as assignee, by subscribing his name, with the date of such subscription, to the receipt originally given to the sheriff:—*Held*, that A. could not be considered as having received the money as assignee until his acknowledgment thereof by signing the original receipt, and, therefore, that B., who was then dead, was not entitled to one half the commissions on receiving, allowed by the Act of 1828.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 1155; Dec. Dig. 391.]

Before Wardlaw, Ch., at Charleston, June, 1853.

Wardlaw, Ch. The plaintiff excepts to the master's report, because the master refused

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to allow to plaintiff commissions on \*the sum of fifteen thousand three hundred and five dollars and eight-one cents.

Defendant is assignee of Dickson & Mills, and plaintiff's intestate was agent of the creditors of that firm, under the Act of 1828, 6 Stat., 365, until his death, July 1, 1848. The sixth section of the Act gives to assignees and agents as compensation for their trouble and labor, commissions of five per cent. on receiving, and two and a half per cent. on paying, to be equally divided between them, viz: one-half to the assignee or assignees, and the other half to the agent or agents. O. Mills & Co., of which firm de-

fendant is a partner, entered up a judgment for a large sum against Dickson & Mills on February 12, 1848. Two days afterwards, Dickson & Mills assigned all their estate to defendant in trust for creditors; and on 23d of same month, at a meeting of the creditors, plaintiff's intestate was appointed agent. This meeting rejected the vote of defendant for agent, although he represented the largest creditors, O. Mills & Co., and on this ground the defendant now insists, that plaintiff's intestate was not lawfully appointed agent, as the Act in the appointment requires a majority in the amount of debt represented to govern. If this rejection proceeded on the ground that defendant was assignee, it seems to me clearly erroneous, for there is nothing in the Act, nor in principle, to hinder an assignee from representing creditors in the appointment of an agent. But the defendant is now estopped from disputing intestate's office by repeated recognitions thereof in proceedings in law and equity, and in matters in pais. Soon after the appointment of agent, proceedings were instituted at law to set aside the judgment in favor of O. Mills & Co., and in equity to set aside the assignment to defendant, and these proceedings resulted in setting aside the judgment, and sustaining the assignment; but during the life of the agent, both judgment and assignment remained apparently of force. The sum of money above mentioned upon which the plaintiff claims commissions, came into the Sher-

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iff's hands by \*sale of the stock of Dickson & Mills, under the fi. fa. of O. Mills & Co., and was paid over by the Sheriff to the latter firm on May 16, 1848, upon a bond of indemnity. In May, 1849, after the decree of this Court sustaining the assignment, defendant gave to the sheriff a formal receipt as assignee, and on 26th of the following month, he paid to O. Mills & Co., and other creditors of Dickson & Mills, their dividends of the assigned estate.

Commissions are earned only upon the receipt and payment of money, and the real



question upon plaintiff's exception is, whether defendant, as assignee, received and paid the sum above mentioned in the lifetime of the agent. Defendant received the money while the agent was living, but he insists that he received it in the character of a judgment creditor, and not as assignee. It is true, that at the time of receipt, he ostensibly was a judgment creditor; but by the judgment of the Court of Law annulling the judgment of O. Mills & Co., necessarily retroactive, he did not in fact sustain that character, and he must be considered as receiving it as assignee. The assets received by him belonged to the estate of which he was assignee; and as they were not lawfully received by him as special creditor, the presumption of law is, that he received them in the character which gave him title to receive. Whenever one does a lawful act, although he may have no right to do it in the character assumed and expressed by him in the performance, from the presumption against intentional violation of law he is supposed to do it legitimately in the execution of his proper office. Thus, if one convey an estate supposing erroneously himself to be entitled in his own right, whereas his title is as executor or trustee, his conveyance at law will be referred to the character in which he has title; and in this Court the same effect would be given, subject to exception from circumstances of fraud, mistake, accident or other equitable matter. I am of opinion, that defendant, in legal contemplation, received as assignee the sum of money in question, so as

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\*to entitle the intestate to commissions on receiving. But I think plaintiff's intestate had no right to commissions for paying out the sum. The sums received by the assignee were not, in fact, apportioned among the creditors, nor dividends paid to any of them until after the death of plaintiff's intestate; and although O. Mills & Co. were entitled in the event to a larger sum than that in question, it would be pressing a fiction of law to an inequitable extent, to hold that the assignee paid to himself at the time of receipt, the proportion to which his firm was ultimately entitled.

The third exception of plaintiff, that the trust of his intestate, as agent, abides in him as administrator, has no foundation in principle. That trust was strictly personal, and by the terms of the Act, revocable at the will of the creditors.

It is ordered and decreed, that the report be re-committed to the master to be reformed, and upon the principles of this opinion.

The defendant appealed from so much of the decree, as held that the payment made by the sheriff to O. Mills & Co., was in legal contemplation a payment to the defendant as assignee, so as to entitle the intestate to commissions on receiving the fund, upon the grounds:

First. Because, the sheriff having parted with the fund to O. Mills & Co. under a bond of indemnity, to return it if the judgment was determined to be invalid, the money must be regarded in law, as it was understood at the time, as remaining in the hands of the sheriff, not only until the question as to the validity of the judgment of O. Mills & Co. v. Dickson & Mills was judicially settled, which was long after the death of complainant's intestate, but until the decree of the Court of Equity was filed, sustaining the assignment, when the assignee received the money from O. Mills & Co., and gave a receipt to the sheriff for it, who then cancelled the bond of indemnity.

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\*Second. Because, although the defendant was one of the firm of O. Mills & Co., and the sheriff permitted them to receive the money as judgment creditors, under said bond of indemnity, that act could not be regarded in law or equity as a payment to an individual member of that firm in a fiduciary capacity, for the assignee had no right or power to touch the fund as assignee, or even to deposit it in the Bank of the State, as assignees and agents are required to do, under the Act of Assembly.

Third. If the fund was not in legal contemplation in the hands of the sheriff, still, the judgment of O. Mills & Co. v. Dickson & Mills was sustained by the Circuit Court, and was good until it was decided otherwise by a majority of the Appeal Court which was after the death of the complainant's intestate, so that the possession of the fund by O. Mills & Co., as judgment creditors, was lawful, and the retroactive operation of the decision only affected the disposition of the fund, and not the possession of it, before the said judgment was declared to be invalid.

Fourth. Because, the fund was legally withheld from the defendant, as assignee, when he applied for it to the sheriff in that capacity, until the rights of all concerned were judicially settled, and the assignee himself, earned no commissions until he gave his receipt to the sheriff for the money, nine months after the death of the intestate.

Dunkin, Brewster, for appellant.

Pressley, contra.

So much of Mr. Dunkin's argument, which was in writing as relates to the effect of an appeal as a supersedeas, is as follows:

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\*The appellant would submit, that the judgment of the Appeal Court of Law setting aside the judgment of O. Mills & Co. is not retroactive so as to charge Beach as assignee with the receipt of the money at the time of payment to O. Mills & Co.

To charge Beach, the payment to O. Mills & Co. in May, 1848, by the sheriff, must have been unlawful—if lawfully paid the appeal decision is not retroactive.

The Circuit Court sustained the judgment

of O. Mills & Co., and their right to receive the money was perfect unless suspended by an appeal or stayed by an injunction. As there was no injunction in this case our inquiry is limited to the effect of an appeal. If there had been no appeal the sheriff must of necessity have paid to the plaintiffs in judgment; the chief question then is: Does an appeal operate as a supersedeas? or was the payment by the sheriff to O. Mills & Co. pending an appeal unlawful? Before examining this question it should be remembered that there was no special order prohibiting the payment of the money by the sheriff,—the special order made by Judge Wardlaw expired by its own limitation (to 2d Monday in May,) before the payment by the sheriff, which was on 16th May, 1848.

The first authority submitted upon this question is the case of *Pell v. Ball*, 1 Rich. Eq. 361. In this case the master, Mr. Gray, reports that in obedience to the directions of the decree of Ch. Johnston, he had advertised the sale of the land and negroes; notice of appeal was given and suspension of proceedings required by appellant; the appellee took the ground that the appeal does not suspend the execution of the order.—The following is the language of Ch. Johnston in the Circuit decree: "Upon the authority of *Riggs v. Murray*, (3 Johns, Ch. 160,) and the cases therein quoted, I take it to be pretty clear that an appeal does not suspend the execution of a decree; that until reversed it operates as a full authority to the officers acting under it; and that in fact a special order is necessary to suspend it, which will only be

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granted by the Court in the exercise of a sound discretion with reference to circumstances." And again p. 367: "It may be that upon an application for an order to suspend proceedings, this Court might more readily grant such an order, where, from a consideration of the points involved, it might be impressed with the conviction that the decision was doubtful."

I would also cite *Thomas v. Yates*, 1 McMullan, 179.—This was an action against sheriff for the penalty under A. A., 1796, for not paying money collected within ten days after demand. Held, that sheriff was justified, he having been notified by attaching creditors of defendant in execution not to pay over as they intended to file a suggestion to set aside plaintiff's judgment as fraudulent and void. The reference is chiefly for the inference from the reasoning of the decision as more pertinent to the present inquiry. Does it not clearly indicate what would have been the action of the Court, if the sheriff had paid the money? In the Circuit decision against the sheriff the argument is urged that the order for leave to file the suggestion "was not accompanied as usual by order restraining sheriff from paying the money;" and that although a bill was filed to set aside

the judgment and for an injunction, yet no injunction was ordered until after sheriff's liability had been incurred. In the appeal decision, per Butler J., we find that in the original question between the judgment and attaching creditors, the Circuit Court decided in favor of the attaching creditors. The Appeal Court reversed the decision.

Considering the facts, the Court, in sustaining the position of sheriff Yates, exercises the significant precaution of saying by its organ, p. 186, "I do not undertake to say that the sheriff may not have been justified in paying to the plaintiff the money when demanded," and proceeding states, that sheriff's conduct "received the sanction of Ch. Harper whose decree should be regarded as a virtual protection for the defendant. When the Chancellor took cognizance and jurisdiction of the matter, his decree should be considered as acquitting the defendant of all

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\*wilful wrong and rescuing him from legal liability. For suppose the Circuit decree had been affirmed instead of being reversed, would it be pretended that the action could have been maintained?"

Consider this case. In *Mills & Co. v. Dickson & Mills*, 6 Rich. 490, on Circuit, Wardlaw, J., declined to "interfere upon the application of one who was no party before him as his interference could only amount to a declaration of opinion—he could make no effective order—certainly not an order for the sheriff to pay the money to Mr. Burckmyer, who is represented to be the agent of creditors." Did not this virtually sanction the course of the sheriff in paying the money to O. Mills & Co.? Would not this protect the sheriff from legal liability? For suppose the Circuit decree had been affirmed instead of being reversed, would it be pretended that an action could have been maintained?

The next case to which I would refer is *Ives v. Lucas & Thompson*, 11 E. C. L. R., 298. This was an action of trover against sheriff for wrongfully detaining plaintiff's horse; under *fi. fa.*, 15th September, 1822, sheriff sold the horse; an order of Justice Bayley, dated 17th November, setting aside the judgment for irregularity, was put in evidence. Park, J., non-suited the plaintiff, "because as long as the judgment existed it protected the sheriff, and no evidence was given that sheriff had horse in his possession later than 15th September, and the judgment was not set aside until 17th of November.—Vaughan, Sergeant.—Does not your Lordship think that the setting aside the judgment makes the sheriff's act tortious by relation." Park, J.—Certainly not.

Your Honors are also referred to Peter's Rep. U. S. 6 vol. p. 8, *Bank of United States v. Bank of Washington*. In this case held—"It is a settled rule of law that upon an erroneous judgment, if there be a regular execution, the party may justify under it, until



the judgment is reversed, for an erroneous judgment is the act of the Court." In this

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case the money \*had been paid before the writ of error was allowed, but the party had given notice of his intention to take it out before the money had been paid. At page 17, the Judge, in delivering the opinion of the Supreme Court, says, "If the bare notice or declaration of an intention to bring a writ of error will invalidate what is afterwards done, should the judgment at any future day be reversed it would virtually in many cases amount to a stay of proceedings on the execution; no such rule is necessary for the protection of the rights of the parties. The writ of error may be so taken out as to operate as a supersedeas; or if a proper case can be made for the interference of a Court of Chancery, the execution may be stayed by injunction."

It may be urged that as to the effect of an appeal there is a distinction between administrative and judicial orders—interlocutory and final. In *Pinckney v. Henegan & Jones*, 2 Strob. 255-6-7, O'Neill, J., held that every order operates upon the matter to which it is addressed in a way to injure or benefit the parties and may affect materially their rights; and hence concludes that there is no ground on which the right of appeal on even interlocutory orders can be denied. In this case held that the appeal did not operate as a supersedeas; by the general admission of the Court through Judge O'Neill, this order must have operated to injure or benefit the parties and the Court upheld the right of appeal; what practical reason precludes a general application? It is resolved into a matter of judicial discretion, what harm clogs its exercise? If the ultimate decision of a case was doubtful the Court would promptly grant a special order to suspend proceedings. From the reasoning of the authorities may not the conclusion be drawn, that a mere appeal would not operate as a supersedeas, but to have that effect there should be a special order restraining the sheriff from proceeding, or the fi. fa. should be stayed by injunction. The practical effect of such construction by the Court would

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be beneficial, it would operate \*as a wholesale check upon frivolous appeals; the anomalous appeal "for time," a formidable abuse grown into common use would be consigned to merited oblivion, and the true spirit of equity would be observed in facilitating and not retarding the enforcement of right. But even if this construction was doubtful as between the original parties, yet in a case like this before us, where a third party, an outsider, fails in his motion on Circuit to set aside the judgment between the original parties, the reasoning and the expediency are more cogent and conclusive against the supersedeas of a bare appeal.

The opinion of the Court was delivered by

DARGAN, Ch. Some time in the year 1843, S. D. Dickson and Samuel S. Mills formed a partnership, under the name and style of Dickson & Mills, for the purpose of carrying on business as grocers, and vendors of provisions, in the City of Charleston. In the year 1848, the said Dickson & Mills, being then insolvent, the latter confessed a judgment in the name of the firm of Dickson & Mills to Otis Mills & Co., for upwards of thirty thousand dollars. Of the company last named, Beach, the defendant, was a member. On this confession, judgment was signed, and a writ of fieri facias lodged with the sheriff, on the 12th of February, 1848. Two days afterwards Dickson & Mills made an assignment to E. M. Beach of all their effects, consisting principally of their stock in trade, for the benefit of certain creditors named in the assignment. Otis Mills & Co. were preferred creditors, under the provisions of the assignment.

On the 23d February, A. D. 1848, at a meeting of the creditors of Dickson & Mills, called by the assignee, Cornelius Burckmyer, the plaintiff's intestate, was appointed the agent of the creditors, in pursuance of the provisions of the Act of Assembly, A. D. 1828. He continued to act as such agent until his death, in July, 1848.

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\*On the 12th February, 1848, a writ of fieri facias was lodged with the sheriff in the case of O. Mills & Co. v. Dickson & Mills, and on the same day the sheriff proceeded to levy on the goods of the defendants in execution, consisting of their stock in trade, and constituting a large portion of the assigned effects. Very soon afterwards, Cornelius Burckmyer, the agent of the creditors, and acting in their behalf, made an application to one of the Law Judges (Judge Wardlaw,) to set aside and vacate the execution, for certain alleged irregularities not now necessary to be considered. He suspended the execution until the May Term \*following, (1848,) at which time the motion was renewed before him, and was refused. From this decision an appeal was taken, which was heard at January Term, 1849, when the decision of the Court below was reversed. By the judgment of the Court of Appeals the execution was declared invalid and was set aside.

On the 12th February, 1848, the sheriff levied on the goods, and the said goods being of a perishable nature, and liable to waste if the sale was delayed, which might be adverse to the interests of all the conflicting claimants, it was agreed upon by all the parties in interest, that notwithstanding the pendency of the litigation, the sheriff should proceed to dispose of his levy by an immediate sale of the goods, without prejudice to the rights of any. Under this agreement, the

sheriff did, on the 12th April, 1848, proceed to sell the goods levied on by him under the execution, and the proceeds of sale nett over fifteen thousand three hundred and five dollars and eighty-one cents.

On the 15th June, 1848, E. L. Adams and others, creditors of Dickson & Mills, filed their bill in the Court of Equity, to set aside the assignment, on the allegation of fraud. On the hearing of the cause, the assignment was held to be valid, and the bill was dismissed.

The foregoing statement is made with a view to a better apprehension of the question

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now before the Court. The present case relates only to a controversy about commissions between the assignee, E. M. Beach, and the agent of the creditors for whose benefit the assignment was made, which agent, as has been already stated, was the plaintiff's intestate.

The sixth section of the Act of 1828, gives to the assignees, and the agent of the creditors, as compensation, five per cent. for receiving, and two and a half per cent. for paying, to be equally divided between them. As I understand the Act, the agent, or agents, are entitled to half of the commissions, and the assignee, or assignees, to the other half.

The gravamen of this bill is, that the defendant, the assignee, has appropriated to himself more than a due share of the commissions; and that he has refused to account, and to pay over to the plaintiff the just share to which his intestate is entitled. The prayer is, that the defendant be decreed to account, and pay to him the share of said commissions to which his intestate is entitled. The defendant denies the claim of the plaintiff to the extent of the demand which the plaintiff sets up. He admits a small balance in his hands due the plaintiff on account of commissions, which the Master in his report states to be sixty dollars and eighty-five cents. This the defendant has tendered, but it has been refused unless the whole claim was allowed and paid.

This contest relates solely to the commissions which have accrued, or should accrue, on the sum realized by the sheriff on his sale of the goods levied on by him as aforesaid, which sum eventually came into the hands of the assignee, and was distributed by him among the creditors according to the provisions of the assignment. This may be considered as a mixed question of law and of fact; and the rights of the parties must be determined by the construction which the Court shall put upon certain facts. There are certain prominent facts about which there is no doubt, which must govern the judgment of the Court.

There is no doubt, that the sheriff levied

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on the goods under the fi. fa. in favor of

O. Mills & Co. Having thus possessed himself of the goods, it is equally certain that he sold them under and by virtue of the execution. The Master so reports the fact to be. He says "that O. Mills & Co. entered up their judgment against Dickson & Mills, on the 12th February, 1848, and under a fi. fa., on that judgment, the stock of goods of Dickson & Mills was sold by the sheriff, on the 12th of April, 1848." The Chancellor, in the statement accompanying his decree, says, "the sum of money abovementioned, upon which the plaintiff claims commissions, came into the hands of the sheriff by a sale of the stock of Dickson & Mills, under the fi. fa. of O. Mills & Co." The sheriff, who was a party defendant to the bill of E. L. Adams and others, filed for the purpose of setting aside the assignment, broadly asserts the same fact.

There is another fact, which is equally clear, namely, that the sheriff paid this sum to O. Mills & Co. as plaintiffs in that execution. The Master, and the Chancellor, both concur in so reporting. The former says, "that on the 16th May, 1848, the sheriff, after taking a bond of indemnity, paid over to the plaintiffs in the judgment the nett proceeds of the sales, viz.: fifteen thousand three hundred and five dollars and eighty-one cents." The Chancellor says, the sum of money realized on the sale by the sheriff, made under the fi. fa. of O. Mills & Co., was paid over to the latter firm on 16th of May, 1848, on a bond of indemnity. The receipt taken by the sheriff was after this manner. The names of the parties to the execution was stated after the usual form, and a receipt for the money was given by Bailey & Brewster, plaintiffs' attorneys, and the money was received by them. They immediately afterwards paid it over to O. Mills & Co. the plaintiffs in the execution.

After the execution was set aside, which was by the judgment of the Law Court of Appeals, at February Term, 1849, and after the dismissal of the bill filed by E. L. Adams and other creditors of Dickson & Mills, to set aside the assignment, (which was held valid

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by a decree of the Court of Equity, filed 18th May, 1849,) the sheriff recognized the right of E. M. Beach to receive the money as assignee. The bond of indemnity, which he had taken from O. Mills & Co., when he paid them the money, was given up to be cancelled. And he required E. M. Beach, as assignee, to subscribe his name to the receipt which had been previously given to him by Bailey & Brewster, which was done, and this signature bears date the 18th May, 1849.

Between this date, and the date of the sale by the sheriff, (which was on the 12th April, 1848,) the plaintiff's intestate, the agent of the creditors, died. He died on the 1st day of July, 1848. And the question is, whether under these circumstances, the agent would



be entitled to receive commissions upon the money so received by the assignee.

I think the Chancellor has correctly stated the case, when he says, "Commissions are earned only upon the receipt and payment of money, and the real question upon the plaintiff's exception is, whether the defendant, as assignee, received and paid the said sum of money in the lifetime of the agent." That he did not so receive it in the lifetime of the agent, is clear from the undisputed facts which have been mentioned. But the Chancellor proceeds to put a construction upon those facts, which imparts to them a different aspect, and would give them a different operation from that which they are entitled to have. He thinks, that although the assignee did no act in the lifetime of the agent, which purported to be a receipt of the money in his character as assignee, yet he must be considered as having done so. He argues, that inasmuch as Beach received this money on an execution in which he was plaintiff, and which was afterwards set aside, and decided to be invalid, the payment to him by the sheriff must be referred to his legitimate authority to receive the money, which was as assignee; and that this having been done in the lifetime of the agent, therefore the agent was entitled to commissions on said payment. But in this reasoning, one

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very important fact is left out of \*view. The payment by the sheriff, on the 16th May, 1848, was not made to Beach personally, and individually, but to Otis Mills & Co. I am far from assenting to the logical correctness of this reasoning, even if Beach had stood alone as the plaintiff in the execution. But how can a payment to Otis Mills & Co., on an execution under which they claimed, though Beach was a member of the firm, be considered a payment to Beach as assignee? Beach had no right to appropriate the funds of the company to objects not falling within the scope of the partnership, without the assent of Mills. So far from agreeing to this, O. Mills & Co. had withdrawn the money from the hands of the sheriff as their own funds, giving a bond to pay it back to the sheriff in event that the proceeding to set aside the execution should be decided against them.

It has been suggested, that inasmuch as the money received by O. Mills & Co. did eventually go into their hands as creditors under the assignment, it should be considered as thus paid to them at the date of their receipt to the sheriff, (which was during the life of the agent,) and that therefore he should be entitled to his commissions. But this appropriation of the fund did not take place until after Beach, as assignee, had given another receipt or acknowledgment to the sheriff. And it appears to me that it would be a great distortion of the facts to consider the payment to O. Mills & Co. a

payment to Beach in his character as assignee.

It has been further argued that the Act does not give the commissions jointly to the assignee and agent, but a moiety to each. And that Beach, having received in his settlement with the creditors the whole of the seven and a half per cent. allowed to the agent and the assignee, must be considered as having received the excess over what he was entitled to charge, for the agent, and that he cannot now refuse an account to the agent for his half of the commission. Whether this be the true interpretation of the Act, I am not prepared to say. It is certain that Beach retained the commissions which he

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charged \*for his own benefit. It does not help the plaintiff's case to show that Beach received more commissions than he was entitled to charge. That was a question between him and the creditors. As to the plaintiff's claim, the question still recurs, whether the agent has earned his commissions, and that depends on the fact whether the money was paid to the assignee in the lifetime of the agent. If this state of facts does not exist, either actually or constructively, it is admitted on all sides that the plaintiff's claim is unfounded.

It appears from the report of the master, that the plaintiff's intestate was entitled to three hundred and sixty dollars, fifty-five cents, of which he received three hundred dollars before his death, leaving a balance of sixty dollars, fifty-five cents still due. For this balance he is entitled to a decree. It is ordered and decreed, that the defendant pay to the plaintiff this sum, and that the circuit decree be modified accordingly. And for as much as this balance was tendered to the plaintiff before suit, it is ordered and decreed that the plaintiff pay the costs of this suit.

WITHERS, WARDLAW, and GLOVER, JJ., and DUNKIN, Ch., concurred.

WARDLAW, Ch., dissenting. This case involves a small sum of money, and no new or great principle; yet it has the interest of presenting a concrete issue of law and fact, upon which the circuit chancellor differed from the master, the Court of Appeals in equity was equally divided, and a conclusion has been attained in this Court of dernier resort by a bare majority.

On February 12, 1848, Dickson & Mills, by the *cognovit* of Mills only, confessed a judgment for a large sum of money to O. Mills & Co., a mercantile firm composed of Otis Mills & E. M. Beach; and on this judgment a *fiery facias* was issued the same day. On February 14, 1848, Dickson & Mills assigned all their assets to the defendant Beach in trust

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for their \*creditors, giving a preference to O.

Mills & Co. and some other creditors; and on February 23, 1848, C. Burckmyer, plaintiff's intestate, was appointed agent of the creditors under the Act of 1828. The goods constituting the stock in trade of Dickson & Mills, were seized by the sheriff under the fieri facias of O. Mills & Co.; and on April 11, 1848, a motion was made, at the instance of the agent, before Judge Wardlaw, to set aside the judgment of O. Mills & Co., which resulted in an order by the Judge that the execution be suspended until the second Monday of May following. The motion to vacate this judgment was renewed at May Term of the Common Pleas, and refused by the same Judge. From this refusal the agent appealed, and his appeal was sustained by the Law Court of Appeals, and the judgment declared to be void. On April 12, 1848, the day after the fieri facias had been suspended by the consent of all parties in interest, the sheriff sold the goods of Dickson & Mills, and received the proceeds of sale. And on May 16, 1848, he paid over the nett proceeds of sale, fifteen thousand three hundred and five dollars, eighty-one cents, to the attorneys of O. Mills & Co., taking for his indemnity a bond with surety from the plaintiffs in execution. This was the only actual payment of this sum ever made to the assignee, and the possession of the money remained undisturbed; although afterwards, on May 18, 1849, the assignee subscribed in that character, prefixing the last date to the receipt given by the attorneys of O. Mills & Co. to the sheriff on May 16, 1848. The money thus paid to O. Mills & Co., proved in event to be smaller than the sum they were rateably entitled to as preferred creditors under the assignment of Dickson & Mills. On April 28, 1848, E. L. Adams, and other creditors of Dickson & Mills, filed their bill in the Court of Equity to set aside the assignment of Dickson & Mills so far as it gave a preference to O. Mills & Co.; and the answers of the sheriff filed on June 17, 1848, and of Otis Mills and E. M. Beach, filed on June 29, 1848, explicitly state that the sheriff had paid

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over the nett \*proceeds of sale to said Mills & Beach; and without allusion to any bond of indemnity or intimation of any condition in the payment. This bill was ultimately dismissed and the assignment sustained. Burckmyer, the agent of creditors, died on July 1, 1848.

In this bill the plaintiff claims that as representative of his intestate he is entitled to one half of the commissions on the sums (including the fifteen thousand three hundred and five dollars, eighty-one cents.) received and disbursed by the assignee in the lifetime of the agent. This claim is admitted to the extent of three hundred and sixty dollars, fifty-five cents, of which three hundred dollars were paid to the intestate in his lifetime, and resisted as to commissions on the

said sum of fifteen thousand three hundred and five dollars, eighty-one cents. If this latter sum of money was received and disbursed by the assignee during the life of the agent, it is clear on the terms of the Act of 1828, and it is undisputed, that the representative of the agent is entitled to one half of five per cent. for receiving, and of two and a half per cent. for paying. The Circuit Chancellor acting on the maxim, in fictione legis, equitas existat, disallowed plaintiff's claim to commissions for payment to O. Mills & Co., because there had been no actual apportionment of the assigned estate among the creditors in the agent's lifetime, although it was ultimately shown that O. Mills & Co. were entitled under the assignment to a larger sum than that paid to them by the sheriff. If there were error in the decree in this particular, it is not made the subject of appeal, and it cannot logically support to any extent the conclusion that the Chancellor also erred in allowing commissions for receiving the money.

The assignee has retained in his hands the full sum of seven and a half per cent. on his receipts and disbursements, and has made no abatement from the demands of O. Mills & Co., of which he was a partner for interest on the sum aforesaid received and used by them for a year at least before the appor-

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\*tionment of assets. It is clear beyond dispute, that according to the provisions of the Act the assignee is entitled to half only of these commissions; and it is equally clear that if he did not regard the delivery of the money to O. Mills & Co., as a payment to himself as assignee, he should have charged himself or his firm in his accounts for the use of this money. I grant that these matters present properly issues between the creditors and the assignee, and that the plaintiff must establish his title to a moiety of the commissions, notwithstanding the defendant retained the whole wrongfully; yet as the creditors have not complained, and as an equivocal possession or any other act of a party is to be construed lawful rather than tortious, some presumption arises from these circumstances that defendant retained the whole commissions in right of himself and the agent, and that he is trustee for the plaintiff as to one half.

The question of the cause is, whether the defendant received the money above mentioned as assignee in the life of the agent. So far as I understand the views of the majority of the Judges, expressed in conference, some of them suppose that the money was in the custody of the Sheriff, until May 18, 1849, and that the transaction of May 16, 1848, was a private loan or deposit by him, upon indemnity to O. Mills & Co., who thereby incurred no greater liability than any stranger would have incurred, by like loan or deposit; and others of the majority



suppose that the character of judgment creditors, in which O. Mills & Co. professedly received the money from the Sheriff, cannot be varied by the event showing that one of the firm only was entitled to receive, and in a different character, as assignee. I will consider the elements of these views.

It appears by the testimony of Mr. Brewster, that the plaintiffs in execution gave a bond to the Sheriff for his indemnity, when they received the money; but it is at least doubtful whether this fact should vary the case, when the bond itself is not produced, nor its loss accounted for. At all events,

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it \*should be treated simply as a bond of indemnity, and not tortured into a bond to secure the forthcoming of money lent or deposited. It cannot be fairly conjectured, that it was intended to limit or qualify the payment, or any thing more than an instrument for the protection of the Sheriff, in a payment which might turn out to be wrongful. Prudent Sheriffs exact such obligations, in all cases of disputed claims to funds; but such obligations are merely superfluous, in no respect controlling the rights of the parties, when the actual payment is sustained as rightful. It appears by the answers of the Sheriff and of O. Mills and E. M. Beach, to the bill of E. L. Adams, and others, that all of those persons concerned in the paying and receiving, considered the payment to O. Mills & Co. as effective and complete, and not limited by the bond of indemnity. If the defendant had never ratified the payment to O. Mills & Co., and the Sheriff had sued this firm on the bond of indemnity, surely they could have defended themselves successfully, by showing that one of them was entitled at the time to receive the money, although in a different character from that in which it was received.

When Mr. Shingler sold the goods, and received the money in question, the mandate of the Court to him officially to sell and receive was suspended in energy; and he acted as private agent of all the parties, and of course of the assignee and agent who were ultimately adjudged to be entitled to the proceeds of sale. He was in effect the agent of whomsoever might have the right, and his receipt of the money was a receipt by his eventual principal, with the consequence of commissions.

Granting, however, that the consent of parties to the sale merely waived the order suspending the execution, and that the Sheriff throughout acted officially, the same conclusion may be attained. Supposing the Sheriff to have officially paid the money to the plaintiffs, in the execution then subsisting, (and I have already shown that both parties treated it as payment in fact,) the payment was lawful and effectual at the time, for one

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\*of the partners had full right to receive.

A structure sustained by various props, does not necessarily fall, because one of the props is not stable. A party having legal right to the possession of a fund, is not damaged by relying on some untenable title, any more than a party entitled to the judgment of a court in his favor, is obstructed by false argumentation in his behalf. E. M. Beach, when he received the money from the Sheriff, was entitled to receive it as assignee, and his title is not impaired by his mistake that he had a right to receive it as a judgment creditor. Having two rights, he might fall back, when one failed, upon the other.

From the nature of partnership, each of the partners is in constructive possession of the whole assets of the firm. It is physically impossible that more than one can have actual custody of a single article at the same time, but in legal construction all the partners possess what any of them may receive and keep. E. M. Beach received the money which was paid to O. Mills & Co., of which he was a partner.

If all the foregoing reasoning be unsound, the ratification by Beach as assignee of the payment in May, 1848, seems conclusive of the case. By adding his signature as assignee to the receipt of his attorneys to the Sheriff, he explicitly recognized the receipt by him as assignee at the date of the original receipt. The prefixing a date to his confirmation, serves only to show the time of his confirmation, and not to restrict the completeness, and necessary retroaction of his confirmation. The money was in fact paid to him in May, 1848, and not in May, 1849, and he acknowledges and adopts this fact, by subscribing the original receipt. Subsequent assent to what has already been done, has a retrospective effect, and is equivalent to a previous command. *Omnis ratihabitio retrotrahitur et mandato priori æquatur.* When a man pays a sum of money or buys goods for me, without my knowledge or request, and afterwards I agree to the payment, or receive the goods, this is equivalent to my previous request to him to pay or buy.

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So, \*if the goods of an owner are wrongfully taken and sold, he may waive action against the wrong-doer, and treat him as an agent, and may adopt the sale and maintain an action for the price against the purchaser. Such adoption of agency relates back to the original transaction, and places it on the same footing as if the authority had been conferred before the transaction. *Broom's Leg. Max.* 345, 380-3; *Chitty on Cont.* 212 and n.; *Lawrence v. Taylor*, 5 Hill (N. Y.) 113.

I adhere to the Circuit decree.

O'NEALL and WHITNER, JJ., and JOHNSTON, Ch., concurred.

Decree modified.

# APPENDIX

## CASES IN EQUITY

ARGUED AND DETERMINED IN THE

## COURT OF ERRORS OF SOUTH CAROLINA

COLUMBIA—NOVEMBER TERM, 1852.

ALL THE JUDGES AND CHANCELLORS PRESENT.

7 Rich. Eq. \*509

\*JOSEPH CUMMINGS and NANCY, His  
Wife, and PRISCILLA BOYD, v.  
JAMES B. COLEMAN.  
(Columbia. Nov. Term, 1852.)

[*Gifts* ⇨8.]

At an administrator's sale, one of the administrators bid off three slaves, and immediately made a parol gift of them:—*Held*, that the administrator had sufficient title to make the gift, and that his subsequent formal consummation of the title enured to the benefit of the donees.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 15; Dec. Dig. ⇨8.]

[*Slaves* ⇨7.]

A mother made a parol gift of slaves to her infant children, who lived with her. She afterwards married, and the husband mortgaged the slaves. The gift *held* valid against the mortgagee.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 28; Dec. Dig. ⇨7.]

[*Husband and Wife* ⇨10.]

The question reserved, whether by marriage a husband becomes purchaser for valuable consideration of the wife's chattels in possession, in the sense in which the term purchaser is used in the Act of 1832 in relation to parol gifts.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 23, 34, 35, 38–46, 396, 398; Dec. Dig. ⇨10.]

[*Sales* ⇨237.]

Purchaser in the Act means one who buys for money or other valuable consideration.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 686; Dec. Dig. ⇨237.]

[*Gifts* ⇨44.]

A subsequent purchaser with notice, cannot avoid, under the Act of 1832, a parol gift of a chattel.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 77; Dec. Dig. ⇨44.]

[*Equity* ⇨180.]

Where one defends on the ground that he is a purchaser for valuable consideration without notice, he must set forth in his plea or answer, with convenient certainty, the various requisites

of the defence: amongst other things, he must deny notice and allege payment of the purchase-money.

[Ed. Note.—Cited in Harper v. Barsh, 10 Rich. Eq. 151.

For other cases, see Equity, Cent. Dig. § 416; Dec. Dig. ⇨180.]

[*Vendor and Purchaser* ⇨228.]

[Cited in Harper v. Barsh, 10 Rich. Eq. 152; Arthur v. Screven, 39 S. C. 82, 17 S. E. 640, to the point that one having notice of an invalid conveyance may disregard it.]

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495–501; Dec. Dig. ⇨228.]

Before Wardlaw, Ch., at Fairfield, July, 1851.

Wardlaw, Ch. The principal matter of litigation in this case is as to an alleged parol gift of slaves.

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\*Malinda Keith is the mother of the plaintiffs, Nancy and Priscilla, the widow of Samuel Boyd, and sister of the defendant, J. B. Coleman. She and the defendant administered upon the estate of Samuel Boyd, the defendant taking the principal management. John Boyd and Nancy, his wife, testify, that, at the administrators' sale of Samuel Boyd's estate, on February 2, 1836, Malinda Boyd having bid off three slaves, Nelson, Jim and Harriet, for the aggregate sum of eighteen hundred and sixty-four dollars, led the slaves into the house where her children were, Nancy, then about two years old, standing by the side of the witness Nancy Boyd, and Priscilla, being about one month old, in witness's lap, and formally gave Nelson to Nancy, Jim to Priscilla, and Harriet to Nancy and Priscilla jointly.

The first question in the case is, whether these witnesses deserve credit. John Boyd is assailed for defect of understanding, and Nancy Boyd for defect of character. The at-



tack upon the former failed signally. The evidence showed that he possessed a mind not strong, but quite sufficient to remember and to state facts accurately, and that he was of a very truthful nature. In relation to the latter it was proved, that she was formerly lewd, but that for the last three or four years she had seemed to be continent, and that her character for veracity had not at any time seriously suffered. I must adopt the testimony of these two witnesses as proof. Circumstances corroborating their testimony will hereafter appear.

It is next objected, that, at the time of the supposed gift Malinda Boyd had no legal estate in the slaves, as there had been no delivery of them to her. But she had taken possession of them after her bid, without committing a trespass; and that amounts to delivery. Again, as administratrix, she had the legal estate in the slaves, and was not bound to give further security beyond her administration bond for her purchases at the sale. Further, by the return of the sale bill, and her subsequent possession of the slaves,

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her title to them was after\*wards consummated formally; and this would accrue, by way of estoppel, to perfect the title of her donees.

The points mainly pressed in the defence are: 1. That the gift is void on account of the indebtedness of Malinda Boyd at the time, which indebtedness, it is said, was only discharged by the sale of the negroes. 2. That the gift is void under the Act of 1832 (6 Stat. 483). "No parol gift of any chattel shall be valid against subsequent creditors or purchasers, or mortgagees, except where the donee shall live separate from the donor, and actual possession shall, at the time of the gift, be delivered to and remain and continue in the donee, his or her executors, administrators or assigns." These points require a full statement of the facts.

The whole amount of Malinda Boyd's purchases at the sale of her husband, Samuel Boyd's estate, was about two thousand one hundred and twenty-two dollars and fifty-eight cents. In his accounts current to the Ordinary, the defendant acknowledges the receipt from her of seven hundred and four dollars, on December 16, 1837, and of nineteen hundred and fifteen dollars and fifty-three cents, in full of the balance, on April 1, 1841.

At July sitting in 1837, the defendant was appointed guardian of the plaintiffs, Nancy and Priscilla. In his returns to the Commissioner as guardian, he charges himself with the hire of negroes belonging to them, whether of the specific negroes in dispute did not distinctly appear, and he credits himself with sums paid to their mother, with whom they resided, for board of the children.

On the 10-12 October, 1838, Malinda Boyd

and John Keith intermarried. At that time Keith was indebted about six hundred and eighty dollars for land, but he became indebted to insolvency before his death on November 7, 1842. On December 22, 1838, Keith, with John Taylor as surety, gave a note to defendant for sixteen hundred and sixty-seven dollars, with interest from date,

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payable twelve months after date. The \*consideration of this note did not appear, and the note itself is produced, crossed or erased. Keith gave a receipt to defendant, May 3, 1841, for one thousand and six dollars and twenty-six cents, in full of his wife's share of the estate of her former husband, Samuel Boyd.

In the spring of 1842, Charles Coleman, father of Mrs. Keith and of defendant, died; and from his estate Keith and his wife received two negroes, and money to the amount of five hundred and sixty-five dollars, delivered and paid through defendant, as executor of Charles Coleman. On February 24, 1842, Keith being indebted to defendant in the sum of two thousand and twenty-three dollars and fifty-four cents, as defendant says in his answer, "for cash lent and otherwise," executed to him, in security for this debt, a mortgage for the three slaves, Nelson, Jim and Harriet, also of the slaves received from Charles Coleman's estate, and other property. The defendant further says, in his answer, "that the purchases made by the said Malinda Keith, at the sale of the estate of her first husband, the said Samuel Boyd, were not entirely paid to this defendant, as administrator of said estate, as aforesaid, until after the marriage of the said Malinda to the said John Keith; and that a considerable amount of her said purchases, at said sale, was included in the mortgage of the said John Keith, given to this defendant as aforesaid, and was not fully paid until the said mortgaged property was sold by the Commissioner in Equity."

After Keith's death, Coleman, the defendant, administered upon his estate, and in February, 1843, sold the estate, including what was mortgaged to defendant, excepting the negroes, Nelson, Jim and Harriet. Some two or three weeks before this sale, John Boyd, as he testifies, met defendant, at defendant's request, in a lawyer's office at Winstboro', with a view of making affidavit of the circumstances of the gift of these slaves by Malinda Boyd to her children, and then stated all the circumstances attending the

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gift; but it happening that \*no magistrate was present in the town at the time, John Boyd was requested to attend on the day of sale, for the purpose of making the affidavit. On the day of sale, John Boyd and one Jackson Coleman, a brother of defendant, did make affidavit of the gift before Josiah Hinant, a magistrate, in the presence and hear-

ing of defendant Coleman. After this affidavit, on the same day, the negroes were offered for sale by defendant, as administrator of Keith, when the sale was forbidden by Mrs. Keith in behalf of her children, and the defendant said, as L. J. Vaughn testifies, he knew that these three negroes were the property of the children, but this would satisfy the creditors of Keith. John Taylor proves the same declarations of the defendant on the day of sale, and further testifies that, in April or May, after the sale, defendant said, at witness's house, these three negroes could not be touched for Keith's debts—that Keith had mortgaged them to him with his own negroes, but that they belonged to the children of Sam Boyd. The defendant swears in his answer, that he never heard of the claim of the plaintiffs until after the death of Keith, when it was ascertained that Keith's estate was insolvent, and that the defendant never knew nor recognized these slaves as the property of plaintiffs. In this round averment, he seems to be contradicted by John Boyd, Hinnant, Vaughn and Taylor—by John and Nancy Boyd, who think, but with no great positiveness of recollection, that he was present when the gift was made—and by his own return of the appraisement of Keith's estate, in which at the end, in different ink and writing from the former part of the appraisement, the three slaves, with their valuation, are set down, and it is remarked in the margin, "in dispute—the same are in dispute." Afterwards the defendant, as administrator of Keith, filed his bill in this Court to marshal the assets of Keith, and to foreclose his own mortgage, and under the order of the Court, the three slaves were sold by the Commissioner on January 6, 1845, and Nelson and Harriet were purchased by defendant, and Jim by one R. B. Hughes. The de-

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fendant \*received the purchase money. It is in proof that the children, Nancy and Priscilla, always lived with the donor, their mother, and that the slaves in question remained in her possession until the slaves were sold by the Commissioner.

I consider it unnecessary to decide, whether notice of the gift, to a subsequent creditor, purchaser or mortgagee, before the extension of the credit, or the purchase or the mortgage, would deprive him of the benefit of the Act of 1832; for although I may have some suspicion, I cannot say I have belief, that defendant knew of the gift before his mortgage was taken. If defendant had proved that Malinda Keith had not paid for her purchase of the slaves except through the mortgage of Keith to him, I think defendant's liability for her devastavit subsequently accruing, or at the least manifested, notwithstanding the date of the administration bond was anterior to the gift, might have been well held as constituting the defendant a creditor or mortgagee subsequent

to the gift. But the fatal defect of the defendant's evidence, is, that he has not shown clearly that any portion of his sister's debt for the purchase was included in the mortgage, or that she owed any debt whatsoever; so as to make the doctrine of either of his objections applicable. The statements of the answer, as appear by the abstracts I have given, are not distinct as to the amount of the wife's debt which was carried into Keith's mortgage; and the evidence does not establish that the minutest portion of her liability then remained unsatisfied. Mr. Leggo, who made the calculation for the parties when Keith's mortgage was executed, could not say that any part of the debt was on the wife's account. It is certain that nearly the whole was Keith's individual debt, for 'cash lent to him and otherwise;' and by no collation of the papers, can it be demonstrated, that anything beyond his private debt was secured. The date of the acquittance in full, in the defendant's accounts as administrator, of his sister's liability for her purchases, is nearly eleven months anterior

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to the mortgage. \*Upon the most favorable construction of the evidence for the defendant, we cannot say more than that, it is not unlikely that Keith's mortgage was partly for the debt of his wife; but considering that the defendant occupied the confidential relation of guardian to the plaintiffs, he could not destroy their interests, except by precise proof. Not a particle of evidence is offered of any other debt of Malinda Keith, besides that arising from her purchases at the sale of her former husband's estate. I think the defence fails in evidence.

It is ordered and decreed, that the defendant deliver to the plaintiffs, Cummings and wife, or to the trustee of the wife, the slave Nelson, and account for his hire, and one half of the hire of Harriet, and for the transactions generally of the defendant as guardian of the plaintiff, Nancy. It is also ordered that the defendant charge himself in his returns as guardian of the plaintiff, Priscilla, with the price of the slave Jim, sold by the Commissioner, and interest thereon, and with one half of the hire of Harriet. The parties may apply at the foot of this decree for a partition of Harriet, or other order to carry into effect the opinions herein expressed. The matters of account are referred to the Commissioner. The defendant must pay his own costs; the costs of the plaintiffs to be paid from their funds in the defendant's hands.

The defendant appealed, and moved the Court of Appeals in Equity to reverse the Circuit decree on the grounds:

1. That the evidence was not sufficient to establish a gift of the negroes in question from Malinda Boyd, now Keith, the mother, to complainants, Nancy Boyd (now Nancy Cummings,) and Priscilla Boyd.



2. That the evidence did not show a sufficient right or title to the property in the donor to authorize her to make a gift.

3. That if the testimony had established a

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gift, it was parol and void, under the Act of 1832, (6 Stat. 483), inasmuch as the donees, the complainants, lived with their mother the donor, and not separate from her, as required by the Act, and the slaves never were in the possession of the donees, but remained in the possession of the donor until she married John Keith, into whose possession they then passed; whilst the defendant was a large creditor of the donor, and claims as subsequent mortgagee, and under subsequent purchasers.

4. That the pecuniary condition and circumstances of the donor when she made the gift, made it a fraud on creditors, and therefore void as against the defendant claiming as creditor.

5. That there was evidence to show that more than one thousand dollars, with interest from the time when the sale of Samuel Boyd's personal property became due (in 1837), being the difference between the purchases of Malinda Boyd, (now Keith,) at the sale amounting to two thousand one hundred and twenty-two dollars and fifty-six cents, and her distributive share of the same amounting with interest, May 3, 1841, to one thousand and six dollars and twenty-six and one-third cents, must have been assumed by John Keith after his intermarriage, October, 1838, and included in his mortgage for two thousand and twenty-three dollars and fifty-four cents, February 24, 1842, to defendant; as said Malinda, until one year after her father's death, in March, 1842, had no funds or resources excepting this distributive share for payment; and her husband, John Keith, was bound in law to pay the balance due.

6. That the Court should have directed an issue at law, to try the fact whether a gift was made; and also whether any portion of the debt due by Malinda Keith to the defendant, and what portion, was included in the mortgage of John Keith to defendant; for reason, that the testimony was complicated,

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\*contradictory and doubtful, and its credibility in part seriously impeached.

After argument the case was ordered to this Court, where it was now heard.

Hammond, Buchanan, for appellant.  
Boylston, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. Upon examination of the answer in this case, it appears that the defences pleaded are, that no gift was made to the female plaintiffs by Malinda Boyd, afterwards the wife of John Keith—that the donor had no legal estate in the chattels at the time of the gift—that the gift is void from

the indebtedness of the donor at the time of gift—that the gift is void under the Act of 1832, (6 Stat. 483,) as to the defendant, a subsequent creditor of the donor, inasmuch as the donees lived with the donor, and had no actual possession of the chattels given—that defendant is a subsequent creditor and mortgagee, without notice of the gift, of John Keith, afterwards husband of the donor—and that if notice be fixed upon him, he, as administrator of John Keith, is entitled to administer the chattels given, as assets of his intestate, in behalf of creditors of Keith, who had no notice of the gift. We are satisfied with the conclusions of the Chancellor as to all of these grounds of defence, and we consider it necessary to add little to his reasoning. It is well, however, to say that no indebtedness whatsoever of the donor, at the time of the gift, or subsequently, is proved, unless we assume, in the absence of express proof, that she and defendant joined in one administration bond. It is the usual, but not the necessary course of proceeding, that joint administrators give a single bond. The

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defendant was no creditor of Malinda Boyd, unless he were surety upon her administration bond. If she gave a separate bond for her administration of the estate of Samuel Boyd, to which bond the defendant was no surety, she never incurred debt to her co-administrator; and supposing that she committed a devastavit in giving away the estate, she incurred a debt to herself, which was extinguished by the concurrence of the characters of debtor and creditor; and she could be made responsible on her bond as administratrix, and not otherwise.

The discussion in this Court has been principally concerning the truth of the proposition, that by marriage a husband becomes purchaser for valuable consideration of the wife's chattels in possession, in the sense in which the term purchaser is used in the Act of 1832. A general rule in the interpretation of statutes is, to define the words employed by the Legislature, in their popular sense. It was argued before us, that the term purchaser, in the Act of 1832, must be understood in the technical sense of one who acquires estate by any other mode than by descent. This distinction between purchase and descent is applicable to real estate only, for personal property is never acquired by descent; and if applied to personalty, this definition of purchase would lead to the absurdity that a subsequent, voluntary donee might set aside a previous gift by his donor. Purchaser in the Act of 1832, must mean one who buys the chattel for money or other valuable consideration. Whether the husband is a purchaser in this popular sense, under the Act of 1832, is a question upon which we have attained no conclusion; and we reserve the decision of it until it may be presented by proper pleading. In the pres-

ent case, the question is not presented by the pleadings. It is true that the marriage of Keith with the donor, and his subsequent possession of the slaves, the subject of gift, are stated in the answer; and this statement might be considered as sufficient allegation that the husband was a purchaser; but the material, integral, portion of this defence, that the husband purchased without notice,

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\*is altogether omitted. This omission accounts for the fact, that defendant's claim as mortgagee of the husband in the character of purchaser from the donor, was not argued on the Circuit, nor considered by the Chancellor. The point that a husband is a purchaser under the Act of 1832, is very vaguely, if at all, suggested in the grounds of appeal. In the third ground of appeal, which is the only one containing any hint of the point, the last words "subsequent purchasers" more naturally refer to the purchasers under the sale for foreclosure, than to a single purchaser, the husband.

If Keith had notice, before marriage, of the gift made by his wife while Malinda Boyd, the gift was no fraud upon his marital rights: on the contrary, it would be a fraud in him to purchase the chattels with the view of avoiding the gift. Where one has notice of an instrument of conveyance void for incompleteness of execution, for example, of a devise of lands without attesting witnesses, he may safely, notwithstanding notice, treat the instrument as legally invalid, and, in disregard of it, may make a contract concerning the subject. Not so of an instrument complete in itself, but declared void by the Legislature, from considerations of policy, as to particular classes of persons. Now a parol gift of a chattel, although the donee may not have actual and separate possession, is as complete and valid, since the Act of 1832, as before, so far as concerns the parties, volunteers claiming under them, and all other persons, except subsequent creditors, purchasers and mortgagees, who may avoid the gift. One who credits a donor in possession of a chattel, looking to the chattel for payment, or buys or becomes mortgagee of the chattel, after notice

of a gift of it, commits a fraud upon the donee, and deserves no favor in a Court of Equity. The want of notice of the gift to the husband, Keith, is an essential part of the defendant's defence; and of course should have been alleged in the answer. Besides answering the plaintiff's case as made by the bill, a defendant must state to the Court in the answer, all the circumstances of which

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he \*intends to avail himself by way of defence; for it is a rule, that a defendant is bound to apprise a plaintiff, by his answer, of the nature of the case he intends to set up, and that, too, in a clear and unambiguous manner; and a defendant cannot avail himself of any matter in defence, which is not stated in his answer, even though it should appear in his evidence. *Dan. C. P.* 814, 992; *Stanley v. Robinson*, 4 C. E. C. R. 544; *Harrison v. Borwell*, 16 E. C. R. 380; *Smith v. Clarke*, 12 Ves. 477. A plea of purchaser for valuable consideration without notice, must set forth the various requisites of the defence with such convenient certainty as to form a definite issue when traversed, and must not rest in intendment, or in general terms and allegations. 2 *White & T. L. C.* pt. 1, 116; *Story, Eq. Pl.* 806. Amongst other things, such plea must deny notice of the plaintiff's title, or claim, previously to the execution of the deed and payment of the purchase-money. *Dan. C. P.* 777. As Chancellor Harper remarks, in *Chesnut v. Strong*, 2 *Hill, Ch.* 150, "when the want of notice is relied upon as a defence, the defendant is required to deny the notice explicitly on oath."

It is scarcely ever safe to allow deviations from the regular procedure of the Court; and where the general justice of the case is so clearly against a defendant, as in the present instance, there is special propriety in restricting him to the defences he has regularly stated.

It is ordered and decreed, that the decree be affirmed and the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., and O'NEALL, WARDLAW, FROST and WITHERS, JJ., concurred.











REPORTS  
OF  
CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

VOLUME VIII

FROM NOVEMBER AND DECEMBER TERM, 1855, TO MAY TERM, 1856  
BOTH INCLUSIVE

By J. S. G. RICHARDSON

STATE REPORTER

CHARLESTON, S. C.  
McCARTER & CO.  
1856

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# CHANCELLORS

DURING THE PERIOD COMPRISED IN THIS  
VOLUME

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HON. JOB JOHNSTON,  
“ BENJ. F. DUNKIN,  
“ GEORGE W. DARGAN,  
“ F. H. WARDLAW.



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# CASES IN EQUITY

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA—NOVEMBER AND DECEMBER TERM, 1855

CHANCELLORS PRESENT,

HON. JOB JOHNSTON,  
" B. F. DUNKIN,  
" GEORGE W. DARGAN,  
" F. H. WARDLAW.

8 Rich. Eq. \*9

\*THOMAS C. AUSTIN v. WESLEY  
PAYNE and Others.

(Columbia. Nov. and Dec. Term, 1855.)

[Wills ⇨495.]

Conveyance of land and negro to trustee in trust for the sole use of feme covert for life, and after her death to the use of the heirs of her body:—*Held*, that upon her death the heirs of her body took as purchasers.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1064; Dec. Dig. ⇨495.]

[Wills ⇨608.]

Where the estate of the ancestor and that limited to the heirs are not of the same quality, that is, where one is equitable and the other legal, the rule in Shelley's case does not apply.

[Ed. Note.—Cited in Markley v. Singletary, 11 Rich. Eq. 401; Burnett v. Burnett, 17 S. C. 550; Gadsden v. Desportes, 39 S. C. 144, 17 S. E. 706.

For other cases, see Wills, Cent. Dig. § 1372; Dec. Dig. ⇨608.]

[Wills ⇨608.]

[Cited in Monaghan v. Small, 6 S. C. 182, to the point that the rule in Shelley's Case has no application to personalty.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. ⇨608.]

[This case is also cited in Duckett v. Butler, 67 S. C. 134, 45 S. E. 137; Clark v. Neves, 76 S. C. 488, 57 S. E. 614, 12 L. R. A. (N. S.) 298; Boyles v. Wagner, 91 S. C. 185, 74 S. E. 380, as to the rule in Shelley's Case.]

Before Johnston, Ch., at Greenville, July, 1855.

James McDaniel, on the 11th day of February, 1836, executed a deed, by which, in consideration of his natural love and affection for his daughter, Rosa Manning Payne, wife of Wesley Payne, and of the sum of two hundred and twenty-five dollars to him paid by Thomas C. Austin, he conveyed to the said Thomas C. Austin, a

certain tract of land and a negro girl named Rachel, "to have and to hold all and singular the premises above mentioned, and the said negro girl Rachel and her future increase unto the said Thomas C. Austin and his heirs, in trust, for the sole use, behoof

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and benefit of my said \*daughter Rosa Manning Payne, during her natural life, she to enjoy all the rents, profits and proceeds of the said premises, and the hire, labor, and services of the said negro girl, to her sole use during her natural life, and at her death, in trust for the sole use, behoof and benefit of the heirs of her body."

Rosa Manning Payne died in 1851, leaving a daughter Susan, wife of Matthew Heldman, a son, James Payne, and Wesley Payne, her husband.

The bill was filed by the trustee for a sale of the property, and for distribution of the proceeds among the parties entitled. A sale had been ordered, and the only question remaining was as to the mode of distributing the proceeds of the sale.

His Honor held, that by a proper construction of the deed Rosa Manning Payne took only a life estate in the property, with remainder to her children who took as purchasers, and that her husband, Wesley Payne, had no interest in the estate, and it was so ordered and adjudged.

The defendant, Wesley Payne, appealed.

Townes, Campbell, for appellant.  
Sullivan, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The solution of the inquiry presented by the defendant's ground of appeal depends upon the character of the in-

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes



terest which his wife took under the deed of James McDaniel. It seems to be insisted that according to the rule in Shelley's case she took a fee conditional in the realty; and that her interest in the personalty was absolute. This rule (which, it may be remarked, has no relation to personalty,) is, that where an estate of freehold is limited to a person, and the same instrument contains

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a limitation either mediate or immediate, to his heirs, or the heirs of his body, the word heirs is a word of limitation, i. e., the ancestor takes the whole estate comprised in this term.<sup>(a)</sup> Thus if the limitation be to the heirs of his body he takes a fee tail, or fee conditional; if to his heirs general a fee simple. And this rule applies to equitable as well as to legal interests. So often has this rule been recognized in this State, and so well is it established, that in some of the cases it is called a rule of property rather than of construction. But a difficulty frequently arises in determining upon the application of the rule. Although it is well settled to apply to equitable as well as legal interests, yet it is equally well established that, in order thus to coalesce, the estate of the ancestor, and the limitation to the heirs, must be of the same quality, that is both legal or both equitable. "Thus, it frequently happens that a testator devises land in trust for a person for life, and, after his death, in trust for the heirs of his body, but gives the trustees some office in regard to the tenant for life, that causes them to retain the legal estate during his life, but which, ceasing at his death, does not prevent the limitation to the heirs of the body from being executed in them. In such cases, by the rule thus stated, they, that is, the heirs, are purchasers."<sup>(b)</sup> Let us apply these principles to the deed of McDaniel. It is recited in the deed, that Rosa Manning Payne was the wife of the defendant, Wesley Payne, and it is provided, that she shall enjoy the rents, &c., during her natural life, to her sole use. If the purposes of the deed, in any possible event, require that the legal estate should remain in the trustees, the use is not executed by the statute, but the legal estate remains in the trustees and the interest of the cestui que use is merely equitable. Upon this principle it has been often decided that a trust to permit a feme covert to receive the rents for her separate use vests the estate in the trustees. See 2 Jarm.

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on Wills, 203, and the authorities there cited. The interest of Rosa Manning Payne was, therefore, merely equitable. The estate remained in the trustees so long as it was necessary to secure the property to her separate use. But this necessity ceased at

(a) 2 Jarm. on Wills, 242.

(b) 2 Jarm. on Wills, 243.

her death; and, in the language of the authority, "did not prevent the limitation to the heirs of her body from being executed in them." The use was executed in them and they took the legal estate. Their interest and that of their ancestor being, therefore, of different qualities, could not coalesce, and the rule in Shelley's case is inapplicable. The heirs of the body took as purchasers, and not by limitation. Of course, the husband can take no interest in the realty under this description.

Then as to the interest of the husband in the slave and her issue. Neither the rule in Shelley's case, nor the statute of uses, has any relation to personalty. The legal title is in the trustee. He held the slave for the wife's separate use during her natural life, and at her death to be delivered to the heirs of her body absolutely. The defendant took, consequently, no interest either in the real or personal estate, and was properly excluded by the decretal order.

The appeal is dismissed.

JOHNSTON and WARDLAW, CC., concurred.

Appeal dismissed.

#### 8 Rich. Eq. \*13

\*NOAH R. REEVES, and Others, v. JOHN G. GANTT.

(Columbia. Nov. and Dec. Term, 1855.)

[Deeds  $\S$  56.]

Bill by the representatives of R. T. to set aside conveyance of all his land and negroes by R. T. to J. G., on the ground of mental incapacity and imposition. R. T. was eighty years old at the time of the conveyance, and the consideration consisted principally of notes given by R. T. to J. G. from year to year, for store accounts for goods purchased by R. T.'s negroes. Bill dismissed, there being no sufficient evidence, under the circumstances, of fraud or mental incapacity.

[Ed. Note.—For other cases, see Deeds, Cent. Dig.  $\S$  153; Dec. Dig.  $\S$  56.]

Before Johnston, Ch., at Anderson, June, 1855.

The circuit decree states every thing necessary to a full understanding of the case, and is as follows:

Johnston, Ch. This is a bill by the administrators of one Henry Trussell, to set aside conveyances made by him of his land and negroes to the defendant, on the ground of mental incapacity and imposition.

Trussell was, at the time, about eighty years of age. He had been active in his young days, of business habits, industrious, frugal and somewhat prosperous, and had acquired a small tract of land of about one hundred and forty acres, and five slaves. Until ten or fifteen years before his conveyances to Gantt, he had made good crops, had enough about him for his plain habits, and sometimes was able to loan money.

But with advancing years, necessarily attended with abatement of activity, his crops and income became less. Still, having, however, neither wife nor child, living on his plantation with his negroes, he continued, as long as he could get about, or exert a control over them, to keep nearly even with the world.

But in 1847, he was crippled by a fall from his horse, and from that time was seldom able to leave home, and used a staff or crutch when out of doors, and perhaps within the house.

He was always very indulgent to his slaves. After having become enfeebled by age and

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infirmity, he allowed them to do \*pretty much as they pleased. He gave them many liberties, allowed them to take up goods, liquor, groceries, &c., both for use and sale; and the consequence was, as uniform experience proves in every like case, they idled away their time, dressed extravagantly, and laid the sure foundation of their master's ruin, and of their own sale into other hands.

In 1840 he opened an account with the defendant, a small shop-keeper and grog-seller, about a mile from his house. The amount taken up was a mere trifle that year; but, year by year, the annual expenditures increased, little by little, until about the year 1846, from which time it grew rapidly till 1851. He paid but little on the yearly accounts, but closed them punctually by note. His habit was to include in the accounts what the negroes took up. Indeed, it is in proof that in another neighboring store, he gave orders that they should get whatever they called for, and he would pay for it; and so, we may presume, he did with Gantt, for though we have no explicit proof of such order in his case, the uniformity with which he settled, by note, the accounts, in which their large dealings were included, is strong evidence that their dealings were made with his permission.

From the year 1847, he avoided the annoyance of giving special orders, giving them passports to trade, and (in the instance of the other store-keeper, Mattison) gave an unlimited written order, pledging his own credit for payment.

Not only did he take up articles in this way from Gantt, but in many instances he sent him persons holding small demands on him, such as due bills, to ask him to take them up.

In this way he went on from year to year, until on the 14th of March, 1851, he was indebted to him, (including interest on his notes) in the sum of two thousand four hundred and eighty-three dollars and fifteen cents.

Mattison had by this time sued him on a note which he held for upwards of three hun-

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dred dollars, and was on the eve of \*obtain-

ing judgment, which he in fact did at the spring court of that year.

So the note to Gantt (of two thousand four hundred and eighty-three dollars and fifteen cents) was taken by way of anticipating Mattison, and on the day it was given, Trussell signed a confession upon it, with the intention to give Gantt a preference—Trussell being provoked that Mattison had sued him.

But, before Gantt's judgment was entered up, a different arrangement was made between him and his debtor, by which the land, (one hundred and forty acres) and five slaves of the latter (Charity, an old woman; Sarah, a girl twelve or thirteen years of age; Maria, a wench about thirty-two or thirty-five years; Strother, a deaf and dumb boy, from eight to ten years, and Louisa, about fifteen or sixteen years old) were sold to Gantt for two thousand six hundred dollars. This bargain was perfected the 20th March, 1851. On that day Trussell conveyed the property to Gantt, and Gantt gave him his note for the excess of the price above his demand on Trussell.

Mattison upon obtaining his judgment, contested the conveyances as colorable, and levied on the land. It was sold under his execution, and Gantt forbade the sale. As a consequence it sold for a trifle, and Mattison bought it at fifteen dollars. He then took Trussell with a ca. sa. Trussell rendered a schedule, on oath, including some trifles, among which was Gantt's note (of about one hundred and fourteen dollars) given on the sale made to him; but excluding the land and negroes he had sold to Gantt.

Mattison contested the schedule. But while the litigation in relation to it was going on, an arrangement was made between himself and Gantt, by which Trussell was released. By this arrangement, Gantt bought up and took an assignment of Mattison's judgment, and Mattison conveyed to him (by quit claim) the land he had bought. The Sheriff's deed to Mattison bears date the 2nd

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of June, 1851, and Mattison's deed to \*Gantt, (as also the assignment of his judgment) is dated the 5th January, 1852.

Trussell went back to his old place, where he remained until his death, which occurred the 29th March, 1854.

The plaintiffs administered on his estate, and Gantt fearing their interference with the slaves, removed them to his own house.

The bill was thereupon filed the 8th May, 1854.

Having given a rapid sketch of the circumstances of the case, I shall leave most of the particulars to be gathered from the pleadings and the proofs offered at the hearing.

In this case it is hardly necessary to say, the land is out of the question. The conveyance of Mattison forms a good title to it, whether the arrangement between Gantt and Trussell was intended to defraud that creditor or not.



If such fraud was intended, the parties to it were equally guilty, and the settled practice is that neither of them (nor, of course, their privies) is entitled to relief as against his confederate.

If there was no such fraud, but it is insisted that Gantt defrauded Trussell, (irrespective of Mattison) then as to this real estate, relief is due, not to the administrators, but to the distributees of Trussell, who are not parties.

The only real points of the case, relate to the slaves.

The allegation is, that Trussell was by mental imbecility, incapacitated to make the conveyances, and that imposition and undue influence was practised upon him by Gantt, either directly or through the negroes.

If there was fraud and imposition in the accounts, or undue influence, there is no trace of it in the evidence. There is no proof of a single act which Gantt, directly or indirectly induced him to do, or prevented him from doing. And this observation may be applied to the conveyances, as well as the dealings which preceded them.

If there was fraud in the accounts, these

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were confirmed, \*and the fraud was waived again and again, and year by year, by Trussell in giving his notes. Then the consolidated note of March 14, 1851, was another waiver, the confession was another, and lastly, the conveyance was a final and conclusive waiver. Then again, the conveyance itself was affirmed, on oath, by Trussell's schedule. He never complained till the day of his death, but acquiesced for three years in perfect silence. Are not his personal representatives equally concluded with himself?

My observations are only applicable if he had capacity. But there is almost an uninterrupted current of witnesses to establish his capacity. There is a difference among the witnesses as to the adequacy of the price paid by Gantt, but the inadequacy is not such (taking the highest estimates) as to infer fraud. And taking all the testimony together, especially considering the great preponderance of proof as to capacity, there is nothing to justify the invasion by this court of the contract of the parties.

There was, indeed, one view taken by counsel, behind all their dealings:—which, if it can be sustained, must overthrow every act done by Trussell. Not only his conveyance and its after confirmation by him, but every act by which he affirmed the accounts of Gantt, all must fall to the ground, if this view be correct, because it exhibits Trussell in the light of a perfect idiot, from first to last.

It was argued for example, that the man who would give an unlimited order, to let his negroes have whatever they wanted, thus making himself responsible for whatever their undisciplined tastes and habits might

covet, cannot possibly have been any thing else than a downright fool, and utterly incapable of business. Of course, if this is so, then all the confirmations in the world, must be unavailing, because the confirmations themselves, are but the acts of the same incapable person, and no more binding than the original contracts.

A close examination of the accounts would

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tend much, if \*this were a common case, to sustain the view so energetically urged by Mr. Reed, one of the plaintiffs' solicitors.

There is no doubt that no ordinary man, not precisely in Trussell's situation, would have allowed such dealings, inevitably leading to his impoverishment. An ordinary man would have relieved himself, as early as 1840, from the expense and annoyance of these negroes, by selling them outright.

But Trussell's case was peculiar: he never had any family, or domestic companions, but these slaves. His increasing age served but to render them more necessary to his happiness. He was indulgent. He loved them; and the only aim of his remaining years was to make them happy, and to place them in the hands of some one likely to prove a kind master to them after he was gone. He declared that he did not value his property, that he did not wish his kindred the "Kays," to have it; that Gantt had been kind to him, and he owed him a good deal, and not wishing to separate his negroes, he intended to let him have them. Gantt was represented to be very indulgent to slaves. Here are exhibited at once all the grounds on which Trussell, as a reasonable man, may have proceeded. The unlimited discretion allowed to his negroes in taking up articles, was only to make them happy. Trussell had but a small remnant of his life before him, and if his property should expire with his life, what then? It could only go to Gantt, his kind friend, who would thus become the kind master of his slaves. All this is supported by evidence, and though it proves Trussell an over fond master, perhaps an imprudent man, it does not, (nor can it, unless imprudence and incapacity are the same thing, whereas they are quite distinct) prove him incapable.

I shall dismiss the bill, but I do not think this a case for costs.

It is ordered that the bill be dismissed. Each party to pay his own costs.

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\*The complainants appealed and moved this Court to reverse the decree, on the grounds:

1. Because it is respectfully submitted that his Honor overlooked the fact that the complainants are heirs at law, as well as administrators of Henry Trussell, deceased; and that all the heirs at law of the said Trussell, were parties, plaintiffs or defendants.

2. Because, the proof, together with the

circumstances of the case, it is respectfully submitted, show clearly, that Henly Trussell was wholly incompetent to transact his own affairs, and that he was in every respect a fit subject to be over-reached and defrauded, by the artful and designing.

3. Because the proof of age, infirmity and imbecility, on the part of the said Henly Trussell, connected with the undue influence and imposition of the defendant, John G. Gantt, exercised over him through the corrupt and corrupting agency, of his own slaves, made a case utterly abhorrent to the pure morality, and refined justice of this Court, and one that demanded that the several transactions between the parties, from 1847, to the death of Trussell, should have been set aside, as fraudulent and void.

4. Because it is respectfully submitted, that the express proof of the physical infirmity and mental imbecility of Henly Trussell, of itself, showed, that he was peculiarly a fit subject for the corrupt purposes of the fraudulent and designing shopkeeper; although from his bed-ridden and lonely life for many years, it was impossible to prove directly, to the full extent, what the circumstance placed beyond a doubt—his utter incapacity to manage his own affairs, or take care of himself from 1847 to his death.

5. Because the exhibits filed with the answers of the defendant, Gantt, designed to

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show the course of dealing between \*himself and the said Henly Trussell, and setting out the pretended consideration for which he purchased Trussell's land and slaves, of themselves, and without any other or sustaining proof, show alike, the total incapacity of Trussell, and the base and corrupting fraud practised upon him by the defendant Gantt.

6. Because it is respectfully submitted, that either mental incapacity, or fraud and undue influence, may be shown in a Court of Equity, where justice is administered under the dictates of an upright conscience, in conformity to the rules of law, as well by acts and circumstances, as by direct proof, and that this is a case in which both are conclusively made out, without the necessity of direct proof, from the mouths of witnesses.

7. Because the inadequacy of price at which the property was sold, and the fact that it was permitted to remain in Trussell's possession until his death, together with the character of the pretended consideration, and the imbecility of Trussell, make this a clear case of imposition and fraud on the part of the defendant Gantt; and complainants, it is respectfully submitted, should have had a decree accordingly.

8. Because the said Trussell was over-reached and defrauded by the defendant Gantt, in the pretended purchase of his property, in this, that he did not in fact pay for

the same, by several hundred dollars, the sum which he pretends to have paid, as shown by his own exhibits.

9. Because the accounts of the defendant Gantt, were made alone by the negroes of Trussell, without his knowledge or consent, so far as appears in the proof, and in closing said accounts, whenever requested, by notes, he showed, it is respectfully submitted, not only a weakness and imbecility sufficient in equity, to avoid all such transactions, but to establish his total alienation of mind.

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\*10. Because the items of accounts were purchased, if at all, entirely by the negroes of Trussell, without either the verbal or written permit of the owner, and said purchases were illegal, in direct violation of the criminal laws of the State, against the public policy, corrupting in the highest degree to the slaves of the country, and were severally a fraud upon the owner and the laws of the land, and therefore transactions resting upon such consideration and excuse, cannot be sustained in equity and justice, but demands the reprobation and correction of this Court.

11. Because the note given, and conveyance made by Trussell on the 20th day of March, 1851, of his entire property to the defendant Gantt, for so inadequate, illegal and worthless a consideration as the defendant relies on, considering his age, and entirely helpless condition, furnishes, it is respectfully submitted, instead of evidence to sustain the transaction, the most conclusive proof of his utter inability to understand or transact the ordinary affairs of life, and therefore, that he was over-reached and defrauded in the said conveyance.

12. Because even if the land was beyond recovery,—the defendant Gantt having the sheriff's title, as well as Trussell's—the negroes at least should have been decreed to the complainants.

13. Because the decree is in other respects, contrary to equity and justice, and should be reversed.

Reed, McGowen, for appellants.

Orr, Wilks, contra.

PER CURIAM. We concur in the decree, and it is ordered that the same be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurring.

Appeal dismissed.

8 Rich. Eq. \*22

\*M. A. MOORE v. JOSEPH CALDWELL, Ex'r, and Others.

(Columbia. Nov. and Dec. Term, 1855.)

[*Executors and Administrators* ¶435.]

Bill by creditor of testator to enforce his demand against executor, and legatees to whom



the assets had been delivered upon their undertaking to pay all demands against the estate:—*Held* that the Court had jurisdiction.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1720; Dec. Dig. ☞ 435.]

[Corporations ☞ 119.]

Contract under seal to purchase one-half of a share in an incorporated company, and the usufruct of a lot belonging to the company:—*Held*, to be upon sufficient consideration, although the company failed, the lot was sold, and the share proved to be worthless.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 499; Dec. Dig. ☞ 119.]

[Limitation of Actions ☞ 46.]

Where there is a covenant between M. and B. that B. shall satisfy certain demands for which M. is liable, and M. is afterwards compelled to pay those demands, the statute of limitations runs from the time of payment, and not from the date of the covenant.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 241; Dec. Dig. ☞ 46.]

[Contracts ☞ 51.]

[The opportunity for profit to the promisor forms a sufficient consideration for an agreement to purchase a share of stock in a corporation.]

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 224; Dec. Dig. ☞ 51.]

Before Johnston, Ch., at Newberry, August, 1855.

In September, 1837, a number of persons, with a view to form a watering place, entered into the following agreement:

"We, whose names are hereunto subscribed, promise to the sums annexed to our names; and, also agree to constitute and form a company to purchase from John B. Glenn, his mineral spring, and all the lands thereto attached, at the sum of fifteen thousand dollars; to consist of fifteen shares, at one thousand dollars, each; one-fifth to be paid on the transfer of said springs and lands,—with interest until all is paid; and it is agreed and understood that any subscriber who fails to pay his installments at the time they become due, that they forfeit their shares, and the amount they have paid to the company.

"D. Caldwell.....	\$1,000
M. A. Moore.....	1,000
Jno. K. B. Sims.....	1,000
R. Moorman.....	1,000
H. D. Van Lew.....	1,000
J. C. Wells.....	1,000
R. S. Brown.....	1,000
R. A. Nott.....	1,000
O. B. Irvine.....	1,000
Wm. C. Pearson.....	1,000
Ann Sims.....	1,000
Geo. Ashford.....	1,000
John B. Glenn.....	1,000
S. W. Shelton for L. N. Shelton, ..	1,000
Jno. W. Smith.....	1,000"

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\*To this paper, Wm. B. Thorne subsequently subscribed; it being agreed that Mrs. Sims should forfeit her share, and that it be transferred to him.

Cotemporaneously, the following instrument, intended as a note to Jno. B. Glenn, for the price of the premises was executed: Glenn himself subscribing it—

"We, either of us, promise to pay John B. Glenn, the just sum of fifteen thousand dollars, viz.:

\$3,000 on the 1st day of January next,
3,000 in January, 1839,
3,000 in January, 1840,
3,000 in January, 1841,
3,000 in January, 1842,

with interest annually, for value received, as witness our hands and seals, September 15, 1837.

"D. Caldwell,	[L. S.]
H. D. Van Lew,	[L. S.]
Geo. A. Ashford,	[L. S.]
R. A. Nott,	[L. S.]
S. W. Shelton for L. N. Shelton,	[L. S.]
M. A. Moore,	[L. S.]
J. C. Wells,	[L. S.]
R. Moorman,	[L. S.]
John B. Glenn,	[L. S.]
O. B. Irvine,	[L. S.]
Jno. K. B. Sims,	[L. S.]
W. C. Pearson,	[L. S.]
R. S. Brown,	[L. S.]
Ann Sims,	[L. S.]
Jno. W. Smith,	[L. S.]"

Subsequently, this singular instrument was subscribed by B. Ligon and Wm. B. Thorne; the former having taken the share of J. C. Wells, and the latter that of Mrs. Ann Sims.

The company was incorporated in December, 1837.

On the 6th of February, 1838, Glenn executed a deed to the corporation for the land, which consisted of several hundred acres.

On the 3d of October, 1839, Dr. Irvine, President of the Company, by its authority, mortgaged the premises to Glenn, as additional security for the four last instalments of the note.

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\*The capital paid in having been expended in improvements, the President, under a resolution of the Company, made a loan from the Bank of the State, of ten thousand dollars for further necessary purposes; for which he gave his note, as President endorsed by Richard Samuel Brown, and by the plaintiff, Dr. Moore, two of the above named stockholders.

By resolution of the Company, a small lot was allowed to each of the stockholders, and Brown took possession of his lot and improved it; but Dr. Moore let his lie unoccupied and unimproved.

To this statement it may be added, that each stockholder was entitled to one vote, in meetings of the stockholders.

In this situation the following contract was entered into between Brown and Moore:

"A bargain was made this day, between M. A. Moore and Samuel Brown, viz.: the

said M. A. Moore sells the one-half of his share in the Glenn Springs stock, (together with his lot,) to the said Samuel Brown, for the sum of three hundred dollars. It is further agreed and understood between the parties, that the said Brown is to be bound for one-half of the liabilities to John B. Glenn and the bank debt of the said Moore's share; and it is further agreed that the money is to be paid on the 1st day of January next, to the said Moore. And, further, the said Brown is to have two votes to the said Moore's one. Given under our hands and seals, February 4, 1840.

M. A. Moore, [L. S.]

R. S. Brown, [L. S.]

Shortly afterwards, Brown died, without having made the payments for which he had thus obligated himself: but leaving a will, of which the defendant, Joseph Caldwell, is executor, by which he devised his interests in the Glenn Springs Company to his wife, and the residue of his estate (in the events

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which \*have taken place,) to his two children, James L., and Martha, defendants in this case.

The Bank obtained judgment against the Company on its debt; under which the Company's possessions, including the lots were sold out, on the 4th of January, 1842, and the proceeds satisfied that debt, and a part of Glenn's as secured by his mortgage, leaving a balance still due to Glenn.

Glenn having died, and it having been decided at law, that no action could be sustained on the note he had taken,—he being one of the obligors; Patsy Glenn, his executrix, brought suit in this Court, in 1847, against such of the obligors as remained in this State, (including Moore, and Caldwell as executor of Brown,) and, in 1851, by final decree in appeal, Moore was obliged to pay over one thousand six hundred and nine dollars; which was collected from him the 7th of July, 1853.

Pending these proceedings, James L. Brown, son of R. S. Brown, came of age, and Caldwell, the executor, delivered to him, and to Dr. Eppes, guardian of the daughter, Martha, the whole residue of the estate in his hands, of which a schedule was made; under which they executed the following:

"We acknowledge the receipt of the above specified property, and all of the real estate of R. S. Brown, deceased, at the same time; and consequently bind ourselves to pay all of the outstanding debts and lawful demands against the said estate,—thereby relieving the above named executor from all liability on his part, as to outstanding debts, or demands against said estate,—this the 2d day of November, 1840.

"J. M. Eppes.

J. L. Brown."

"In presence of

Thos. B. Kennerly.

The bill was filed the 24th of May, 1854, against Caldwell, the executor, James L.

Brown, and Martha, with Thomas B. Kennerly, now her husband; and, upon the fore-

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going facts, \*claimed payment of the three hundred dollars, and also of half the sum which Moore was obliged to pay on Glenn's demand, with interest.

The defense was:—

1. That there was no consideration for the engagement, inasmuch as the share sold by Moore, as events proved, was worth nothing; and furthermore, he had no title to the lot.

2. The statute of limitations.

3. Want of jurisdiction.

Some evidence was taken. The case was heard August 2, 1855, when the following decree was pronounced.

Johnston, Ch. The want of jurisdiction is not, now, so frequently objected as formerly.

This Court has at length by the promptness of its procedure and the fullness of the remedies administered by it, so established the forum in the public confidence, that it is, now, very rare to hear such a plea interposed.

I do not perceive how the jurisdiction can be questioned in any case, where the decree renders full and complete justice between numerous parties, not all liable to be impleaded at law in the same action, in a matter where the legal remedy is not plain; or where, if plain, it is to be attained only by an expensive and dilatory circuit.

In this case it would be difficult to frame a declaration at law covering the complaint against the executor. But when to this is added the liability, accumulated upon him, by the transfer of assets to the legatees, and their engagement to answer in his place (to the benefit of which engagement the plaintiff is entitled,) it can scarcely be doubted that

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the plain\*tiff's remedy at law, upon the whole case, is neither so plain nor so adequate as to exclude him from this tribunal. (a)

Then, as to the consideration of Brown's agreement. The point seems to me to be misconceived.

It is true that the bank debt nearly consumed the whole property. There was little of its proceeds left to be applied to the purchase money due to Glenn. This does not prove that the Company had no title, but only that, having a title, the company was in debt. Brown knew this as well as Moore. Nor does it show that Moore had not in the stock of the Company, so circumstanced, the share (be it worth more or less,) which he sold. Brown knew the circumstances of the Company, and was as competent as Moore, to form a judgment of the value of the stock shares. He bought upon a speculation; and his engagement was to pay one-half the liabilities falling on the share he purchased, and an advance of three hundred dollars. The chance

(a) Vernon v. Ehrich's Ex'rs, 2 Hill, Eq. 257.



of profit was the consideration of his purchase. If a man purchase a share in a bank, and is not imposed on by fraud or concealment, can he be relieved because it turns out that it was a bad bargain?

There was, again, a full legal consideration in this case, in the transfer of the share; which is not impaired by the failure of the Company. This consideration consisted in letting in the purchaser to a share of the franchise.

As to the lot: let it be granted that Moore had no exclusive title. If he had sold the lot as his own private property, apart from his character of stockholder, still inasmuch as Brown knew the infirmity of the title, this could be no ground for a total rescision, but only for an abatement. It is proved to have rated so low as to be unworthy of consideration in the latter light. But the circumstances show that the usufruct of the lot as allowed by the Company, and as appurtenant to the stock share, was all that was contem-

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plated in the bargain. Brown, \*a co-stockholder, conversant with all the facts, understood all this very well, and is not to be excused from the contract, made by him with full knowledge.

Lastly, as to the Statute of Limitations. It is very plain that the three hundred dollars promised to Moore under seal could be recovered only in debt,—and the specialty by which it is secured is no more liable to the bar of the statute than any other bond. This is not disputed.

But then, it is said that the engagement to pay one-half the purchase of the share to Glenn, is a covenant; that the Statute instantly began to run; and this covenant was, by the terms of the Statute barred in four years.

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The point is misconceived. The suit is not brought on the instrument. The instrument is only used as evidence that one-half the sum paid by Dr. Moore to Glenn's executrix was Brown's debt; so acknowledged by him in this instrument. Moore has been obliged to pay that debt; and his suit is for the money thus paid for Brown. The statute runs only from the advance of the money to Brown's use; and the bill being filed within one year from that time, is not barred.

It is decreed that the defendants are liable to the plaintiff (the legatees primarily,) for the sum advanced, with interest from the advance; and for the three hundred dollars, with interest from the time it was due; and for the costs of this suit.

It is ordered that the commissioner take an account, and report the sum due.

The defendants appealed and moved this Court to reverse the decree on the grounds:

1. Because it is respectfully submitted, that if the plaintiff is entitled to any relief, he has plain and adequate remedy at law.

2. Because the consideration upon which the contract was founded, failed.

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\*3. Because the plaintiff's claim was barred by the statute of limitations.

4. Because the decree is in other respects contrary to law and equity.

Sullivan, Garlington, for appellants.

Fair, contra.

PER CURIAM. This Court approves the decree of the Chancellor, and it is ordered that the same be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

8 Rich. Eq. \*30

**\*I. L. BROOKS v. THE SO. CA. RAILROAD COMPANY.**

(Columbia. Nov. and Dec. Term, 1855.)

[Injunction  $\hookrightarrow$  113.]

Bill to compel defendants to open and not to obstruct certain streets alleged to have been dedicated by defendants' vendors. The alleged obstruction was in 1845, and the bill was filed in 1851:—*Held*, that plaintiff's remedy, if he had any, was by action on the case at law; and that, if he was at one time entitled to relief in this Court, he had been too tardy in prosecuting his claim.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 200; Dec. Dig.  $\hookrightarrow$  113.]

[Injunction  $\hookrightarrow$  4.]

[The proper jurisdiction of equity is to prevent mischief rather than redress a wrong consummated.]

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 4; Dec. Dig.  $\hookrightarrow$  4.]

Before Wardlaw, Ch., at Edgefield, June, 1854.

The circuit decree of his Honor, the Chancellor, is as follows:

Wardlaw, Ch. The plaintiff proceeds for the recognition of certain streets or roads, leading from his land over the land of the defendant to the town of Hamburg and to the Savannah River.

It appears that the executors of John Fox, deceased, with a view to the more advantageous sale of the Greenwich plantation, belonging to their testator, and lying on the Savannah River, immediately below the town of Hamburg, procured a portion of said plantation adjoining Hamburg, to be laid off by William Phillips into small lots and streets, as the site of a projected town, to be called Greenwich, and procured the remnant to be divided into small farms. On November 14, 1837, the said executors proceeded to sell said lands, at public outcry, in lots and farms, and exhibited a plat which designated the lots and farms by numbers and dimensions, and the streets by names and dimensions. The executors of Fox are named as defendants to this bill, but they are not before the Court according to regular procedure. It is set down in the return of the executors to the Ordinary that the South Carolina Railroad Company bid off one of the lots and two of the farms at this sale, but there is no competent evidence that any officer or agent of the Company was present at the sale, or even had notice of the plat. Afterwards, however, the Company took the place of some of the bidders at the sale;

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\*and on December 2, 1839, in consideration of \$10,448.10, received a conveyance from the executors of one hundred and seventy-two and seven-tenths acres, part of the Greenwich plantation, as represented by a plat of William Buckhalter. It is said in the recital of this deed, that the tract conveyed had been sold by the executors at auction, on

Nov. 14, 1837, in divers lots and parcels; but no mention is made of streets in any part of the deed. At the public sale aforesaid, plaintiff, through his agent, John Cloud, bid off two of the farms, but none of the town lots; and on January 5, 1843, in consideration of \$6,071.47, received a conveyance from the surviving executors of farm No. 1, containing one hundred and nineteen acres; farm No. 2, containing three hundred and sixty-three acres, (apparently bid off by defendant;) and farm No. 3, containing forty-nine acres. It is from the last tract that the right of way is claimed; and it may be proper to copy the description of the boundaries: "Bounded south-east by lands of said I. L. Brooks, south-west by a branch or small stream, separating it from the town of Greenwich as delineated on said plat," (meaning a plat made by Wm. Phillips, and exhibited at the time of sale,) "north-west by a ditch separating it from the lands purchased at the same time by the South Carolina Railroad Company, and north-east by a line running parallel with the said Railroad, on the south side of the same, and at the distance of one hundred and seven feet from the centre of said road." This deed grants no right of way, and makes no mention of streets. It does not appear that Greenwich has ever existed as a town, except on the Surveyor's plat; nor that the streets delineated on the plat have been accepted by any public authority or used by the people. In 1845, the defendant erected a new depot, obstructing some of said streets, and in the same year leased some adjoining lands to one Burley; and this tenant, without giving notice to the Company, so far as appears, for two or three

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years gave license to the plaintiff to \*pass over the leased premises with his wagons, &c., on condition he kept the gates shut at all proper times.

This bill was filed February 26, 1851; and the only prayer of it affecting the defendant is, that the Company may be required to open and not to obstruct the said streets in the town of Greenwich. The answer denies that the land conveyed to the defendant was purchased with reference to any streets laid out or to be laid out over it; denies all knowledge that a plat was exhibited on the day of sale; and pleads the Statute of Limitations.

The case of the plaintiff seems to me to be so full of difficulties as to render it quite unnecessary to elaborate the argument.

1. The proper remedy of the plaintiff, if he be entitled to any, is by the action on the case in the Common Pleas. He goes for relief, and not for prevention; whereas, the proper jurisdiction of this Court in such case is to prevent irreparable mischief, rather than to redress a wrong consummated. (*Wilson v. Cohen, Rice, Eq. 80.*)



2. The plaintiff has established no private right of way in any mode known to the law. Not from necessity, for he has practicable routes over his own land to Hamburg and the river, although not so easy, short and convenient as the one he seeks to establish. Not by grant, for he proves no agreement with defendant on the subject, and even his conveyance from the executors of Fox implies no such easement to him. Not by prescription, for he has exercised no such claim adversely at any time, and the whole time since his ownership is too brief for such a presumption.

3. If plaintiff claims the right as incidental to the dedication of the streets in Greenwich by the executors of Fox to the purchasers of the lots, there are various answers. How-

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ever this \*dedication may commit the vendors, it cannot implicate the defendant, who had no notice of it. (*Livingston v. Mayor of N. Y.*, 8 Wend. 85, 98.) Besides, the dedication was merely inchoate and rescinded by the subsequent conveyances. Again, plaintiff was not a purchaser of a town lot, and accepted a conveyance of a farm expressly separated from the projected town. There has been no acceptance of the dedication by the plaintiff or any portion of the community; and such acceptance is necessary to the establishment of a public street. (*State v. Carver*, 5 Strob. 217.) Finally, plaintiff has been too tardy in presenting his claim.

It is ordered and decreed that the bill be dismissed.

The plaintiff appealed, and moved this Court to reverse the decree on the grounds:

1. Because it is submitted that this is the proper jurisdiction in which alone the plaintiff can obtain adequate relief, by compelling the defendant to open, and not to obstruct the streets leading to the Savannah River, which were laid down and platted as appurtenant to the tract of land purchased by the plaintiff of the executors of Fox.

2. Because the President of the said Railroad Company had full and ample knowledge of the manner in which the Greenwich plantation was laid off and sold at auction, in town lots, streets, and small farms, and became a purchaser at that sale of a part thereof, and therefore the said Company should not be allowed to set up want of notice in bar of the relief sought by the plaintiff.

3. Because the plaintiff is entitled to a right of way through the streets of Greenwich, as platted, to the Savannah River, because the executors of Fox, when they sold

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to the plaintiff \*the land in question, represented and exhibited by a plat, public streets leading from the margin of said land to the river, and it was in reference to the convenience and value of those streets to

the plaintiff that he was induced to make his said purchase.

4. Because the said Railroad Company, being subsequent purchasers from the executors of Fox, with full notice and knowledge of all the facts, should be held bound by all the obligations which rested on the executors of Fox to keep the streets open or give a right of way to the river for the benefit of plaintiff.

Bauskett, for appellant.

Bonham, contra.

PER CURIAM. This Court concurring in the decree of the Chancellor, it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

### 8 Rich. Eq. \*35

\*MOURNING ROBERTS v. JOHN W. LESLY.

(Columbia. Nov. and Dec. Term, 1855.)

[*Wills* ⇐682.]

Testator bequeathed property real and personal to M. R., a single woman, "to her, and her heirs forever," and directed that the property be turned into money, that the money be put out at interest, and the interest paid annually to her; and he appointed J. C. "trustee and executor with full powers to carry this will into effect;" and should J. C. die, "then it is my will that the ordinary for the time being for Abbeville, appoint a trustee to the said M. R., and successor to the said J. C.:"—

*Held*, that the property, before sale, and the proceeds after sale, belonged absolutely to M. R., and that she had power to control and dispose of it as she pleased.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1608; Dec. Dig. ⇐682.]

[*Trusts* ⇐157.]

J. C. sold the property and paid the annual interest to M. R. until his death. After his death his executor, with the concurrence of M. R., petitioned D. L., ordinary of Abbeville, to take charge of the money and manage it "as trustee or as an estate derelict." The money was accordingly transferred to D. L., who paid the annual interest to M. R., until 1850, when he transferred the fund to F. S., his successor in office. F. S., paid the annual interest to M. R., for three years, and then died, insolvent:—

On bill filed, 13th March, 1855, by M. R., against the executor of D. L., *held*, that she could not recover,—she was barred by the statute of limitations, and by accepting the annual interest from F. S. had ratified the transfer to him.

[Ed. Note.—Cited in *Beard v. Stanton*, 15 S. C. 170.

For other cases, see *Trusts*, Cent. Dig. § 203; Dec. Dig. ⇐157.]

Before Johnston, Ch., at Abbeville, June, 1855.

Benjamin Beal, of Abbeville, by his last will, dated the 27th of August, 1827, provided as follows:—

"As to my worldly affairs, I will and bequeath as follows, that is to say:

"I will and bequeath all my negroes to Lucinda Gray, to her and her heirs forever.

"And to Mourning Roberts I will and bequeath the balance of my estate, both real and personal, consisting of cash on hand, notes, book accounts, horses, saddle and bridle, bed and furniture, &c., &c., and the whole of the moiety of the tract of land I am entitled to, and on which my father resided, to her and her heirs forever, in the following manner, viz: I will that the bequeath to Mourning Roberts aforesaid, be turned into ready money, and the money to be put out to interest, and, after deducting all necessary expenses, the amount of interest

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to be \*paid over annually, to the said Mourning Roberts, for her use and benefit.

"And I hereby appoint James Calhoun, trustee and executor, with full powers to carry this my last will and testament into effect.

"And should the aforesaid James Calhoun refuse to act, or dies, or removes from the district, then it is my will that the Ordinary for the time being, for the district of Abbeville, appoint a trustee to the said Mourning, and successor to the said James Calhoun.

"It is further my will that my funeral expenses, and all other expenses, with debts I may justly owe, to be equally paid by my aforesaid legatees."

James Calhoun, during his life, duly executed the will, by selling the property mentioned in the will as given to Mourning Roberts, and paying her the annual interest of the nett proceeds. But he died the of January, 1843, leaving a last will and testament, of which his son, William Henry Calhoun, was executor. William Henry Calhoun continued, as his father had done, to loan out the fund of Mourning Roberts, and pay her the annual interest, until the 1st of April, 1844.

On the 10th of December, 1843, he filed his petition in the Ordinary's Court (in which Mourning Roberts concurred) as follows: "South Carolina. Abbeville District.

"To David Lesly, Ordinary: The petition of William H. Calhoun sheweth, that James Calhoun, deceased, was the executor of Benjamin Beall, deceased, and executory trustee, in the will of the said B. Beall, deceased, for the interest or legacy of Mourning Roberts, who was to receive the annual interest of said legacy during her natural life.

"That by the will of the said B. Beall, deceased, it was also provided that, in case of

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the death of the said James Calhoun, \*as executor, the Ordinary of the district was to take charge of the said estate, or legacy, of the said Mourning Roberts.

"That the said James Calhoun has depart-

ed this life, and your petitioner is the qualified executor of his will; and that he is desirous, and in fact, determined, to give up his management of the interest of the said Mourning Roberts, as the representative or executor of the estate of his father, the said James Calhoun; and that there has been a settlement of the estate of Benjamin Beall, deceased, and of the interest which the said Mourning Roberts had therein, in the Ordinary's office, in 1843, in which it was decreed due to Mourning Roberts aforesaid some two thousand six hundred dollars; and the said Mourning Roberts having signified her desire and request for you, the said D. Lesly, as Ordinary, to take charge of her money as Ordinary or trustee, or as an estate derelict.

"Your petitioner prays that you, as Ordinary, take or receive the same into your hands, the estate or monies, legacy or interest of the said Mourning Roberts; and hold and manage the same as the will directs, and as the law contemplates you should as trustee, or an estate derelict."

On the first of April, 1844, William Henry Calhoun transferred the principal of the fund to Mr. Lesly; who thenceforth continued, year by year, to pay Mourning Roberts the interest so long as he continued in the office of Ordinary.

Having been succeeded in office by F. W. Selleck, who demanded the fund, Mr. Lesly (—first paying over the interest to Mourning Roberts, to the 1st of April, 1850—) stated an account with Mr. Selleck, his successor, showing a balance in his hands of two thousand five hundred and sixty-two dollars and twenty-five cents; under which he took the following receipt:

"This amount of two thousand five hun-

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dred and sixty-two \*dollars and twenty-five cents was this day paid over to me by D. Lesly, late Ordinary. 28th March, 1850.

"F. W. Selleck, O. A. D.

"Witness, Thos. C. Perrin."

Selleck died insolvent. Afterwards David Lesly died, leaving a will, of which the defendant, J. W. Lesly is executor.

The bill was filed by Mourning Roberts, the 13th March, 1855, against William Henry Calhoun, and against the executor of David Lesly, seeking payment of the fund thus lost.

The case was set down and heard, first against William Henry Calhoun; and the bill was dismissed as against him, on the ground among others, that by plaintiff's own showing, he transferred the fund to Lesly with her privity and consent.

The case came on then to be heard as against the executor of Lesly.

It appeared in evidence that on the 28th of February, 1851, the plaintiff, Mourning Roberts, drew on Selleck for the interest of the preceding year, but the draft not being then honored, her subsequent receipt to Sel-



leck, as Ordinary, for one hundred and seventy dollars and forty-eight cents, dated the 17th March, 1851, was proved, "being the whole amount due me from my legacy for the last year."

Another draft was put in evidence from her on Selleck, "for the money due me for the last year," and dated 8th April, 1852; accompanied by a receipt from her to Selleck, dated April 9, 1852, for one hundred and seventy dollars and forty-eight cents, "being the amount due me from the estate of Benjamin Beall, deceased, for the last year."

Also, a draft, dated March 21, 1853, from same on same, for one hundred and seventy dollars and forty-eight cents, "due me from your office," with a receipt, of same date, from same to same, styling him Ordinary for Abbeville District, for one hundred and seventy dollars and forty-eight cents, "being in full for this amount due me for last year."

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\*Johnston, Ch. The money has been lost, eventually, in Selleck's hands; and, as he had no right to the possession of it in his official character, it cannot be, and ought not to be, charged to his sureties. This being clearly seen by the plaintiff, she has not impleaded them in this suit.

Selleck having died insolvent, it would have been a vain thing to bring his representative before the Court.

The question is, which of the parties now before the Court shall lose the money? and, let the decision go which way it may, it will work a hardship. But this is a matter which, though it may affect the feelings of the Court, must not influence its judgment.

This fund has been considered by all parties, from the time it came to the possession of James Calhoun to the present, as subject to a trust. But I am very clearly of opinion that, from the time the legacy was assented to, as no longer subject to debts of the testator, the interests of Mourning Roberts in it were legal, and not equitable. The property was given to her and her heirs forever, which vested her with a legal and absolute right of dominion; and the direction to convert it, and apply the annual interest to her, did not abrogate the right of control arising to her from her title to the property or its proceeds.(a)

She could, any moment she chose, have compelled the delivery of the property, before it was sold, or its proceeds afterwards, by an ordinary proceeding at law, suited to the circumstances.

Therefore, the delivery of the fund to Lesly, by Wm. Henry Calhoun, at her instance, or with her assent, was a delivery to herself; and, if she had, at any time afterward, demanded a delivery of it by

Lesly, he could not have resisted. Calhoun was only her agent while he held the fund, and Lesly was no more after it came to his hands.

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\*This was the law, I apprehend, if the parties had understood it. But it is manifest that none of them viewed the matter in this light. They all considered it as a case of express continuing trust. Lesly acted under the same mistake as the other parties. There was a mutual mistake. It was, in truth, owing to the prior mistake, of Calhoun and Roberts, that Lesly was led into the blunder of taking trust control of the fund. To the legal inferences proper to be drawn from this mistake of all the parties, I shall hereafter turn, and show how they, in my judgment, affect the case.

If, in fact, such a trust existed under the will, as the parties supposed, or assumed—that is to say, if, under the will, James Calhoun was a pure trustee of the fund, then, upon his death, the provision came into operation that the Ordinary should appoint a successor. But this being no part of the official duty of the Ordinary, Lesly had no official power, as Ordinary, to make the appointment. The power was a mere personal power with which he was clothed by the *descriptio personæ* of the testator. It was a private, and not an official authority, which he might or might not exercise, according to his pleasure. And, moreover, the *cestui que* trust was at liberty to absolve him from making the appointment, and consent that he, himself, might take the trusteeship. This is what she did. Concurring with Calhoun's application, she desired him to assume the trusteeship, or the control of the estate as derelict; and, thereby, none the less dispensed with his appointment of the successor, because she contemplated that he was to act as Ordinary.

If a trust existed, therefore, under the will, (which is the view I am taking for the present,) then the fund came to the hands of Lesly with that trust attached to it. He was then trustee to execute it. This was in conformity with the view of Mourning Roberts; of which we have evidence in her regularly calling on him and receiving the annual interest, for four years in succession.

Now, if we stop at this point to inquire

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what was the effect \*of Lesly's transfer, of the fund to Selleck, on the 28th of March, 1850; the answer must be, that the act was intended, either as a complete discharge of the trust, or as a violation of it; and, if a violation, or breach, of trust was intended, then this was either with the concurrence of the *cestui que* trust, or without it.

If the transfer was made with the intention to discharge the trustee, then the case of *Moore v. Porcher*, Bail. Eq. 198, shows that the statute barred this suit before bill filed.

(a) *Jasper v. Maxwell*, 1 Dev. Eq. 358; 2 Story Eq., § 971.

The statute has, upon principles equally plain, established a bar in case a breach of trust was intended; (provided, as I shall here assume, the *cestui que trust* had knowledge of it;) and whether she concurred in it or not.<sup>(b)</sup> In case of her non-concurrence, the trust was openly thrown off, and she was impliedly defied to sue; and her neglect justly subjects her to the bar. In case she concurred, if she were not by that very fact deprived of all remedy, it is plain that no remedy could be administered to her after the expiration of four years.

If no trust attended the fund into the hands of Mr. Lesly, then the case, in one aspect, was the very common one of money received by one man to another's use. An action lay from the moment it came to his hands; and is barred. In another aspect, it may be regarded as money in the hands of an agent. In such case, it seems, the law courts regard the possession of the agent as that of the principal, and apply the statute only from the time of demand made to pay it over. I suppose they apply it, also, in case the fund was misapplied, from the time of misapplication. Certainly principle would seem to require this, if the misapplication was known to the principal. In this case, I assume, upon the evidence, that the transfer to Selleck was known to Roberts. Her early application to him for the interest, as soon as interest had accrued, and the repetition of this application year by year, favor the

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idea that she knew the \*fund, from which the interest was to arise, was in his hands. If to this we add the fact that, prior to, and as a preparation for, the transfer, Lesly paid her, in anticipation, the interest not then quite accrued,—it is almost certain—at least there is a moral probability, which, as evidence, should not be disregarded—that she knew of the transfer at the time it took place. Look, also, at her order on Selleck, of 28th Feb., 1851.

Thus, whether the supposed trusts under the will actually existed, and attended the money into the hands of Mr. Lesly; or whether the money went into his hands divested of all trusts; in either of these cases the bill cannot be maintained.

But there is another view of the subject which should not pass without consideration. Lesly, as Ordinary, was neither bound to appoint a trustee, nor act as trustee; nor to take possession of the fund as derelict. But as Mourning Roberts was *sui juris*, she was at liberty to place the fund in his hands upon whatever terms she pleased; and this whether it was a trust found or not, or whatever the trusts attached to it were. There was no other person interested in the trusts, whatever they were, but herself. No person who could gainsay her act. Now, it is plain that

the mistake of all these parties was that Lesly was, somehow, bound to take this fund into hand as Ordinary. No doubt he received it in that character. It was so considered by all parties. Though this was not the law, it was the understanding.

Looked at in this light, the expectation of all was that he was to deal with it as an Ordinary should deal with funds properly in his hands in his official character.

I assume it as sound doctrine, that when one person places a subject in the hands of another, which is accepted by that other, with a stipulation express, or necessarily evidenced by the circumstances, that the latter shall deal with the subject according to some standard of duty contemplated by both parties, the acceptor of such authority is absolved from liability if he conforms to that

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standard. Of course I am understood, \*here, as referring to the standard of duty arising from the law of the Ordinary's office. I wish to be explicit. If, in any point of view, it had been possible for this money to have gone into Lesly's hands officially, then no mistake of the parties as to what his duties demanded could have been set up as the standard of his duties: he must conform to the law. Different, however, is the doctrine where the transaction, from the necessity of the case, must be regarded as entirely voluntary. The engagement in this case,—there being really no law to compel either party to enter into it,—must be regarded as purely voluntary on both sides. But all voluntary engagements should be enforced according to the intention of the parties, and not otherwise. It is admitted that Mourning Roberts supposed she was properly confiding her funds to the Ordinary, and that she had the security of his official bond for the performance of the duties she expected him to perform, as such. This security she could not have, because the law would not allow his bondsmen to be made liable except in cases where the law required the principal to act. But the question before us does not relate to the security to which Roberts is entitled, but to the nature of the duties she intended to exact from Lesly.

These duties were measured in the conception of both parties by what an Ordinary should do with a derelict estate. If this had, in fact, been such an estate, Lesly has transferred it to his successor; and that is what he was expected to do: and he is absolved.

It is said he could not have regarded it as a derelict estate. Why? Because he did not deposit the fund in bank, as required by law. But it is not the neglect to make such deposit that is now complained of. The complaint is, that he transferred the fund to Selleck, who has wasted it. And had Lesly deposited it, would he not have been bound to transfer all proper deposits to his successor? and this among others? Would not the money have been equally lost, whether the fund was

(b) 2 Ad. 109.



directly transferred, or transferred through

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the circuitry of a deposit? \*Besides, is it not a sufficient answer to the objection of neglect to deposit, that the plaintiff may have excused that duty? and is it no evidence of this, and of her ratification of Lesly's conduct, that she received the interest at his hands for four years?

Having disposed of every view heretofore suggested, it remains only to notice the plaintiff's ratification of the transfer to Selleck, evidenced by her repeated drafts on him, as Ordinary, and receipts to him, as such, up to the time his insolvency became notorious. Had he never failed, we should never have heard any complaint.

It is ordered, that the bill be dismissed; each of the parties now before me (the plaintiff and Lesly's executor) to pay his and her own costs. The executor's costs to be charged to his testator's estate.

The plaintiff appealed, and now moved this Court to reverse the decree on the grounds:

1. Because it is respectfully submitted, the interest the plaintiff took under the will of Benjamin Beall, deceased, was a trust estate—that the trust was executory, and not subject to the plea of the statute of limitations.

2. Because David Lesly, by accepting the trust estate from the executor of James Calhoun, deceased, executor of Benjamin Beall, appointed himself trustee in the place and stead of the said James Calhoun, by virtue of the power conferred upon the Ordinary of Abbeville District for the time being, by the will of Benjamin Beall, deceased; and that he did not divest himself of the trust by paying over the trust fund to F. W. Selleck, his successor in the office of Ordinary.

3. Because if David Lesly was not trustee by his own appointment, as aforesaid, he was by his agreement with the plaintiff, and was liable in that character.

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\*4. Because if David Lesly was neither trustee by his own appointment, nor by his agreement with the plaintiff, he was, at least, her agent; and his paying her funds to F. W. Selleck without her knowledge or authority did not discharge his liability to her.

5. Because the plaintiff's demand was not barred by the statute of limitations.

Jones, Sullivan, Thompson, for appellant.  
McGowen, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch.—As the observations of the Chancellor with regard to the liability of Selleck's sureties were not intended to prejudice any proceedings the plaintiff may institute against them; we desire that the opinion of the Court as to their liability be reserved.

We are satisfied with the result of the de-

cre; and it is ordered that the same be affirmed, and the appeal dismissed.

DUNKIN, DARGAN and WARDLAW,  
CC., concurred.

Appeal dismissed.

8 Rich. Eq. \*46

\*JOSEPH BIRD v. THE W. & M. R. R.  
COMPANY.

(Columbia. Nov. and Dec. Term, 1855.)

[*Eminent Domain* ⇨58.]

The charter of the W. & M. Railroad Company does not authorize the Company to take, without the consent of the owner, as a site for a ware-house, a parcel of land four hundred yards from the line of their road, and build a narrow track from their road to such parcel of land, although the whole quantity required for the site of the ware-house and the road leading to it would not exceed five acres.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 152; Dec. Dig. ⇨58.]

[*Eminent Domain* ⇨273.]

An injunction will lie to restrain a Railroad Company from making a permanent appropriation of plaintiff's land, as erecting a ware-house, &c., thereon, not authorized by their charter.

[Ed. Note.—Cited in *Lamar v. Railroad Company*, 10 S. C. 491.

For other cases, see *Eminent Domain*, Cent. Dig. § 756; Dec. Dig. ⇨273.]

[*Injunction* ⇨197.]

Where the Court entertains jurisdiction to restrain further injury to land, by granting an injunction, it may grant compensation for the injury already committed, either by reference to the Master, or by ordering an issue quantum damnificatus.

[Ed. Note.—Cited in *Sanders v. Anderson*, 10 Rich. Eq. 244; *Bath South Carolina Paper Co. v. Langley*, 23 S. C. 145; *Boulard v. Carpin*, 27 S. C. 239, 3 S. E. 219; *Busby v. Mitchell*, 29 S. C. 452, 7 S. E. 618; *Ragsdale v. Southern Ry.*, 60 S. C. 391, 38 S. E. 609; *Welborn v. Dixon*, 70 S. C. 118, 49 S. E. 232; *Atlantic & C. Air Line Ry. Co. v. Victor Mfg. Co.*, 79 S. C. 269, 60 S. E. 675; *Southern Ry. v. Gossett*, 79 S. C. 381, 60 S. E. 956; *Ross Tin Mine v. Cherokee Tin Mining Co.*, 88 S. E. 10.

For other cases, see *Injunction*, Cent. Dig. § 417; Dec. Dig. ⇨197.]

[This case is also cited in *Simonds v. Haithcock*, 18 S. C. 604, without specific application.]

Before Johnston, Ch., at Marion, February, 1855.

A sufficient statement of the case will be found in the Circuit decree, which is as follows:—

Johnston, Ch. The bill in this case sets forth, that the defendants have violently, and without the plaintiff's consent, entered upon his land adjacent to the line of their Road, cut down his timber, and dug up and subverted his soil, to his permanent and irreparable injury.

It appears that the plaintiff's land lies above the line of the Road, where it crosses the Great Pee Dee. It lies on the left bank of the river, and stretches from a point

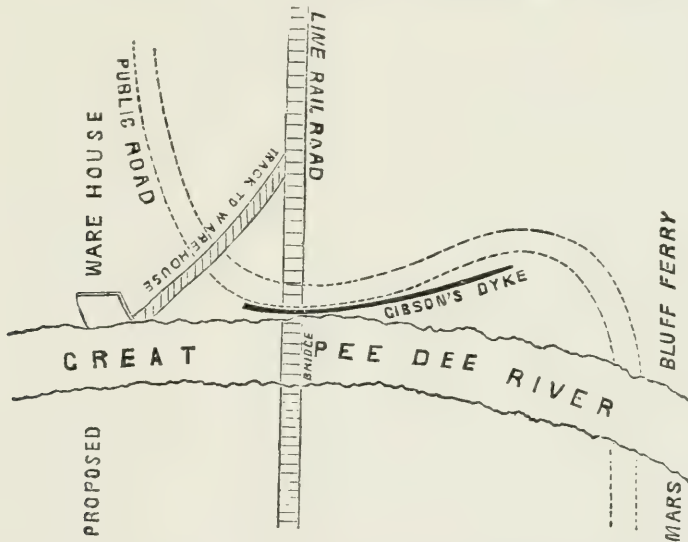
some distance above the Railroad bridge, which spans the river, down to that bridge, and extends back from the river into the adjacent highlands.

The Company desiring to build a warehouse on the bank of the river some distance above the bridge, laid out, through the plaintiff's land, a track from their road up to that point, and being forbidden by the plaintiff to proceed with their enterprize, caused the usual course to be pursued, by the appointment of Commissioners from the Court

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of Common Pleas. The return \*of the Commissioners is, of course, for the judgment of that Court. But pending the cause there, the plaintiff has filed his bill here.

This diagram will sufficiently represent the premises:



The curved track presents, as near as may be, the high water mark, from the point where it leaves the line of the railroad, until it makes the point where the warehouse is intended to be erected, at which latter point there is a bluff. The point where it leaves the line is about four hundred yards from the river; and the point where it ends at the warehouse is, in a direct line, about four hundred yards above the Railroad bridge across the river. This curved track is about six hundred yards long. Its margin varies, as laid out, from twenty to one hundred feet; and the whole of the land to be taken by the track, and its margin, and the lot designated as the site of the warehouse, would not exceed five acres.

The defendants plead in justification, the

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15th section of the \*Statute, by which they were incorporated, (see Statute, 18th December, 1846, 11 Statutes at large, 388,) which section is in these words:

"That the President and Directors of the said Company, their officers, agents and serv-

ants, shall have power and authority to enter upon all lands and tenements, through which they may desire to conduct their Railroad, and to lay out the same, according to their pleasure, (so that the dwelling-house yard, garden, or grave-yard of no person be invaded, without his consent,) and shall have power to enter on and lay out such contiguous lands, as they may desire to occupy, as sites for depots, toll-houses, ware-houses, engine-sheds, work-shops, water-stations, and other buildings, for the necessary accommodation of their agents and servants, their horses, mules, and other cattle, and for the protection of property entrusted to their care. Provided, however, that the lands so laid out on the line of the Railroad, shall not exceed (except at deep cuts and fillings,) one hundred and twenty feet in width;

(and at such deep cuts and fillings shall not exceed a width sufficient for the construction of the banks and deposits of waste earth;) and, that the adjoining land, for the sites of buildings, (unless the President and Directors can agree with the owner, or owners, for the purchase of the same,) shall not exceed five acres in any one parcel."

I have no doubt there are many cases where these Companies, depending on their strength, may oppress the citizen; and that their subordinates, unknown to them, and beyond their control, may often exert their petty authority very much to the annoyance both of the public and of individuals.

I have no reason to suppose, however, that in this instance there is any intention to oppress. The Superintendent is acting in this matter under a deliberate resolution of the Company; and I dare say the Company sincerely believes in its right, under the charter, to construct the track in ques-

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tion, and to \*lay out and appropriate a site for a ware-house, where it proposes to do so.



The question is, whether its proceeding is authorized by the Statute. That question, as it arises out of the facts of the case, belongs to another forum, before which it is now pending.

If the charter does not give the right claimed, the acts of the defendants, as charged in the bill, constitute a pure trespass, for which there is ample remedy at law. If the charter gives the right, then the Statute has given the remedy for such loss as the plaintiff may sustain by its exercise. On this ground alone I must dismiss the bill.

I am unwilling, however, to part from a case of this character, without stating, that it by no means follows from any thing I have said, that such Companies may exercise even their legal powers without restraint. If, for example, such a Company, keeping to its line, attempts so to construct its road, or its buildings, as to make them nuisances to the neighborhood, I have no doubt whatever of the right of this Court to restrain them. Take, as an example, the filling up of a trestle, or the embanking of a hollow, without sufficient culverts to prevent the stagnation of waters thus intercepted, thereby occasioning disease. In such a case of threatened irreparable mischief, justice must interfere, to prevent or to remove the evil. But when the injury amounts to a naked trespass, without more, I conceive that this Court cannot interfere. My impression is, that the Statute does not authorize the improvement designed, and does not bind the private property of the plaintiff for such a purpose; but being satisfied that he has a remedy in the case stated at law, and his case being before a forum designated for its decision, I do not deem it proper to express any decided opinion on this point.

It is ordered that the bill be dismissed.

The plaintiff appealed, and now moved this Court to reverse the decree, on the grounds:

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\*1. That the decree is erroneous, in that it decides that the unlawful cutting down of the timber, and digging pits and ditches, is not such damage and permanent injury to freehold as to warrant the interference of the strong power of this Court.

2. That the damage complained of was waste, and as such should have been perpetually restrained.

3. That the injuries inflicted by the defendants on the realty of complainant, if but a mere trespass, yet is such a trespass by a corporation travelling outside of its charter, as to demand the interposition of an injunction to restrain them.

T. Evans, for appellant.

Haynsworth, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The concluding remarks of the Chancellor are founded on a misapprehension of the facts. When the bill was filed

and an injunction granted by the Commissioner, no proceedings were pending, or had been instituted, at law, for the appointment of Commissioners to assess the value of the premises, etc., as prescribed by the Act. By the sixteenth clause of the Act for the incorporation of the Wilmington and Manchester Railroad Company it is declared that, where the parties cannot agree upon the value, lands may be taken, for the purposes designated by the Act, at a valuation to be fixed by Commissioners appointed by the Court of Common Pleas. If an appeal is made from the valuation, it is further provided, that the pendency of the appeal "shall not prevent the works intended to be constructed from proceeding;" and provision is therein made for the payment of the valuation. Before striking a spade into the plaintiff's land it was, therefore, obviously the duty of the Company, in any view of their rights, to have adopted the preliminary measures of having the value of the land, proposed to be taken, assessed by an application to the Court of Common Pleas for the appointment of Commissioners.

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\*This would probably have presented the inquiry as to their right under the charter. It is abundantly shown by Chancellor Kent, in *Gardner v. Newburgh*, 2 Johns. Ch. 162, that, until compensation has been paid, or provision has been made for securing compensation to the proprietor of the land, "it would be unjust, and contrary to the first principles of government, and equally contrary to the intention of the statute, to take from the plaintiff his undoubted right." On this ground alone he granted an injunction. And if, in this case, the facts had been fully disclosed at the hearing the bill would not have been dismissed.

But it is proposed now to consider the authority of the defendants under the Act of 1846. The Chancellor in his decree expresses his impression that the Statute, which constitutes the charter of the defendants, "does not authorize the improvement designed by the Company and does not bind the private property of the plaintiff for such purpose." Upon examining the clause of the charter it is manifest that power is given to the Company for two distinct purposes; First, they are authorized to lay out the line of the railroad, and, for this purpose, to pass through the lands of individuals, provided that the lands so laid out on the line of the railroad shall not exceed (except at deep cuts and fillings) one hundred and twenty feet in width. Second, they are authorized "to lay out such contiguous lands as they may desire to occupy, as sites for depots, tollhouses, ware-houses, engine-sheds, work-shops, water-stations and other buildings, for the necessary accommodation of their servants and agents, their horses, mules and other cattle, and for the protection of property entrusted to their care, provided that the adjoining

land for the sites of buildings (unless the President and Directors of the Company can agree with the owner or owners for the purchase of the same) shall not exceed five acres in any one parcel."

The object of the enactment seems sufficiently transparent. The hundred and twenty feet in width allowed for the track of

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\*the Railroad might not be more than sufficient for that purpose. The Company must have also depots, toll-houses, engine-houses, ware-houses, &c., &c., for which purpose they would be obliged to encroach on the adjoining lands beyond the one hundred and twenty feet of width. Perhaps they might desire to establish, at the same point, a depot, toll-house, work-shops, ware-houses, &c. They were therefore empowered by the Legislature to lay out such contiguous lands for these objects, provided they did not take of the adjoining land more than five acres in any one parcel. No species of property is held by individuals with more tenacity—none is guarded by the constitution and laws more sedulously—than the right to the freehold or inheritance. When the Legislature interferes with this right, and for great public purposes appropriates the estate of an individual without his consent, the plain meaning of the Act should not be enlarged by doubtful interpretation. This case cannot be well understood without the chart of the proposed improvement which makes part of the brief. But the Railroad spans the Great Pee Dee, and, on the western side, strikes the land of Gibson. Some four hundred yards west of the river, and beyond Gibson's land, the line of the road passes the land of the plaintiff. It happens that his tract extends in a north-east direction until it strikes the Pee Dee river some four hundred yards north of the Railroad bridge which crosses the river. The defendants propose to construct a tramroad, or some other narrow railway, extending from the Railroad where it strikes the plaintiff's land and run it in a north-east direction, until it strikes the river, and there to erect a ware-house for the convenience of receiving cotton, &c., from the river boats. As the tramroad will be narrow, and not much space will be occupied by the ware-house, it is estimated that, altogether, not more than five acres of the plaintiff's land will be taken. We concur with the Chancellor that the Act does not warrant the proceedings of the defendants in thus appropriating the plaintiff's land. The proposed site of the ware-house is up the river nearly

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one-third of a mile distant from the Railroad bridge. The distance of the proposed site by the tramroad would be still further from the Railroad. The intention of the Act was only to authorize the Company to extend the width given for the line so as to enable them to erect thereon depots, toll-houses,

ware-houses, &c. If Darlington village had been two miles north of the Railroad it might be very convenient for the Company to locate ware-houses, &c., at that point. If the plaintiff had been so unfortunate as to own the intermediate land, could the defendants run a narrow road through his land, against his will, and fix their ware-house or depot at the village, under the clause of their charter allowing them to lay out the lands adjoining the railroad for the site of their depot, ware-house, &c.? If Mr. Gibson had owned a narrow strip of land fifty feet in width between the Railroad and plaintiff's land, it is not pretended they could run the proposed road and fix their site on plaintiff's land at the river. Doubtless it may be very convenient for the defendants to have this particular site for a ware-house to receive cotton from river boats and for other purposes. It may be very inconvenient and expensive to erect one at a different point. If so, it must be procured in the ordinary mode adopted when a man desires to possess his neighbour's land. If this site be necessary for the transaction of the business of the road, or a great public convenience, and the plaintiff is obstinate in resisting such improvement, resort may be had to the same power which granted the charter, and the same may be amended as has been recently done in analogous cases.

The next inquiry presented is whether, under these circumstances, the plaintiff was entitled to the injunction granted by the Commissioner. It is not doubted that for ordinary cases of mere trespass the party has an adequate and more appropriate remedy at law, and it would not be advisable (says an eminent jurist) to introduce the Chancery remedy as a substitute except in instances of trespass which go to the destruction of the inheritance, or where the mischief

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is remediless. In a recent approved treatise on Equity jurisdiction it is said to be "now settled that an injunction will lie for protection of a title admitted or proved at law whenever the act complained of is attended with permanent results, destroying or materially altering the estate." The strongest authority cited on behalf of the defendants was Chancellor Kent's judgment in *Jerome v. Ross*, 7 Johns. Ch. 336, the last act (it may be observed) of his judicial life, and not unworthy of his fame. One of the grounds on which the Chancellor dissolved the injunction was that the act of the defendants (in removing some stone and gravel from the land of the plaintiff) was a mere trespass. But in the same judgment he cites with approbation the case of *Agar v. The Regent's Canal Company*, (Coop. Eq. R. 77.) in which the defendants were empowered by a private Act of Parliament to cut a canal; the line of the canal had been prescribed, and they departed from that line, and were carrying the canal through a garden and rick-yard.



and Lord Eldon allowed an injunction. Also, the case of *Shand v. Henderson*, (2 Dow, 519,) in which the Aberdeen Canal Navigation Company were charged with having taken and appropriated lands to their use, by unwarrantably deviating from the line particularly prescribed by Statute, and an injunction to restrain the Canal Company within their limits was admitted to be proper. "But in both these cases (says Chancellor Kent) the Companies were making a permanent appropriation of the land, and destroying the inheritance; and upon the principle acknowledged in all the cases it was necessary to restrain them." It is not doubted that in this case the defendants are attempting to make a permanent appropriation of the land admitted to belong to the plaintiff, and thereby to destroy the inheritance. In such case, upon acknowledged principles, the plaintiff is entitled to the aid of this Court. A case was decided in December, 1853, by the Appeal Court of Chancery in England, in which the principles of the Court are thus stated by Lord Cranworth, L. J. "We accede," says he, "to the general obser-

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vation that persons, obtaining from the legislature by Acts of Parliament like those now before us, powers to interfere with rights of property, for their own purposes, are bound strictly to adhere to the powers so conceded to them—to do no more than the Legislature has sanctioned, and to proceed only in the mode which the Legislature has pointed out." "In such case a plaintiff seeking the assistance of a Court of Equity, by way of injunction, is bound to show that he has an interest in preventing the defendants from doing what is in fact, or may well be called, a violation of their contract with the Legislature. He must show not only that the defendants are committing or intended to commit a wrong, but also that the wrong complained of, does occasion, or will occasion loss or damage to him." The injunction as to part of the bill was made perpetual; and as to another part was dissolved, because the plaintiffs showed no interest in the lands. The case is *The Mayor, &c., of Liverpool v. The Chorley Water Works Company*, and is reported 21 Vol. Eng. L. & Eq. R. 624. It is principally instructive as showing the strict sense in which such extraordinary powers granted to corporations should be construed. It might be suggested that public improvements may be sometimes greatly retarded by this summary interference on the part of the Court. But if the right of property in the plaintiff be conceded or established, and the license or warrant of the defendant to encroach upon it is deemed doubtful by a judicial magistrate, the defendant should withhold his hand until the right be established, and it was so held in *Darick v. The Corporation of New York*, 4 John. Ch. 53. The power of this Court can rarely be

exercised with more salutary effect than in protecting the rights of the humble citizen against the strong arm of a powerful corporation.

The plaintiff also seeks compensation for the injury sustained by the unlawful acts of the defendants. It is stated by Mr. Justice Story, 2 Eq. Juris., § 794, that, "as a general proposition, for breaches of contract,

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and other wrongs and injuries, \*cognizable at law, Courts of Equity do not entertain jurisdiction, to give redress by way of compensation or damages, where these constitute the sole objects of the bill." "Compensation or damages (it should seem) ought," therefore, (says he) ordinarily "to be decreed in Equity only as incidental to other relief" sought by the bill and granted by the Court. It does not ordinarily attach except as ancillary to some other relief. "The mode by which such compensation or damages is ascertained in such cases, is either by a reference to the Master, or by directing an issue quantum damnificatus, which is tried by a jury. The latter," he says, "was almost the invariable course in former times, in all cases where the compensation was not extremely clear, as to its elements and amount; and is still commonly resorted to in cases of a complicated nature. But the same inquiries may be had before a Master; and, in cases where such inquiries do not involve much complexity of facts or amounts, this course is often now adopted." 2 Eq. Jur., § 795. In *Watson v. Hunter*, 5 John. Ch. 169, Chancellor Kent says, that in cases of waste it is the practice of the Court to grant injunctions to prevent or stay the future commission of waste; and the remedy for waste already committed is merely incidental to the jurisdiction in the other case, assumed to prevent multiplicity of suits, and to save the party the necessity of resorting to trover at law. And he cites the authority of Lord Hardwicke in *Jesus College v. Bloom*, (3 Atk. 262.) It was there stated that "where the bill was for an injunction to prevent waste, and for waste already committed, the Court, to prevent a double suit, would award an injunction to prevent future waste, and decree an account and satisfaction for what was past. The ground for coming into Chancery was to stay waste, and not for satisfaction for the damages, as the commission of waste was a tort, and the remedy lay at law. But to prevent multiplicity of suits, the Court on bills for injunctions to stay waste, and where waste had already been committed, would make a complete decree and give the injured party a

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\*satisfaction for what had been done, and not put him to another action at law." The same doctrine was held by Lord Hardwicke in *Garth v. Colton*, (1 Ves. 528.)

The principal doubt entertained by the Court is that suggested by the Master of the

Rolls in *Nelson v. Bridges*, 2 Beav. 239. It is a case of damages and not of account. No profits have been made by the defendants, and the object is to ascertain the amount of loss which the plaintiff has sustained by their wrongful acts. In that case after much consideration he ordered an issue quantum damnificatus—and, in some points of view, this would be the most satisfactory course here—but the plaintiff by applying to this Court, waives all claim for vindictive damages; and the actual injury and loss sustained may probably be as well ascertained before the Commissioner, as by subjecting the parties to the delay and expense of a trial at law. It is therefore ordered and decreed that the decree of the Circuit Court be reformed—that the injunction granted by the Commissioner be made perpetual—and that it be referred to the Commissioner to ascertain, and report upon the loss and injury sustained by the plaintiff in consequence of the unauthorized acts of the defendants.

JOHNSTON and WARDLAW, CC., concurred.

DARGAN, Ch., having an interest, did not sit.

Decree reformed.

#### 8 Rich. Eq. \*58

\*ANDREW W. BURNETT, and Others, v.  
WM. P. NOBLE, Adm'r, and Others.  
(Columbia. Nov. and Dec. Term, 1855.)

[*Aliens* §10.]

Where an intestate leaves heirs entitled to his real estate by descent, and an alien widow, such widow can take no part of the real estate. An alien widow takes under the Act of 1828, only where the intestate leaves no heirs, and the estate is, therefore, liable to escheat.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 30; Dec. Dig. §10.]

Before Johnston, Ch., at Abbeville, June, 1855.

The decree of his Honor, the Circuit Chancellor, is as follows:

Johnston, Ch. John Bull died intestate, on the 6th of January, 1855, possessed of a considerable estate, real and personal; and leaving neither father, mother, sister or brother, or lineal descendant, but being survived by his wife who is an alien, and by three first cousins, (plaintiffs in this case,) who are his only next of kin, and who filed this bill the 8th of June, 1855.

The only question proper for decision at this time is, whether the real estate is distributable among these next of kin, to the exclusion of the wife.

There is no doubt that the statutes of 1791 (5 Stat. 162), 1826 (6 Stat. 284), and 1828 (Ib. 363), are to be construed in *pari materia*, as the defendants' counsel contends. But the question is, what effect have they in remov-

ing the incapacity of the wife as an alien, to succeed to her husband's lands?

The right to the enjoyment of real estate is generally of a political rather than of a municipal character. By the common law, the right of succession was confined to natives, or naturalized subjects, owing allegiance to the government; and as, by the same law, the right of succession accrued through the medium of inheritance by blood, and an alien

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had no inheritable blood, real estate could neither be received nor transmitted by him. Our law of distributions, which is altogether statutory, does not operate upon the principle of consanguinity. Those who take by statute, take simply by virtue of its terms; and their right depends, generally, merely upon their coming within the description given by the statute.<sup>(a)</sup> They are *haeres facti per statutam*. Therefore the want of inheritable blood, as an incident of alienage, is no impediment under our statute of distributions. But the alienage itself, is a political impediment to the acquisition and retention of land which can be removed only by legislative provision. The statute of 1828, (6 Stat. 363) is supposed to have effected this purpose. This Act, which is entitled "An Act to amend the Escheat Laws in relation to the widows of citizens of this State," provides "That no lands of which any citizen of this State shall die seized, possessed, or interested in, shall vest in the State, or be liable to escheat, where such person, shall have left a widow, a resident of the State, although such widow shall not have become a naturalized citizen—but the said land shall pass by will or descent to such widow, in the manner already provided by law." The question is, what interpretation shall be put upon this statute, particularly on the latter words?

Is the construction to be so affected by the title of the statute as to confine the operation of these latter words exclusively to cases liable to an actual escheat?

The statute book is full of enactments which go beyond the mere title of the Acts in which they occur; and though the words "and for other purposes," have not been added to the title, it has never been suggested that these enactments are void, or that, where the words of them are plain and unambiguous, full effect is not to be given to them.

What different provisions shall be included in a statute is merely a question of parlia-

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mentary order and practice—\*proper only for the Legislature. We have no such constitutional provisions as exist in Georgia, and possibly in other States, debarring the Legislature from including in a bill matters not

(a) See the authorities quoted in Buist and Dawes.



described in the title endorsed on it. It is true that when the words of a statute are ambiguous, the construction may be helped by resort to the title; of which we have an instance, even in the criminal courts, in the interpretation of the Act (6 Stat. 284) relating to the fraudulent or secret taking away of growing or standing crops, passed in 1826. The enacting clause of this statute adds nothing in terms to the common law; but by resort to the title, the courts were enabled to discover a new offence. In all enactments of a remedial character, it is proper to extend (not restrict) the meaning of the words employed, by resort to context and title, and to every other legitimate source. The spirit of the Act—its reasons—the evil existing—the remedy proposed—should all be looked into. The Act before us is emphatically remedial. The remedy should be advanced (not restricted,) if the words of the statute will allow of it. The latter words do allow of a construction removing the disability of alienage from a widow in all cases, where widows take interests (either partial or total) by prior statutes. Indeed the words rather imply that the case of actual escheat was not exclusively within the contemplation of the Legislature. If the case of total escheat was contemplated,—a case in which the only claimant before the State was the widow,—and the State was willing to release to her their entire interests, (which is the necessary assumption in that case,) why did they not vest the whole in her, instead of declaring she might take such interests, partial or total, as were already provided for her by law? I can conceive of no reason why the Legislature should have intended to remove the objection of alienage when the widow claims the whole estate, and not to remove it when her claim is only to a part of it. Why, when she claims little—

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because she has little \*to claim, and therefore is in the greatest need—why should we suppose that in such a case a Legislature, willing to give her the whole, was unwilling to give her a part?

From these observations, it will be perceived that, if this statute of 1828 were open to my construction, I should much incline to a liberal construction in favor of the widow. It is true that in the many cases which have arisen since its enactment, it has seldom been brought to the view of the Court; in none, indeed, that I remember, except the case of *Keenan v. Keenan*, 7 Rich. 345. Therefore there is no case, that I know of but that, which authoritatively imposes an interpretation on the statute.

In that case it is to be observed, this Act came under review only incidentally, and under circumstances little fitted to secure it a full consideration. The very question before me was put out of the way by concession of counsel. It was conceded, says

the Court, that the alienage of the wife destroyed her right of distribution, unless it was removed by a subsequent naturalization.

Accordingly, the few observations made by the Court upon the statute, evince that its attention was not drawn to a full examination of its provisions. It is dismissed with the observation that the plain intent (as shown by the title) was to release escheats, and to enlarge the capacity of the wife to take. The latter branch of this observation was the proper subject of examination, and it seems to me that if the question had been discussed by counsel, the Court would probably have examined how far the Act enlarged the capacity of the widow.

But by the settled rule of this Court I am to follow the decision of law courts upon points of law; and I am bound by the case of *Keenan v. Keenan*.

It is therefore adjudged that the plaintiffs, as next of kin, are exclusively entitled to the real estate of the intestate, described in the pleadings. On the other points of the

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case, it is \*ordered, that the bill stand until the expiration of nine months from the death of the intestate, and that then a writ issue for the partition of the personalty, and that the commissioner inquire into and report upon the matters of account.

The defendant, Sarah Bull, appealed and moved for a reversal of so much of the Chancellor's decree as declares her not entitled to a partition of the real estate of her deceased husband, on the ground:

That a proper construction of the Acts of Assembly of this State allows an alien widow to take real estate by descent from a deceased husband, in like manner as a widow who is a native.

Thomson, McGowen, for appellant.

Rhett, Burt, contra.

The opinion of the Court was delivered by

DARGAN, Ch. John Bull, the intestate, died seized of real estate. He was a native citizen. He left surviving him, his wife, who at the time of his death was, and still is a resident of the State, but who is an alien. Besides her he left no nearer relations, than his three cousins german, who are native born citizens, and are plaintiffs in this cause.

The only question submitted, either on circuit, or in this court, is, whether the widow is entitled to take under the provisions of the Act of 1828, (6 Stat. 363,) such a portion of the intestate's estate, as she would have been entitled to take if she had been a citizen.

The Act of 1828 is entitled "An Act to amend the escheat laws in relation to the widows of citizens of this State." It enacts, "that no lands of which any citizen of this State shall die seized, possessed, or

interested in, shall vest in the State, or be liable to escheat, where such person shall

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leave a widow. \*a resident of the State, although such widow shall not have become a naturalized citizen; but the said land shall pass by will or descent, to such widow in the manner already provided by law."

It is said, that this Act is to be construed in pari materia with the Act of 1791, (5 Stat. 162.) which is a general law of distributions, and the Act of 1826, (6 Stat. 284.) which is amendatory thereof, and which gives the widow the whole of her intestate husband's real estate under certain circumstances. The rule of construction which has been invoked is too familiar for comment; it is its application to this case, which is questionable. The subject matter of the two Acts last referred to relates to the distribution of intestate's estates, while the purpose of the Act of 1828 is to amend the escheat laws. The subjects are as diverse as it is possible for them to be. But if the Act of 1828 were to be construed in the manner contended for, it would afford us no aid in its interpretation. There is no difficulty, or doubt, as to what the widow of the intestate would be entitled to take under our Acts of distribution, if she is entitled to take at all. The question is, whether the fact of her being an alien, and not naturalized, does not exclude her altogether under the circumstances of this case.

If the intestate had left no kindred entitled to take his estate under the provisions of the Act of 1791, then the Act of 1828 would have operated, and the widow would have taken the whole, notwithstanding her alienage, she being a resident of the State. The purport of the argument on this appeal is, to give the Act of 1828 a liberal and enlarged construction, and to extend its operation to cases which do not fall within its terms. The Chancellor himself, who presided on the circuit trial, has adopted the reasoning which supports this construction, though he felt himself constrained to decide in a manner different from what would otherwise have been his judgment, on the authority of the law case of *Keenan v. Keenan*, (7 Rich. 345.)

It is said, that in the construction of the

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Act of 1828, we \*are not to be restricted by its title, which would seem to confine its purview to the subject of escheats. This I admit, or rather, I admit the doctrine on which the proposition rests. The title, or preamble of an Act, or both together, may be resorted to in aid of a doubtful interpretation, or for the explication of an ambiguity. It is too clearly settled to admit the shadow of a doubt, that the title or preamble of a statute, singly or together, is not to prevail against the plain language or manifest import of the enacting clauses; even though they contain provisions entirely dif-

ferent from the subject matter of the statute, as set forth in the title and preamble.

But in the Act of 1828, there is the most perfect harmony between the title and the enacting clause. The former declares it to be an Act to amend the escheat laws; and the latter provides, not for the distributive share which a widow shall take of her intestate husband's estate, (which had been already effectually done by previous Acts,) but to remove under certain circumstances set down in the Act, the disability of an alien widow to take at all; and to declare, that on certain conditions, the lands of the intestate should not escheat, where otherwise, and before that Act, they would have escheated.

The next inquiry will be, in what cases, according to a proper construction of the Act of 1828, is an alien widow entitled to a widow's share of an intestate husband's estate. The first and most conspicuous condition is, that she must be a resident of the State, which condition is fulfilled in this case. The second condition is, (and here is the difficulty, though to my mind it is equally plain,) that the title to the land must otherwise vest in the State, or be liable to escheat. Alienage is the same as nonexistence, as to the right or capacity of taking real estate by descent. Therefore, if an intestate has many children who are aliens, and one who is a native, or naturalized citizen, the latter would take the whole estate, as if he were the only child; the existence of the others, as to the right to inherit, not being recogniz-

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ed. And so of any other given case \*on the same principle; which has been clearly settled by a series of decisions. The plaintiffs, who are legally the next of kin of the intestate, would on this principle, be entitled to take under the Act of distributions, the whole of the intestate's real estate, though he had left other relations nearer in propinquity of blood, (even children,) who were aliens. The intestacy of John Bull did not, therefore, give rise to a case of escheat, either as to the whole or a part of his real estate. The title did not vest in the State, nor was in any way liable to escheat. Now the manifest import, nay the plain language of the Act of 1828 is, to give to the alien widow who is a resident of the State, the lands of her intestate husband, where the same would otherwise vest in the State or be liable to escheat. By the provisions of this Act, the State merely intended to grant to a resident widow the escheated property of her deceased husband's estate, without an intention to interfere with the claims of other persons having a right under the existing laws. Suppose that after the death of the husband in this instance, the State had by an Act granted to the widow, all the lands of the intestate, the title of which had vested in the State, or which were liable to escheat:—the widow could take nothing under such



a grant, for the obvious reason, that there were no lands of the intestate, the title of which had vested in the State, or which were liable to escheat; said lands having already vested in the plaintiffs as next of kin, they being under no disability of alienage, or otherwise. The only difference between the Act supposed, and that of 1828 is, that one is general and the other special. Couched in the same language, they would be construed in the same manner.

I have already adverted to the case of *Keenan v. Keenan*, decided by the law Court of Appeals. The conclusion at which I have arrived by the foregoing reasoning is in harmony with the judgment of the law Court in that case. This being a question of law, I cannot but regard that decision as authoritative; though the question does not

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seem from the report to \*have been much discussed. For this reason, the Chancellor who tried this cause, did not consider himself so much bound by the decision, as he would otherwise have done. Yet he considered himself so far constrained, as to follow it against his own convictions.

Upon the whole, I am satisfied that the judgment of this Court which I am now to announce, is supported by reasons whose cogency cannot be resisted, as well as by an authority we are bound to respect.

It is ordered and decreed that the circuit decree be affirmed, and the appeal be dismissed.

DUNKIN, Ch., concurred.

WARDLAW, Ch., absent from indisposition.

Appeal dismissed.

8 Rich. Eq. \*67

\*LEWIS M. GILLAM, Administrator, v.  
JAMES GILLAM.

(Columbia. Nov. and Dec. Term, 1855.)

[*Limitation of Actions* ¶53.]

Defendant was the agent of his mother from 1835 to 1851, to hire out and manage her slaves. He purchased her life estate in a tract of land, and agreed to pay her therefor an annuity of fifty dollars per annum. About 1848, he received certain pension moneys, which were paid on account of his father's Revolutionary services; and from 1840 until 1851, when she died, his mother lived with and was maintained by him. The bill was filed by her administrator for an account: *Held*, That, as to the annuity, for all sums due more than four years before the bill was filed, the demand was barred by the statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 289; Dec. Dig. ¶53.]

[*Principal and Agent* ¶76.]

That, as to the pension money, defendant was not estopped by his agency from showing that, under the laws of Congress, it belonged, not to his mother, but to the estate of his father.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 159; Dec. Dig. ¶76.]

[*Parent and Child* ¶4.]

That he was entitled to compensation for the board and maintenance of his mother; and that he was not restricted, in his demand on that account, to the amount due by him for the hire of the negroes during the time his mother lived with him.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. § 65; Dec. Dig. ¶4.]

Before Johnston, Ch., at Abbeville, June, 1855.

This case came before the Court on exceptions to the following report of the Commissioner:

"The Commissioner, to whom the questions made by the pleadings have been referred, begs leave to submit the following Report:

"That Robert Gillam, the husband of Elizabeth Gillam, died in 1813, having previously duly made and executed his last will and testament, whereby he bequeathed and devised to his widow, the said Elizabeth, certain negroes therein named, and the moiety of a tract of land, in Newberry District, for life. After the death of Robert Gillam, Mrs. Elizabeth Gillam took possession of the said estate, and managed it till 1831, when she abandoned house-keeping, and resided with her relatives in Newberry District till 1840, when she removed to the house of the defendant, her son, and continued with him till her death, in 1851. By the will of Robert Gillam, the other moiety of the tract of land in Newberry District was

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devised to James \*Gillam, as also the part devised to Mrs. Gillam after the termination of her life-estate. About the year 1835, the defendant, James Gillam, having long since removed to Abbeville District, and his mother having abandoned house-keeping, became desirous of selling the tract of land in Newberry District, and, in consideration of the sum of fifty dollars, to be paid annually to Mrs. Gillam during her life, procured a release from her of her interest in the moiety of the said tract.

"In 1835, James Gillam, at the request of his mother, undertook the hiring out and management of the negroes, which he continued to do till December, 1851, when she died; collected and received the money, and paid the accounts of the said Elizabeth Gillam. The said defendant also, in 1847, 1848 and 1849, received various sums of pension money, to which his mother was entitled for Revolutionary services of her deceased husband, Robert Gillam, amounting altogether, after deducting expenses, to the sum of five hundred and thirteen dollars and sixty-nine cents.

"In 1836, many years before her death, and several before she took up her abode at defendant's house, Mrs. Elizabeth Gillam duly executed her last will and testament, whereby she made disposition of all her effects, choses in action, &c.

"After her death, in 1851, the said will was admitted to probate, but the executors therein named having refused to qualify, letters of administration, with the will annexed, were granted to the complainant, who thereupon instituted proceedings against the said James Gillam for the arrears due on the annuity of fifty dollars, as before mentioned, the hire of the negroes, and the pension money.

"To the amount claimed by the complainant, the following grounds of defence are relied upon by the defendant: First, that the matters now in suit were not in existence at the date of the will, and not contemplated by it; secondly, that the amount due him for the board and maintenance of

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his mother \*would exceed the amount of money due by him to Mrs. Gillam; and thirdly, the statute of limitations and the lapse of time.

"The question arises, then, is the defendant liable to account, and to what extent? The proof is clear, and indeed it is admitted by the defendant, that from 1835 to 1851, he either hired out Mrs. Gillam's negroes or worked them on his own farm, paid her accounts, &c., and in every respect acted as her agent. That the choses in action now in suit were not in existence at the date of the will, is immaterial, as it has been often held, that subsequently acquired personal property will pass under a will. I apprehend, if Mrs. Gillam had died intestate, her representatives would clearly have been entitled to her choses in action of every description. As agent of Mrs. Gillam, he cannot avail himself of the protection of the statute until a demand and settlement. The cases of *Wardlaw v. Gray*, [2 Hill Eq. 644.] and *Parris v. Cobb*, [5 Rich. Eq. 450.] seem to me very clear on the point.

"To what extent, then, and for what sums, is the defendant liable to account?

"In 1835, as above stated, the defendant, in consideration of the release of her life-estate in the tract of land in Newberry District, by Mrs. Gillam, undertook to pay her the sum of fifty dollars annually. The depositions of J. G. Sheppard and F. B. Higgins are very clear on the point, and the defendant, in his answer, does not deny it, but alleges that, in 1839 or 1840, as he was proceeding to charge himself with the said sum, Mrs. Gillam voluntarily released him from all further liability in relation to the same. Of this allegation there is no proof, except the answer; and I think, under the circumstances, the defendant must account for arrears. As regards this claim, however, I think the defendant occupies a different position from that in which he stands in reference to the other matters in controversy. Here he stands on the same footing as an ordinary obligor or debtor. His obligation is a purely personal one, and subjects him to a

legal liability, while he no longer occupies the

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confidential relation of an agent to his \*principal. For this reason, I think the statute a protection, except for the last four years of Mrs. Gillam's life. This, at the rate of fifty dollars per annum, will make two hundred dollars. By the obligation of defendant, the said sum of fifty dollars was payable annually, and upon failure of payment, became an interest bearing sum. In addition to the sum of two hundred dollars, I think the defendant must account for the interest upon each annual sum of fifty dollars, from the time it fell due.

"In 1835, the defendant, James Gillam, at the request of his mother, hired out her negroes, and continued to do so till her death, in 1851. The amount of their hire, during the intervening period, as appears by defendant's answer and proved to be correct by the evidence of R. C. Gillam is three thousand and thirteen dollars. During the same period the defendant expended, on account of Mrs. Gillam, the sum of seven hundred and five dollars and ninety-eight cents, of which the sum of five hundred and forty-five dollars and ninety-four cents was expended between the years 1835 and 1840, before Mrs. Gillam went to reside at defendant's house. As a set-off to the hire of the negroes, the defendant makes a charge of two hundred and fifty dollars per annum for the board and maintenance of his mother during the twelve years she lived with him, amounting to the sum of three thousand dollars. Much and voluminous testimony was introduced to prove the value of those services; and the witnesses, Dr. Holland, Miss Johnson, Miss Smith, R. C. Gillam and Simeon Chaney, all prove the great care and trouble endured by this defendant, and the constant attention and affectionate kindness with which he endeavored to promote the comfort and soothe the declining years of his mother, when, her body enfeebled and her mind impaired by old age, she had become a charge and burden to her family. By the same witnesses, the value of these services is rated from three to five hundred dollars per annum, a sum exceeding the charge made by defendant. The com-

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plainant \*alleges that the services rendered by defendant to his mother were gratuitous, and never intended to be a charge. It cannot be doubted that services intended to be gratuitous cannot afterwards be converted into a charge, but will not the onus of proving such to be the case rest upon the party making the allegation? and will the law presume such services gratuitous where the recipient has, if not a competency, at least an estate which can contribute largely towards a support, especially, too, where the benefit does not accrue to the person receiving, but to third persons? I must confess, however, the evidence which sustains the defendant's



claim for compensation is inferential rather than demonstrative. Independent of the answer of defendant, there is no proof whatever on the subject, except some remarks made by Mrs. Gillam, in a conversation had with the witness R. C. Gillam. The defendant alleges that Mrs. Gillam frequently told him that she wanted him to keep her and take charge of her property, and that, if there was enough to compensate him, she cared for nothing more, and appeared solicitous only lest her little "income" would not be adequate to compensate him. In the conversation with R. C. Gillam, Mrs. Gillam said she had a comfortable home for life and wanted nothing more.

"Defendant alleges that Mrs. Gillam intended not only that the hire of the negroes, or their services during the time she lived with him, should go as a compensation for her board and maintenance, but also the hire which had accumulated from 1835 to 1840, before she came to live with him. I see nothing in the evidence or the circumstances of the case to bear the defendant out in this construction, and I think he must account for the hire of the negroes from 1835 to 1840, amounting to the sum of eleven hundred and seventy-two dollars. The amount expended by defendant for Mrs. Gillam is seven hundred and five dollars and ninety-four cents, nearly the whole of which was expended during the same period; and I think the defendant ought to be allowed the same as

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a credit, so far, \*on the above sum. Some testimony was introduced to show that the value of the hire of the negroes was greater than the amount defendant charged himself with; but, under the view I have taken of the case, the result is the same.

In 1847, 1848 and 1849, James Gillam received pension money, due to Mrs. Gillam, after deducting expenses, to the amount of five hundred and thirteen dollars and sixty-nine cents. The same was received by him as agent of Mrs. Gillam, and I think he must account for it.

"The account, then, will stand as follows:

"James Gillam,.....Dr.

"To four years' annuity, at fifty dollars per annum, with interest on each sum from time it fell due, say to 1st June, 1855.....\$ 268 80

"To amount hire of negroes from 1835 to 1851.....3,013 01

"To amount pension money.....513 69

\$3,795 50

"Cr.  
"By board of Mrs. Gillam, from 1840 to 1851 (am't hire of negroes).....\$1,841 00

"By amount paid for Mrs. Gillam, from 1835 to 1851.....705 98

2,546 98

\$1,248 52

"The above sum of twelve hundred and forty-eight dollars and fifty two cents I think

the defendant must account for to complainant."

Johnston, Ch. This case comes before the Court upon a report and exceptions subject to equities. The pleadings and evidence being in writing, dispense with the necessity of stating the case, and the points made. The

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report and exceptions, and \*the Commissioner's judgment on the exceptions also, speak for themselves.

The bill is brought for an account. Mrs. Gillam, the mother of the defendant, and testatrix of the plaintiff, had a life-estate in a small tract of land, and a few negroes. The defendant was the remainder-man of the land; and, as executor of his father, had the right to the negroes on his mother's death, to be disposed of as part of his father's estate.

Many years ago he purchased in the interest of his mother in the land, for which he engaged to pay her an annuity of fifty dollars per year during her life. This constitutes one claim set up in the bill.

For many years, the defendant, as agent of his mother, hired out her slaves, and in other years, with her assent, they remained on his plantation. This is another claim.

The father of the defendant, and husband of plaintiff's testatrix, had been a Revolutionary soldier. About the year 1847, the defendant, while agent of his mother, applied to the U. S. Government for compensation for his father's services, under the Pension laws, and received several sums on that account. The bill lays claim to these sums, as constituent portions of the mother's estate. This is the third and last claim in the case.

The defence is, in limine, that the defendant, in the care and attention he had been obliged to bestow on his mother and her affairs, for near twelve years she lived with him, in great imbecility of mind and body, arising from great old age, understood himself, and was understood by her, to be earning a right to all the income of her property, with which he might otherwise have been chargeable; that it was, at best, but an inadequate compensation, and that it should not be wrung from him to serve as the pabulum of a will executed as far back as 1836, and probably forgotten by her who made it; but which, if material were thus furnished for its operation, would deprive an obedient and dutiful son of the proper reward of his filial piety, for no other purpose than to transfer it to others, who, all the

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\*time, were not called to the performance of any of the trying duties he had so assiduously bestowed on his parent. To protect himself in this moral right, he pleads the statute of limitations.

This is a general outline of the defence to the whole case. Particular objections, or de-

fences, will be found in the after pleadings.

Reserving the general equities, the Commissioner has taken evidence and reported an account, to which exceptions have been taken by both parties.

1. As to the annuity of fifty dollars, agreed to be paid as a compensation for Mrs. Gillam's life-estate in the land, the Commissioner considers the statute of limitations applicable to it; and holds that every instalment is barred, except such as accrued within four years before Mrs. Gillam's death. My opinion is, that the nature of this claim renders it subject to the statute. It stands entirely apart from the matter of agency; is a common personal engagement by one person to pay money to another; and is subject to all the incidents of a demand purely legal. But my impression is, that the statute is not confined to four years before the death of the creditor, but to four years before suit brought. I presume, that when the statute begins to run in the life-time of the creditor, his death does not suspend it. It is different, I suppose, as respects demands which accrue after the creditor's death. There the statute only begins to run from the date of administration. If I am right in these views, no instalment which accrued, of this annuity, more than four years before the filing of the bill, should have been charged, and it is so adjudged.

2. The sums received under the Pension laws. On this claim the defence was, that the money being received for Revolutionary services of Robert Gillam, constituted part of his estate, and was distributable as such, and not as part of his widow's estate. The Commissioner charged it to the defendant as part of the estate of Mrs. Gillam. The

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defendant's excep<sup>tion</sup> (his 2d exception) to this part of the report is, "Because, in truth and equity, the will of Mrs. Elizabeth Gillam had no reference to, and ought not to cover and dispose of pension money, which her son, James Gillam, received from the United States long after its execution, on account of the Revolutionary services of Robert Gillam, deceased. This money is the property of the heirs of Robert Gillam, under the laws of the United States." Upon this the Commissioner, reporting on the exceptions, remarks, "As regards his second exception, I think the receiving of the pension money by Mrs. Gillam's agent was a sufficient appropriation of it to her own use to relieve it from the operation of the laws of Congress in relation to pensions, and I overrule it."

I am left to infer from this (for the laws of Congress were not produced or cited), that, by the law of the Federal Legislature, pensions are given to the personal representatives of deceased officers and soldiers; and that the reason for transferring the money, in this case, to Mrs. Gillam's estate is, that

the person who received it was, at the time, her agent. This is hardly a sufficient reason. But to allow the production of the laws of Congress, and to permit any particular act of the defendant to be set out, by which he may be estopped from denying the right of Mrs. Gillam to the money, the report may go back. If the law is as I have supposed, or if the defendant is not estopped, as indicated, by some act (incapable of being corrected as a mistake), of course the money is, in law, the estate of Robert Gillam, and distributable under the law applicable to his will, and the defendant is not chargeable here. I suppose, if Mrs. Gillam were alive, and demanding this money, there is not a child she has (and the defendant as little as any of them) who would retain it from her. But this is neither here nor there. If the money is, in law, her's, let her have it; if Robert Gillam's, let it go to his heirs or legatees.

On the same claim, the Commissioner allowed interest only from the filing of the bill, and I approve his judgment.

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\*3. Then as to the hire of the slaves. No part of this case can be fully understood without reference to the record, &c., and least of all this part.

The defendant's hiring out of the slaves is distinguished by the Commissioner into two periods: the first extending from 1835 to 1840, while Mrs. Gillam lived in Newberry; the second from the expiration of the first to 1851, when Mrs. Gillam died. During this latter period she lived with her son, the defendant.

During the first period, the sums	
charged for hire amount to.....	\$1,172 00
And the sums expended by defendant	
for her, and credited, to.....	705 94

Leaving for this period a balance of	
hire of .....	\$ 466 06
The hire of second period.....	1,841 01

\$2,307 07

Against this (and also all the other claims), the defendant sets off a claim for board, trouble and attention. The Commissioner has allowed him the amount of the hire (\$1841.01) from 1840 to 1851, as compensation for board, services, &c., during that time. The set-off is not allowed to extend to the hire of the entire period, which is credited only with the sums expended. This ruling is complained of in the exceptions, and I think justly.

Though there is no explicit proof of an agreement by Mrs. Gillam to allow all the hire to the defendant, in consideration of his sustaining her in the infirmities and decrepitude of old age, there is much to favor the idea that such was her understanding and intention. But waiving this, what is there in the case, or in common justice, to confine the defendant's claim, so that it is to be satisfied only out of the hire accruing in the last period? This is a case of agency and of



mutual demands (and it is only because it is

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a case of agency that the statute \*has not been applied to all the hire accruing more than four years before suit), and what is to prevent the defendant's claim to be paid out of any part of the account? He has certainly established his right to at least two hundred and fifty dollars per annum, and I should think to a much higher sum, nor do I construe his answer, though it mentions that sum, as confining the demand to that amount. The claim, as I understand it, is to a quantum meruit. With these observations, as directions, let the report be re-committed, reserving to the Court the questions upon the general merits and equities of the case, until the report comes in; at which time, with the whole account before it, a judgment can be best formed upon them. The question of costs also reserved.

The complainant appealed, and moved for a reversal or modification of the decree upon the grounds:

1. That the defendant, James Gillam, was the general agent of his mother, Elizabeth Gillam.

2. That the annuity of fifty dollars was received and held by the defendant, as the agent of his mother.

3. That, under the circumstances, neither the statute of limitations nor lapse of time could affect the claim.

4. That the pension money, amounting to five hundred and thirteen dollars and sixty-nine cents, was received by the defendant in his mother's life-time, as her agent, was clearly chargeable against him, and should have been so declared.

5. That the charge for board by James Gillam was an after-thought, and that no charge for board was intended by him in the first instance.

6. That the defendant, by his letter, expressed his willingness to set off the board

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of his mother, for the time she lived \*with him, against the hire of the slaves for the same period; and also fixes, in his answer, the sum of two hundred and fifty dollars per annum as compensation.

7. That as the Commissioner had not fixed nor decided what would be a proper sum for board, that the whole matter be referred to him, free from instruction and direction, to take testimony and report what would be a proper allowance for board; and likewise what would be a proper sum for the hire of the slaves of Mrs. Gillam for the same period.

Marshall, Thompson, for appellant.

McGowen, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. In affirming this decree, it is only necessary to observe, that what is

said in relation to the claim of the defendant, for the support of the testatrix, has been misunderstood. The mistake is very natural, as the language of the Chancellor, taken apart from the report and the exceptions, on the subject of which he speaks, may seem to imply that the charge might be raised by proof above two hundred and fifty dollars per annum. That was not, however, the meaning of his remarks. His meaning was, that more than two hundred and fifty dollars might be allowed in those years to which the Commissioner restricted the claim, provided the whole sum allowed did not exceed two hundred and fifty dollars per annum for the whole time during which the defendant supported testatrix. With this explanation,

It is ordered that the decree be affirmed, and the appeal dismissed.

DUNKIN and DARGAN, CC., concurred.

WARDLAW, Ch., absent from indisposition.

Appeal dismissed.

#### 8 Rich. Eq. \*79

\*LUKE MATHIS v. C. B. GUFFIN and Others.

(Columbia. Nov. and Dec. Term, 1855.)

[Wills. ⇐116.]

The will, after certain specific bequests, directed the residuum, which included a tract of land, to be sold, and the proceeds divided so as to equalize the legacies. Probate of the will was rejected, because the executor was one of the attesting witnesses: *Held*, that it was a case of intestacy as well to the land as to the personalty, the will being one altogether of personal estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 298; Dec. Dig. ⇐116.]

[Conversion. ⇐15.]

A direction by testator that his land be sold, out and out, and converted at all events into personalty, is a bequest of personalty. *Wilkins v. Taylor*, [8 Rich. Eq. 291.] Ap.

[Ed. Note.—Cited in *Brooks v. Brooks*, 12 S. C. 458.

For other cases, see Conversion, Cent. Dig. § 28; Dec. Dig. ⇐15.]

[This case is also cited in *Noble v. Burnett*, 10 Rich. 530, without specific application.]

Before Johnston, Ch., at Abbeville, June, 1855.

This bill was filed to sell the land of which Mrs. Isabella Mathis died seized and possessed. The said Mrs. Mathis left a paper purporting to be a will, which was refused probate by the Ordinary of Abbeville District, because James Carson, who was named as the executor, was also one of the subscribing witnesses to the said paper. After giving certain specific bequests of negroes to all her children, except her daughter Mary Hill, the said Isabella Mathis directed the rest of her estate, not disposed of, to be

"sold and, divided in such manner so as to make each child's portion equal, having regard to the value of the negroes;" and further declared as follows: "As to the children of Samuel Hill, my grand-children, I give them nothing now, as their mother, my daughter Mary Hill, has had all her portion before." The aforesaid residuum, in the paper purporting to be her last will and testament covered, among other things, a tract of land containing three hundred and sixty-five acres, which had been sold by a previous order of this Court—the equities of all parties as to their rights in the proceeds of the sale being reserved. The questions were, First, was the will good as to the tract of land notwithstanding the executor attested it as a subscribing witness? and, second, Even if the will was not good as to the land,

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whether the chil\*dren of Mary Hill were not excluded on account of advancements to their mother, Mary?

The pleadings and exhibit having been read and argument heard, and the Commissioner having made his report that he had sold the land, and there being no exception to the same:

On motion of McGowan & Perrin, it was ordered that the said report of sale be confirmed.

It was further ordered, that the Commissioner do pay out the said proceeds of sale, as soon as collected, to the heirs at law of Isabella Mathis, deceased, excluding the children of Mary Hill, as follows, viz: one-fifth to Charles B. Guffin and Jane his wife; one-fifth to Thomas M. Morrow and Sarah his wife; one-fifth to Luke Mathis; one-fifth to William Mathis; and one-fifth to Thomas E. Mathis; taking the joint receipt of husband and wife for any portion that may be going to a married woman, and that of the guardian of such as may be minors.

This order was made pro forma, at the close of the term, with a view to leave the matter open to an appeal by any party who might be dissatisfied with its operation.

The children of Mary Hill, deceased, appealed and moved to reverse so much of the circuit decree as excluded them from a share of the proceeds of the sale of the land, upon the grounds—

1, Because all the estate of Isabella Mathis is intestate; the paper propounded for probate being adjudged invalid as a will, is insufficient to pass real estate by devise.

2, Because the paper, if held valid to alienate realty, by its terms converts the land into personalty, which, as such, becomes intestate when probate of the paper was refused.

3, Because there is error in the circuit decree excluding the \*children of Mary Hill, deceased, from a share of the proceeds of the

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sale of the real estate of Isabella Mathis, deceased.

Thomson & Fair, for appellants.

McGowen, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The case of Wilkins and Wife v. Taylor, decided by this Court at Charleston, Spring Sittings, 1847, (a) is entirely conclusive upon the point submitted by the second ground of appeal.

It is ordered and decreed that the decree of the Circuit Court be reformed, and that the children of Mary Hill, deceased, be admitted to a share in the proceeds of the real estate of Isabella Mathis, deceased, according to the provisions of the Act of Assembly for the distribution of intestates' estates.

DARGAN, Ch., concurred.


JOHNSTON, Ch. I concur in the result.  
Decree reformed.

(a) See Appendix [8 Rich. Eq. 291.]


8 Rich. Eq. \*82

\*MARGARET GOULDING v. REUBEN GOULDING and Others.

(Columbia. Nov. and Dec. Term, 1855.)

[Partition. 111.]

Commissioners in partition assessed the value of three several parcels of land, assigned one parcel to the widow, at the assessed value, as her share, and recommended that the other parcels be sold for distribution among the children. The return was confirmed, and the two parcels brought at the sale nearly twice the amount they were assessed at by the Commissioners: Held, that the widow was not entitled to come in and share with the children the amount which the land brought over the assessed value.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 402; Dec. Dig. 111.]

Before Johnston, Ch., at Newberry, July, 1855.

A full statement of this case will be found in the opinion delivered in the Court of Appeals.

Baxter, for appellant.

Jones, contra.

The opinion of the Court was delivered by,

DARGAN, Ch. This was a case for the partition of real estate. The intestate left three several tracts of land, and a widow and three children as his heirs at law. There had been an order for partition, a writ had issued, and the Commissioners made their return, which was confirmed without exception. They assessed the value of the homestead at one thousand six hundred and fifty-eight dollars and eighty-eight cents, and assigned it to the widow, under the provisions of the Act of 1791, with her assent; and she was, and still is in possession thereof. The other



tracts they assessed, one at nine hundred and twenty dollars, and the other at two hundred and ten dollars, making an aggregate of one thousand one hundred and thirty dollars. Finding it impracticable to make partition of these two tracts among the three children of

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the intestate, the Com<sup>\*missioners</sup> assigned these two tracts collectively to them; and recommended a sale, that the proceeds might be divided. The tract assigned to the widow, according to the assessed value of the whole made by the Commissioners, exceeded her share, for which excess she was to be accountable. By the order of the Court, the two other tracts were sold; the first named, at two thousand dollars, and the other at one hundred and fifty-three dollars, making the aggregate of two thousand one hundred and fifty-three dollars; which, it will be perceived, exceeded the assessed value of the Commissioners by one thousand and twenty-three dollars. If the proceeds of this sale be added to the assessed value of the homestead assigned to the widow, which had not been sold, the total amount would be three thousand eight hundred and eleven dollars and eighty-eight cents. Assuming this sum as the true valuation of the whole real estate, and as the proper basis of division, the widow would be entitled to one third thereof, and the three children of the intestate to the remaining two-thirds.

In the Circuit Court, a claim was set up in behalf of the widow, that she was entitled to retain the tract of land assigned to her at its estimated value, as made by the Commissioners, and to participate in the excess of price which the other two tracts brought over their estimated value as set forth in the return. A motion was made before the Chancellor, that the partition should be equalized in this manner; which motion was refused. And this is an appeal from that decision.

The injustice of equalizing the partition in this mode, and on this principle, is so glaringly manifest, that little need be said on the present occasion. If the whole real estate had been sold, and had brought more or less than its assessed value by the Commissioners, to divide the whole proceeds among the parties according to their respective rights, would of course have been fair, and is a case of daily occurrence. But this would have been to set aside the return of the Commissioners altogether. How can this be, when

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the return was confirmed, and the de<sup>\*cree</sup> of confirmation stands unreversed? What is the effect of that decree? It is, that the widow shall take the homestead at its assessed value, and account for the excess of such valuation over her distributive share. This decree was made by her consent, or at least with her acquiescence. She has not appealed, neither did she except.

If she had offered to submit the tract as-

signed to her, to the experimentum crucis of its value, namely, a sale at auction along with the others, and to have had her share of the whole estate, according to this standard of valuation, there would have been a greater color of reason and justice in her proposition. But she did not do this, and if she had, the others would not have been bound to accept the offer. She wishes to retain to herself all the benefits arising from the action of the Commissioners in assigning to her a tract of land at an assessed value, and to participate with her co-distributees in the accidental benefits accruing to them, from the fact that the lands assigned to them, brought more at a subsequent sale than their value as assessed by the Commissioners at a former period. I have spoken of the benefits as accidental; for one of the tracts assigned to the children of the intestate brought more, and one less, than the assessed value by the Commissioners.

It would be a very great mistake, to attempt to attain equality by acting upon two different standards of value; one as adopted by the Commissioners, and the other as tested by an actual sale at auction. The results, as the one or the other standard was adopted, might largely vary. The Commissioners may have estimated the property at too low, but the presumption is, that they estimated it all upon the same standard. And in such case, there could be no injustice to any.

Who can undertake to say, that the Commissioners did not estimate the value of these several tracts rightly? The assessment and partition were made some time (a year or more) before the sale was made. Who can say that the increase of price for which one of these tracts sold, was not owing to the

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\*advancing value of real estate in the country, or in that vicinity? And, if this be so, the value of the part assigned to the widow has advanced at the same ratio. Or without reference to any supposed actual appreciation, and on the supposition that the assessed value put by the Commissioners on the lands assigned to the defendants was erroneous, how does it appear that the widow's portion, if sold at the same time, would not have brought the same advanced price?

The foregoing views for the most part, tend only to show that the justice of the case abstractly considered, is with the appellees. It would be sufficient perhaps to say, that whatever might be the hardship, real or imaginary, there could be no remedy in a case like the present. The Commissioners are authorized by law, (under a sound discretion,) to assign the estate of an intestate, or a portion thereof, to one or more of the distributees at any assessed valuation. If the assessment is too high, no one is bound to accept. If it is too low, the parties who are dissatisfied may file exceptions to the return, and be heard by the Court. But, when the

return is made and confirmed, it becomes a decree of the Court, which can only be questioned as any other decree of the Court may. Until, or unless reversed or set aside, it is binding upon all the parties to the record. No party can afterwards say, that the land assigned to him or her, or to any of the co-distributees, was estimated at too high or low a value. It is a solemn judgment of the Court, that the land is worth so much, and, that the party to whom it is assigned shall take it at the price, and with the terms prescribed. The title of all the distributees then passes, and vests without further formality in the distributee to whom the land has been assigned; and, if it is in full of his share, he has thereafter no part or lot in the remainder. If it is in part, the rule has the same operation *pro tanto*.

Partial divisions of the same estate occurring at different periods, are by no means uncommon in practice. Where there are adult and infant distributees, it is sometimes

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desirable and quite an usual arrangement in proceedings for partition, to assign to the adults their shares and to let the residue remain, and be kept together undivided for the infant parties jointly. If afterwards, it should be deemed necessary or expedient to sell the common estate of the infants for partition among themselves, and it should sell for more than its estimated value in the original partition, it would be a monstrous proposition to let the adults, who are in the possession and enjoyment of their shares, come in for a participation of the increased value of the portion of the infants. Yet the principle contended for on this appeal, would even warrant that injustice.

I will only further remark, that the conclusion at which I have arrived, is in conformity with the decision in *Buckler v. Farrow*, Rich. Eq. Cases, 178. Though that case does not afford a precise analogy as to the facts, the principle is considered to be the same.

It is ordered and decreed that the Circuit decree be affirmed, and that the appeal be dismissed.

JOHNSTON and DUNKIN, CC., concurred.

WARDLAW, Ch., absent from indisposition.

Appeal dismissed.

8 Rich. Eq. \*87

\*N. K. BUTLER, Adm'r. v. JOSEPH H. JENNINGS.

(Columbia. Nov. and Dec. Term, 1855.)

[*Executors and Administrators* 111.]

Where a will is admitted to probate in common form, and is afterwards impeached and finally set aside by the verdict of a jury, on the ground of the testator's insanity, the execu-

tor will be allowed all expenses necessarily incurred by him in defending the probate.

[Ed. Note.—Cited in *McClellen v. Hetherington*, 10 Rich. Eq. 204, 73 Am. Dec. 89; *McKnight v. Wright*, 12 Rich. Eq. 233.

For other cases, see *Executors and Administrators*, Cent. Dig. § 451; Dec. Dig. 111.]

Before Johnston, Ch., at Edgefield, June, 1855.

Henry F. Freeman of the district of Edgefield, on the 8th June, 1851, executed a paper purporting to be his last will and testament, of which the defendant, Joseph H. Jennings, and Startling S. Freeman, were nominated the executors. On the 1st August, 1851, the said H. F. Freeman died—the paper was admitted to probate in common form by the Ordinary of the said district, on the 7th October, 1851, and on the same day the defendant was duly qualified as its executor. The decedent left surviving him his wife, Catharine C. Freeman, who, on the 10th September, 1851, gave birth to a daughter, Henrietta Freeman. Afterwards at the instance of the said Catharine C. and Henrietta Freeman, the defendant was cited before the said Ordinary and required to prove the said will in due form of law, and thereupon such proceedings were had that on the 5th August, 1852, a decree was pronounced by the said Ordinary adjudging that the paper in question was the last will and testament of the said deceased, and admitting the same to probate in due form of law. From this decree of the Ordinary, the said Catharine C. and Henrietta Freeman appealed, and for that purpose filed a suggestion in the Court of Common Pleas for the said district, controverting the said decree upon various grounds, and among them upon the ground that at the time of the execution of the said will, the said H. F. Freeman was laboring under partial insanity, or an insane aversion to his

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wife. To this suggestion the defendant pleaded, and issue being joined, the cause was tried before Munro, J., at the March term of 1854. On the opening of the case, and without any previous notice given to the defendant's attorney, the counsel for the suggestors moved for the following order:

"Catharine C. Freeman, and Another, }  
v. }  
Joseph Jennings.  
Suggestion.

"On motion by Messrs. Miller, Bonham and Moragne, attorneys for Catharine C. Freeman, ordered that the said Catharine have leave to withdraw her suggestion against the decree of the Ordinary, admitting the will of Henry F. Freeman to probate, and that the cause proceed in the name of Henrietta Freeman by her guardian ad litem, James A. Collins."

The motion, though earnestly opposed, prevailed, and the order was passed. In the progress of the trial the suggestor, Catharine



C. Freeman, executed a release of all her interest in her deceased husband's estate to W. C. Moragne, Esq., in trust for her infant daughter, the said Henrietta, and though objected to as incompetent, was permitted to testify as a witness in the cause. The jury rendered a verdict declaring the will to be null and void, and the defendant appealed and moved for a new trial, and for the reversal of the order referred to, but this motion was dismissed.<sup>(a)</sup> Subsequently the administration of the said decedent's estate was granted by the Ordinary to N. K. Butler, who, on the 7th April, 1855, exhibited his bill against the said Jos. H. Jennings for an account of the effects and estate of the deceased come to his hands. Expenses to a considerable amount had been incurred by the said Joseph H. Jennings, whilst acting as execu-

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tor as aforesaid, for legal \*advice and for counsel fees, and costs and charges of suit in the litigation touching the validity of the said will. In his answer, and on the reference before the commissioner, the defendant insisted that so much of those expenses as were incurred whilst the aforesaid decrees of the Ordinary stood unreversed, constituted a rightful charge upon the estate of the deceased, and that his (defendant's) accounts should be settled accordingly, but the commissioner ruled otherwise, and on the 30th May, 1855, filed his report upon the accounts, rejecting the credits claimed in that behalf by the defendant and ascertaining the sum due by him on 1st June, 1855, to be five thousand seven hundred and twenty-one dollars and fifty-five cents. The portion of the commissioner's report that relates to the rejected credits is as follows:

"The commissioner in making up the account, rejects entirely the claim of the defendant to certain counsel fees, and costs incurred in the suit at law. The deduction seems unavoidable, that Jennings was no legal executor; and if not a legal executor it does not appear to the commissioner that he can in any view set up a reasonable claim to costs incurred while defending the very case in which he was defeated, as to his claim of executorship."

To this report the defendant filed the following exceptions:

1. The decrees of the Court of Ordinary admitting the paper propounded by the defendant to probate, first in common form, and afterwards in due form of law, as the last will and testament of Henry F. Freeman, deceased, were judgments of a Court of competent authority upon a matter clearly within its jurisdiction, and whilst those decrees stood unreversed, the said paper was in legal contemplation, the lawful will of the said Freeman, and the defendant its lawful executor, and with all the rights and immunities

incident to that office; and the defendant maintains therefore, that the fair and rea-

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sonable \*expenses incurred by him as such executor, whilst the said decrees stood unreversed, are proper and rightful charges upon the estate of the deceased, and that the commissioner erred in ruling otherwise.

2. Because after joinder of issue upon the suggestion of appeal from the decree of the Ordinary, and on the very eve of its trial before the jury, Catharine Freeman the widow of the deceased, one of the suggestors, was, on motion by her attorney, of which no previous notice had been given to the defendant or his attorney, permitted by the Court to withdraw her name from the record, to assign her interest in the estate of the deceased for the benefit of her daughter, and remaining suggestor, and then to be introduced and to testify as a witness in the cause, and this too, without payment of the costs, the ordinary condition upon which amendments of the pleadings in the law courts are allowed—which conditions, it is submitted, should have been and would have been imposed, had it been suggested to the Court by the defendant's counsel, who, however, omitted to do so, being surprised by the application—and under such circumstances, the defendant maintains that he is equitably and of right entitled to be reimbursed his costs and charges of suit incurred up to that stage of the proceedings—and that the commissioner has erred in ruling otherwise.

The case was heard on the report, and the defendant's exceptions thereto, at the June sitting of 1855, before his Honor, Chancellor Johnston, who overruled the exceptions, and pronounced the following decretal order:

Johnston, Ch. This case having come on to be heard on its merits, upon the report of the commissioner submitted as information, and exceptions thereto, and after discussion, it is adjudged and decreed that the said report be confirmed, and that the defendant pay over to the plaintiff, the sum of five

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\*thousand seven hundred and twenty-one dollars and fifty-five cents, with interest from June 1st, 1855.

The defendant appealed, and moved for a modification of the decretal order, upon the ground, that the order overrules the defendant's exceptions to the commissioner's report, both of which ought to have been sustained for the reasons therein set forth.

Bauskett, Carroll, for appellant, cited *Allen v. Douglass*, 3 T. R. 125; *Poag v. Carroll*, Dud. 5; *Thompson v. Harth*, 1 Sp. 99; Act 1839, § 11, 11 Stat. 41; Act 1789, § 20, 5 Stat. 109; 1 Hag. 71; 2 N. & McC. 577; 1 Bay, 221; 3 Wash. C. C. 122; 2 McC. 76.

Moragne, contra, cited *Maxwell v. Connor*, 1 Hill, 23.

(a) Vide *Freeman v. Jennings*, 7 Rich. 383.

The opinion of the Court was delivered by

DUNKIN, Ch. Upon the statement submitted by the brief, the Court are all of opinion that the defendant's first ground of appeal is well taken. So long as the judgment of the Ordinary remained unreversed, the executor was entitled to be reimbursed all the necessary expenses incurred by him in sustaining that judgment. This position is fully sustained by the authorities adduced at the hearing. The Court will not undertake to say that extreme cases may not be supposed which would constitute an exception. A pseudo executor, who was successful enough by subornation of perjury to palm off upon the Ordinary a forged instrument as a genuine will, and whose turpitude was exposed in a trial before the jury, would scarcely be allowed to retain any part of the estate to reimburse the expenses of his nefarious attempt. No such case is here presented by the evidence. The verdict of the jury was manifestly founded on a conviction of the mental hallucination of the decedent.

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\*But it was suggested at the hearing that the defendant had an interest under the supposed will. No such fact appears. The will is not before us, and counsel do not agree as to the provisions of the instrument. It seems that the wife of the defendant, took some interest; but it is insisted that whatever she took was to her sole and separate use. If so, the defendant had no interest of the character contemplated. But, if he had, we are of opinion that the expenses of maintaining and defending the will as admitted to probate and his title as executor, were properly and necessarily incurred—must be referred to his fiduciary relation, and should be allowed. In the case of *Wham v. Love, Rice, Eq. 51*, all the ordinary duties of the defendant as administrator, had been fully discharged and the Court allowed all the expenses incurred

in relation to the same. But a considerable sum of money remained in his hands for distribution amongst the next of kin. The plaintiffs claimed this fund as sustaining that character. The claim was resisted by the defendant on the ground that himself and other co-defendants were properly entitled as next of kin. The plaintiffs succeeded in the issue, and, in taking the account, the Court, expressly allowing all the expenses incurred by the defendant as administrator, declined to reimburse the expenses incurred on the trial of the issue, in a controversy, not for maintaining his fiduciary relations, but for advancing his private interests. If the act of the Ordinary in granting him letters of administration had been impugned, because he was not entitled as next of kin, or for any other cause, and his judgment had been subsequently reversed, still all his acts while proceeding under the judgment of the proper tribunal would be supported, and the expenses necessarily incurred by him in maintaining his fiduciary relation would be properly chargeable on the assets of the estate. The case is stronger where the executor has been appointed by the person, under whom the plaintiffs claim as volunteers; and whose will has been admitted to probate by the Ordinary in common form, and the executor qualified

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\*thereon. When the litigation was subsequently stirred and the will required to be proved in solemn form, the executor was not at liberty to withdraw or decline the litigation, and the expenses therein necessarily incurred should be allowed in his accounts. It is ordered and decreed that the decree of the Circuit Court be modified, and the report of the commissioner reformed accordingly.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Decree modified.





# CASES IN EQUITY.

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

CHARLESTON—JANUARY TERM, 1856.

CHANCELLORS PRESENT,

HON. JOB JOHNSTON,  
“ BENJAMIN F DUNKIN,  
“ GEORGE W. DARGAN,  
“ F. H. WARDLAW.

8 Rich. Eq. \*95.

\*F. A. FORD, Escheator, ex rel. J. FERGUSON v. STARLING J. DANGERFIELD.

(Charleston. Jan. Term, 1856.)

[*Slaves* ⚡22.]

Testator, who died in 1836, bequeathed certain slaves to J. R., “in trust nevertheless, and for this purpose only, that the said J. R. do permit and suffer said slaves to apply their time and labor to their own proper use and behoof, without the intermeddling or interference of any person or persons whomsoever, further than may be necessary for their protection under the laws of this State, which now exist or may be past hereafter.” The rest and residue of his estate he also bequeathed to J. R., “upon trust nevertheless, and for this purpose only,” that said slaves be permitted to use and enjoy the same forever, without the interference of J. R. or any other person, further than may be necessary to secure said slaves, in the full use and enjoyment thereof; and he appointed J. R. executor, who duly proved the will. Testator left no next of kin. On bill filed by the escheator against the administrator of J. R., *Held*, that the will declared a trust in favor of the slaves, which was unlawful and void, and, there being no next of kin to claim, that the whole property bequeathed escheated to the State.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. § 94; Dec. Dig. ⚡22.]

That the cases of the State v. Singletary (Dud. 220), and Rhame v. Ferguson (Rice 196,) had not decided the questions involved in this case.

[*Trusts* ⚡66.]

Where the words of a will are not merely those of advice or request, but declare a trust which is void or unlawful, the legatee holds the property for the next of kin, and if there be none, then for the State.

[Ed. Note.—Cited in *Ford v. Porter*, 11 Rich. Eq. 251, 253, 254; *Craig v. Beatty*, 11 S. C. 378.

For other cases, see *Trusts*, Cent. Dig. § 94; Dec. Dig. ⚡66.]

Notwithstanding the decision in *Gill v. Douglass* (2 Bail. 387), this bill against the administrator of the executor was sustained.

[Ed. Note.—Cited in *Kaminer v. Hope*, 18 S. C. 575.]

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\*Before Dunkin, Ch., at Charleston, June, 1855.

The bill of Frederick A. Ford, escheator of the district of Charleston, at the relation of James Ferguson of St. Johns Berkley, Planter, stated, That George Broad, late of St. Johns Berkley, according to his own account a foreigner by birth, by his last will and testament bearing date the 5th April, 1836, duly executed to pass real estate, did devise and bequeath in manner following—that is to say:

“The State of South Carolina.

“In the name of God, Amen, I George Broad of the Parish of St. Johns Berkley, in the said State, farmer, being of sound mind, memory and understanding, do make, publish, and direct my last will and testament in manner and form following—that is to say: I will and direct that my just debts and funeral expenses be paid as soon after my death as possible: Then I give and bequeath to my friend, John R. Dangerfield of Bameretta, in said Parish of St. Johns Berkley, to him and his executors and assigns for ever, my slaves Daphne and her children, Nicholas, Mary, Jacob, Betsy, Sammy, William, Sarah, Frederick, James, George and Simon, and her grandchildren, John and Betsey, together with the future issue and increase of such as are females: In trust, nevertheless, and for this purpose only, that the said John R. Dangerfield, his executors and assigns, do permit and suffer the slaves



above mentioned, and each and every of them, and their future issue and increase, to apply and appropriate their time and labor to their own proper use and behoof, without the intermeddling or interference of any person or persons whomsoever, further than may be necessary for their protection under the laws of this State, which now exist or may be past hereafter: Then I give and bequeath all the rest and residue and remainder of my estate both real and personal, to my said friend John R. Dangerfield above mentioned, his heirs and assigns for ever: upon trust,

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\*nevertheless, and for this purpose only, that the said slaves above mentioned, and each and every of them and their future issue and increase, be permitted and suffered to use and enjoy the said estate, whether real or personal, for ever, without the interference or meddling of the said John R. Dangerfield, or any person or persons whomsoever, further than may be necessary to secure the said slaves the full use and enjoyment of the estate above mentioned.

"Lastly, revoking all former or other wills and testaments, I do hereby declare this to be my last will and testament: and do hereby constitute John R. Dangerfield sole executor of the same."

That afterwards, about the first day of May, 1836, the said George Broad departed this life, being at the time of his death possessed of the slaves mentioned in his will, viz.: An old woman called Daphne and her children and grandchildren: That he was also seized and possessed of a small tract of land and personal estate of some value, leaving no wife or lawful child, nor any other kindred besides his natural children. That John R. Dangerfield, the executor therein named, proved the will, and made an inventory of the estate, and filed the same in the Ordinary's office, and paid all the debts of the testator, and retained the overplus without any further account.

That the devise and bequest to John R. Dangerfield contained in the said will is upon trust, and that the said John R. Dangerfield, by the said will, takes no beneficial interest, and that on failure of the trusts declared, the trustee takes for the benefit of the next of kin; and on failure of the next of kin, for the State. That the trusts declared by the said will fail, because they are contrary to the policy of the law, and expressly invalidated by the Act of 1841. That by the 8th section of the Act of 1787, entitled an Act to appoint escheators and regulate escheats, it is enacted that when any money or personal estate shall be found in the hands of any executor or administrator, being the property of any person heretofore

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deceased or hereafter dying, and leaving no person entitled to claim the same according to the Statute of distributions, without mak-

ing any disposition of the same, the escheator of the District where such chattels shall be found, or the Attorney General on behalf of the State, shall or may sue for and recover, either at Law or Equity, and pay the same into the treasury of this State. That in the consideration of the law, there is no difference between dying without making any disposition, and dying without making any valid disposition. And the right of the State to demand an account from the said John R. Dangerfield, is the same as if the said George Broad had made the said John R. Dangerfield his executor without disposing of his estate.

That the said John R. Dangerfield sold Nicholas, Sammy and Simon, three of the testator's children which had been devised to him in trust aforesaid, and received the purchase money to the amount of between nine hundred and one thousand dollars, and applied the same to his own use, and sold and disposed of other personal property of the testator, as well as the real estate, and converted the money to his own use, and afterwards, about the day of last, died intestate, and administration of his estate was committed to Starling Dangerfield; who has taken possession of the stock of cattle belonging to the said testator as the property of John R. Dangerfield's estate; and would also have taken possession of the slaves of the said testator and their issue by the same title; but the said slaves have been seized as slaves illegally emancipated, and are held by Dr. Theodore Gaillard as his property under the Act of 1800.

And the bill insisted that the estate of the said George Broad has escheated to the State, and that the personal property which came to the hands of John R. Dangerfield, and was converted by him, should be accounted for by his representative, and that the said Starling Dangerfield should account for all the property of the said George

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Broad's estate that has come to his hands, and that all the money due on the balance of John R. Dangerfield's account as executor, and on the said Starling Dangerfield's account with the estate of George Broad should be paid into the public treasury. And that the personal property of which the said George Broad was possessed, and which came to the hands of the said John R. Dangerfield, and has not been lawfully administered, should be sold, and in like manner paid into the public treasury.

The prayer was that the said Starling Dangerfield may account for the property real and personal of the said George Broad, which came to the hands of the said John R. Dangerfield or to his hands; and that so much thereof as has not been converted may be sold, and the money paid into the treasury: and for general relief.

Dunkin, Ch. The Statute 1787, § 8, sec. (5 Stat. 48,) declares that where any moneys or other personal estate shall be found in the hands of an executor or administrator, being the property of any deceased person, who has died leaving no person entitled to claim according to the Statute of distributions, and without making disposition of the same, the escheator of the district in which such chattels shall be found, or the Attorney-General, on behalf of the State, shall and may sue for and recover, either at law or in equity, and pay the same into the treasury of this State: and, after due advertisement, if no person shall, within the time prescribed in the Act, appear and make good title to such personal estate, other than as executor or administrator, or their legal representatives, then such personal estate shall become vested in, and be applied to the use of this State.

Plaintiff alleges that George Broad died in May, 1836, having made his will in the previous month, of which will the late John R. Dangerfield was appointed executor—that he left, among other things, fourteen slaves, of whom no valid disposition was made by his will—that there were no persons entitled

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\*to his estate under the Statute of Distributions—that the executor took possession of the slaves and held them until his death, with the exception of three, whom he sold for about one thousand dollars. The bill prays an account from the defendant, Starling Dangerfield, of the property received by his intestate from the estate of his testator, Broad, and for general relief.

The will of George Broad is sufficiently recited in the pleadings, and is set forth at length in *Rhame v. Ferguson*, Rice, 196. The slaves are bequeathed to John R. Dangerfield, (whom he appoints sole executor:) "in trust, nevertheless, and for this purpose only," and the trust is then declared. In *Morice v. The Bishop of Durham*, 10 Ves. 521, it is said, "if a testator expressly says he gives upon trust, and says no more, it has been long established that the next of kin will take," "Then, if he proceeds to express the trust, but does not sufficiently express it, or expresses a trust that cannot be executed, it is exactly the same as if he had said, he gave upon trust, and stopped there. There is no difficulty upon that." Such is the language of Lord Eldon, affirming the decree of Sir William Grant, reported 9 Ves. 369. The principle thus declared, as well as the authority of the case, has been repeatedly recognized in our own Courts, and recently in *Finley v. Hunter*, 2 Strob. Eq. 215, and *Johnson v. Clarkson*, 3 Rich. Eq. 316. If the gift be made expressly in trust, whether the trust be valid or invalid, effectual or ineffectual, the donee cannot take beneficially. The declaration negatives the inference of such intention, on the part of the testator. It is then very clear, that, in this Court,

John R. Dangerfield must be held to have taken no beneficial interest in this bequest. The right of the plaintiff must depend upon a further inquiry.

Laws regulating emancipation are a part of the police system of this State. By the Act of 1800, it was declared unlawful for any person to emancipate or set free his slaves except by deed, and after examination and certificate that they were not of bad character, or incapable from age or infirmity

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of \*gaining a livelihood. The Act of 1820 declared that no slave should thereafter be emancipated but by Act of the Legislature. The trust declared by the will of George Broad is a manifest attempt to evade, or defeat, the policy of the law. It could not be enforced, not merely because there is no person to ask the aid of the Court, but because it is against principle to lend the assistance of the Court to such purpose. The consequence is succinctly repeated in the authority already referred to; "if, upon the face of the will, there is declaration plain, that the person, to whom the property is given, is to take it in trust: and the trust is incapable of taking effect, the party taking shall be a trustee, if not for those who were to take by the will, for those who take under the disposition of the law." For this disposition of the law the Court must first look to the Statute of distributions. If the deceased left no person to claim under this Statute, then the plaintiff is entitled to recover the property for the use of the State.

Difficulties have sometimes arisen which do not present themselves in the construction of this will. They are adverted to by Lord Eldon. He observed that, in the course of the discussion, a doubt had been raised how far it was competent to a testator "to give to his friend a personal estate, to apply it to such purposes of bounty, not arising to trust, as the testator himself would have been likely to apply it to. That question, as far as this Court has to do with it, depends altogether upon this: if the testator meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take. On the other hand, if the party is to take himself, it must be upon this ground, according to the authorities: that the testator did not mean to create a trust; but intended a gift to that person for his own use and benefit: for, if he was intended to have it entirely in his own power and discretion, whether to make the application or not, it is absolutely given, and it is the effect of his own will and not the obligation imposed by

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the testament; the one inclining, the other compelling, him to execute the purpose. But if he cannot, or was not intended to, be compelled, the question is not then upon a trust that has failed, or the intent to create a



trust: but the will must be read, as if no such intention was expressed, or to be discovered in it." The distinction is then shown between an express trust, and precatory words, or words of request and recommendation, accompanying a gift. In the latter case, he says, "Prima facie an absolute interest is given; and the question is whether precatory, not mandatory, words impose a trust upon that person." The cases are then examined, and the difficulty stated which the Court has experienced in imposing upon such expressions the character of a trust. "But," he concludes, "the principle of those cases has never been held in this Court applicable to a case where the testator himself has expressly said he gives his property upon trust."

Mr. Jarman, commenting upon the doctrine of recommendatory trusts, remarks that, "recent cases suggest a doubt whether such words would now receive a similar construction, for the Courts seem to be sensible that they have gone far enough in investing with the efficacy of a trust loose expressions of this nature, which, it is probable, are rarely intended to have such an operation." 1 Jarm. 338.

McLeish v. Burch, 3 Strob. Eq. 225, arose upon the construction of a will which was in operation prior to the Act of December, 1841. The gift of the slaves was absolute. No trust was expressly declared. In the clause preceding, the testatrix had bequeathed slaves to one of the same persons in trust for others, indicating an apprehension of the meaning of the terms. Accompanying the absolute gift were certain expressions which the Court held to be merely advisory or precatory, and not as creating a trust. There is nothing in the letter, or the policy, of the law, which prohibits a testator, in bequeathing a slave or slaves to his son, to bespeak for them, or either of them, his kind treatment, or the mode of treatment. The rela-

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tion of \*master and slave remains the same. The rights and obligations of proprietorship are unimpaired. What the father might do, in relation to the treatment of his slave, in his lifetime, without violating the law, or rendering the slave liable to seizure, or impairing his title, the son may also do. Circumstances might induce the son to change his treatment in consequence of the conduct of the slaves: or they might be sold to pay his debts. These are the incidents of ownership. Such bequest would be no violation of the Act of 1820 prohibiting emancipation. Such was the ground assumed by the defendant in *McLeish v. Birch*, see page 230. It may not be always easy to draw the line between an ordinary recommendation of kindness or humanity annexed to a gift and an interference with the salutary policy of the law. But, as has been already remarked, in this case the Court is involved in no such perplexity. The trust is declared on the face

of the will, and, therefore, the donee cannot take beneficially. The trust declared is illegal, and therefore fails.

What has been said in reference to the bequest of the slaves concludes the question as to the residue of the testator's estate. That bequest depends upon the validity of the former, and fails with it.

It is declared that the slaves described in the pleadings are part of the estate of George Broad, deceased; and it is ordered and decreed that the same, together with their issue, be delivered up to the Complainant.

It is further ordered and decreed that the defendant, Starling, Dangerfield, account for the transactions of his intestate as executor of George Broad, deceased, and for the sales of any of the slaves held under the will; that it be referred to one of the Masters to state an account making all equitable allowances, and that no hire be charged against the defendant prior to the time of exhibiting this bill. Parties to be at liberty to apply for such further orders as may be necessary.

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\*The defendant appealed on the grounds:

1. Because, the 8th section of the Act of 1787, cited and relied on both in complainant's bill and by the Chancellor's decree, is inapplicable to the case presented by the pleadings—the property in question not having been "found in the hands of an executor or administrator" of the deceased, George Broad.

2. Because, the decree orders the surrender and delivery by defendant, of negroes not asked for by complainant in his bill, and which according to the statement of complainant in said bill, had never been in defendant's possession, but on the contrary, had, against his will, been seized by Dr. Gailard, "as slaves illegally emancipated, and were held by him as his property."

3. Because, the will of George Broad having gone into effect prior to the Act of 1841, and being therefore unaffected by said Act, the trusts are such as might be legally executed, and the testator had made a valid disposition of his property, and effectually destroyed any right of escheat.

4. Because, prior to 1841, the residuary clause of Broad's will, as to the estate left for the use of his negroes, and which is the real subject of complainant's bill, expressed a trust, the execution of which was not forbidden by our laws, and could not be construed as any evasion thereof, and left no subject for escheat.

5. Because, according to the decisions of similar cases in this State, John R. Dangerfield held an absolute right in the negroes bequeathed by George Broad.

6. Because, under the laws of the State, John R. Dangerfield's was not a mere naked

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trust, but one coupled with an \*interest, inasmuch as it was "necessary for the protec-

tion of the negroes" bequeathed "under the laws of the State" "to apply and appropriate" a portion of their time and labor to his (Dangerfield's) own use—to prevent their seizure under the Act of 1800.

Simonton, Hayne, for appellants.

Petigru & Pettigrew, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. In the argument it was said, on behalf of the defendant, that on two former occasions, when this will was before the Court, the right of the defendant to hold the slaves bequeathed, was sustained. But this is hardly supported by the cases<sup>(a)</sup> referred to. In both cases it was held that the legal title vested in the legatee, but subject to the right of any person to seize the slaves under the law then existing, if any act of emancipation were committed. The first of the cases (*State v. Singletary*,) was an indictment for a riot, committed in a violent attempt to seize the negroes still in the custody of the legatee, and the defendants were convicted for their tumultuous conduct, there being no sufficient evidence of the legatee's having abandoned his proprietary right and dominion. The other case (*Rhame v. Ferguson*), was an action of trover for the slaves; and the plaintiff's title was founded on an alleged seizure of them, under the Act of 1800, as having been emancipated contrary to law. The Judge charged the jury that Dangerfield had a legal title under the will, and that a Court of law could not take notice of the trusts annexed by the testator, (though a Court of Equity might [as the Judge suggested] regard Dangerfield as a trustee, and

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the property as \*liable to escheat). That if Dangerfield has assented to the emancipation, and, in fact, carried it into effect, they were liable to seizure; and the question was left to the jury, under the circumstances, whether, in fact, a seizure had been made, so as to give the plaintiff a title to the property. A verdict was rendered for the defendant.

There is nothing in these cases to conclude the one now before this Court. In the former case the defendants might have been properly convicted for their riotous conduct, whether the slaves were emancipated or not; and in the latter, though the legal title was asserted, and the character or validity of the trusts discarded, as matters not cognizable in a Court of Law; yet the question was left out of the judgment, whether it might not be considered by this Court. In both cases, but particularly in the last, the fact of seizure (the only remedy brought under consideration against unlawful acts of emancipation,) was negatived.

In relation to the general doctrines, applicable to questions of emancipation, several

cases have been cited, from our own reporters.<sup>(b)</sup> It may be sufficient that three of these five cases, *Cline v. Caldwell*, *Carmille v. Carmille* and *Broughton v. Telfer*, all arose under deeds; and these deeds were all executed prior to the Act of 1841. It is not necessary to express any opinion here, as to the propriety of the ruling of the cases at law. So far as points of law were decided by the Law Courts, this Court is bound to follow them; and this is true also as to decisions in the Court of errors. But it would be difficult, if the matter were *res integra*, to say that, under a deed, executed before the statute of 1841, the legal title was not in the grantee: or that, so long as he abstained

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from actually emancipating the slaves conveyed to him, any adverse title could be acquired by seizure.

The distinction between executed contracts, such as deeds, and contracts executory, is very material, when they are considered with reference to the party entitled to avoid them. If property be passed by executed contract upon an unlawful, base or immoral consideration, or with an unlawful or immoral purpose, he who gave away the property with such an intent can never take advantage of his own wrong to rescind his contract; whereas, if the contract be executory and require the action of Courts of Justice to enforce it, the same party may successfully defend himself, and no Court will decree performance in favor of the other party, who is equally criminal. The deeds in the cases quoted, if void for fraud, were still good against the fraudulent grantors and their privies in the post. The personal representative of such a party after his death, standing in his place and representing him, would be equally bound with himself; and so of his next of kin. As to next of kin, in his life time,—there could be no such persons. It was only by the statute of 1841 that the nearest of kin had such an interest given them, during the life of the grantor, as entitled them to interfere. And I suppose, if it had been possible for the grantor himself to have avoided his deed, and reclaimed the property before that statute, the statute took his right away and conferred it on his kindred. This seems to be the scope of the policy of the Legislature. Their object was to cut up by the roots all attempts at emancipation; and to secure this end the self interest of the kindred was called into requisition as an instrument to carry out their measures. But if it had been left in the power of the grantor, the principal party to the fraud intended, to anticipate those thus appointed by the Legislature as its agents, he might only interfere for the purpose of making another and more successful

(b) *Cline v. Caldwell*, 1 Hill, 423; *Carmille v. Carmille*, 2 McM. 454; *Broughton v. Telfer*, 3 Rich. Eq. 432; *McLeish v. Burch*, 3 Strob. Eq. 226; *Skrine v. Walker*, 3 Rich. Eq. 266.

(a) *State v. Singletary*, Dud. 220; *Rhame v. Ferguson*, Rice, 196.



effort. Or he might suffer his right to be barred; or the statute of limitations to

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\*have such operation in his life time, as speedily to bar his representative.

But the present case arises under a will. As to next of kin, who take by law, it requires a valid will to divest. An unlawful will, or clause of a will, or any unlawful or void provision in a will, never excludes them. As to them, it is no will, and a void or unlawful trust is, as to these persons, no trust. Then, as long as the doctrine of *Morrice v. The Bishop of Durham*, quoted in the decree, exists, a legatee to whom property is given, coupled with an ineffectual or unlawful trust, cannot hold the property against the next of kin. No beneficial interest was intended to be conferred on him. The title was conferred on him only to enable him to execute the trust, and when he cannot execute it, equity will not permit him to set up his naked title.

The two other cases quoted of *McLeish v. Burch*, and *Skrine v. Walker*, are not, in principle, opposed to this doctrine. The doctrine upon which those cases were determined was this: that when a party intends to confer the benefits of property, with conditions which are void, or with the suggestions by way of advice, or request, that (considered as his property) the donee will use it in a particular manner, or treat it so and so,—not amounting to a trust—the property vests as a beneficial gift. No trust was contemplated. No legal duty was intended to be created. The grantor intended to suggest an imperfect obligation, but he also intended to give the property, as property, with all its incidents. Suppose a parent or a husband bequeaths his portrait, or other work of art to his wife or child, with a request that it be not sold, or given away out of the family. Suppose a favorite horse be given with a desire that he be not subjected to the plough, or to drudgery. Suppose that an aged, faithful, or enfeebled nurse be given to a child, with an injunction that she be fed for the residue of her days and no services exacted: or that a choice stock of negroes be bequeathed with

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the strongest direction (even \*using words of trust) that they be moderately worked, and only in certain employments, and be fed and clothed in a specified manner. None of these cases present cases of trusts; and why? Simply because the property was intended to pass, as property for enjoyment, with all its legal incidents.

Now, whether in the cases mentioned, (c) the construction adopted was correct or incorrect, while by another and a better construction, the words of the testators might have been held to create trusts, is not the question here. The principle of those cases (having arrived at the conclusion that the

legacies were intended to be beneficial and not fiduciary) was, that as no trusts were intended, none should be raised to deprive the legatee of his property. This is the whole extent of these cases; and so it is expressed in the judgments given in them.

But in the present case the language of the testator admits of no such interpretation. He gives "in trust, and for this purpose only," that the slaves enumerated have the sole control of their time and employment, without the interference or intermeddling of any person in the world further than such friendly assistance as may secure their legal protection. Is not this freedom? All the rest of his estate is also given "in trust for this purpose only," that the enumerated slaves enjoy it, exclusively, without the control of Dangerfield, the nominal donee, or any other person. What benefit or interest was intended to Dangerfield in the slaves or property, of which all control or dominion is expressly taken away from him?

We are compelled, therefore, by the explicit language of the testator, to conclude that nothing was given to Dangerfield but a naked title, intentionally coupled with a trust to emancipate. The title was intended as a mere power to feed that trust. The trust was unlawful when the will came into operation; and, if there had been next of

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kin, they might have \*interposed, even before the statute of 1841. As there were no next of kin, the State succeeded to their rights.

The same naked title has been constantly attended with the same unlawful trust from the death of the testator to the present moment; and the trust being still executory and now incapable of execution, the case of *Blackman v. Gordon* [2 Rich. Eq. 43, 44 Am. Dec. 241] decides, that the trustee may be stripped of his legal title.

An objection founded on *Gill v. Douglass*, 2 Bail. 387, is taken in the first ground of appeal, to the effect that as the present defendant is only administrator of Dangerfield, executor of Broad, he does not represent Broad's estate which has escheated, and, therefore, is not liable to the escheator who sues him. The power of the escheator was examined, in that case, only in the light of the statute of 1787. But this officer has rights at common law as well as by statute. He is to make title to escheatable property, and must necessarily proceed according to the circumstances of the case. In this case, if it is necessary to reach the property sought to be subjected through an administrator *de bonis non cum testamento annexo* of Broad, and such administrator is brought in, in order that the property be placed in his hands, it is manifest that he will be a merely formal party. As administrator he will have no right to rescind the will or reclaim the slaves to his testator's estate. The sub-

(c) *McLeish v. Burch*, and *Skrine v. Walker*.

stantial right of rescission must, at last, be in the escheator.(d) At this stage of the

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suit we are unwilling to \*arrest its progress upon a merely technical and unsubstantial ground.

Upon the whole we see nothing to dissent from in the principles of the decree brought up by this appeal. There is a little matter of detail which needs some explanation. It is said in the grounds that the decree requires the defendant to deliver up slaves not in his possession, but which had been seized by Gaillard. An assertion is made in the bill that Gaillard had seized them, but neither party substantiated the fact at the hearing. It seems to have been taken for granted that Gaillard would obey the decree. But he is not a party. Let the decree be modified by directing that the defendant deliver up such of the slaves as he had in possession at the filing of the bill, or at the hearing, or as he may hereafter get possession of; and that an unconditional delivery by Gaillard to the plaintiff shall be equivalent to a delivery by the defendant.

With this modification the decree is affirmed, and the appeal dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

(d) JOHNSTON, Ch. Certainly there are too many difficulties in declaring that the right of setting aside the legal title of one to whom property has been conveyed upon an unlawful trust, exists in the representative of the grantor, or that rights arising consequently from such a conveyance, should be made to depend on such right in the representative, for a Court to venture lightly on such declaration. Suppose for example a case like this: A. sells and conveys, by deed, slaves to B. in trust to emancipate them, and this is done since the statute of 1841. Then A. dies, leaving next of kin. This is not a gift but a sale. Now, add the further fact that the purchase money has proceeded from C., a third person. Has the administrator of A. any right to recover the slaves for which he received the full value? Are his next of kin entitled to the slaves, or to his estate, consisting of the price? Can B.'s administrator claim the slaves? or can his next of kin?

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\*HONORIA T. McNISH, and Others, v. FRANKLIN P. POPE.

(Charleston. Jan. Term, 1856.)

[Dower ⇨12.]

C. L. and J. H. were appointed trustees upon their giving security, and the trust estate, land, was ordered to be sold. At the sale C. L. became the purchaser for \$1500. He and J. H. then gave bond as trustees, and the commissioner conveyed to him the land taking his receipt, as trustee, for the purchase money. On the same day he mortgaged the land, as counter security, to G. P., a surety on his bond as trustee. Two years afterwards C. L. sold the land for two thousand and twenty-five dol-

lars, which was paid to G. P., to "be by him applied to the trust bond for the benefit of" the cestui que trusts:—*Held*, that the widow of C. L. was entitled to dower in the land.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 36–43, 48; Dec. Dig. ⇨12.]

[Dower ⇨12.]

Where a trustee purchases the trust property and the sale is not impeached by the cestui que trusts, his title is good and his wife's right of dower attaches.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 48; Dec. Dig. ⇨12.]

Before Dunkin, Ch., Charleston, June, 1855.

Dr. Thomas E. Screven, by deed dated 27th January, 1829, conveyed a tract of land on May River, called the Bower, to John McNish, trustee of Honoria McNish, John Horatio, Charles Lycurgus, Thomas Julius, Laura, Mary Catharine, Jane Dupre, and Susannah McNish, in trust for the aforesaid children and such other children as may be born of the body of Ann McNish, wife of John McNish, to be divided among them equally, share and share alike, and until such division shall take place, to be occupied and used entirely and specially for the maintenance and support of the aforesaid children. By deed, dated 5th February, 1831, between the same Dr. Screven, of the first part, Ann McNish of the second part, and Jeremiah Fickling and Richard Davant of the third part, reciting that Dr. Screven had purchased a plantation called Stock Farm, on May River, and certain negroes, at Sheriff's sale, as the property of John McNish, and had sold part of the land and reimbursed himself for the money paid, and that Mrs. McNish had released her dower in the part thus sold, he conveyed the residue to Fickling and Davant, in trust, to permit the said Mrs. Ann McNish to receive and take the rents, &c., dur-

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ing her natural \*life, and after her decease, for all such child or children as she shall at the time of her death leave alive and surviving her, share and share alike, as tenants in common and not as joint tenants, their heirs and assigns forever.

26th January, 1838.—A petition was presented by Mr. Alexander L. Edwards, at Gillisonville, in the name of Mrs. McNish, praying that C. L. McNish, and J. H. McNish might be substituted in place of Fickling and Davant, as trustees, under the deed of 5th February, 1831.

Mr. Davant, the commissioner, being a party, this petition was referred to Angus Patterson, Esquire, as a special commissioner, who reported the next day, on the testimony of George Pope and Alexander Verdier, that C. L. and John H. McNish were proper persons to be trustees in place of Fickling and Davant. That report was confirmed on the same day, and an order entered, that C. L. and J. H. McNish be substituted trustees to the deed of trust mentioned in the petition, upon such certificate



being endorsed by the commissioner upon the original trust deed, and duly recorded.

On the next day, the 29th January, 1838, petitions were presented severally by John McNish, as trustee under the deed of 27th January, 1829, and C. L. and John H. McNish, as trustees under the deed of 5th February, 1831, stating that the two pieces of land were adjoining and brought no rent, and ought to be sold. In each case an order was made the same day, referring the petitions to the Commissioner to report on the facts and the propriety of granting the prayer of the petitions, and the gross value of the trust property proposed to be sold.

On each petition the commissioner made a separate report next day, viz.: that from the testimony of Norton, Logan, Verdier and Pope, filed with the report, it would appear that a sale is beneficial to the *cestui que trusts*.

On the 2d February, 1838, an order was entered in both cases, that the commissioner

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hold a reference to ascertain the \*gross value of the trust property proposed to be sold, and upon the trustees' giving bond and security in double its value, for the faithful discharge of their duties, the property mentioned in the petitions be sold by the commissioner, and the proceeds delivered to the trustees, to be held by them subject to the trusts, respectively in the trust deeds.

Nothing was done till 1839, when a new petition was presented to the Court at January term, in the name of C. L. McNish, Honoria McNish and J. H. McNish, setting forth Dr. Screven's conveyance to Davant and Fickling, for the use of petitioners, their father, mother, brothers and sisters, viz.: Laura, Thomas Julius, Jane Dupre, Mary Catharine and Susannah Dupont McNish, of a tract of about three hundred and fifty acres, called Stock Farm, and another conveyance by the same in trust to John McNish, father of the petitioners, for the use of petitioners, and the other parties above mentioned, of a tract of land called the Bower; that the lands in their present situation, are of little value, and that it would be much to the interest of the petitioners, who are of age, and of their father and mother, and of their brothers and sisters, who are under the age of twenty-one years, that the same should be sold, and the proportional shares of the minors put out at interest, upon bond, with good security, bearing interest payable annually. That as the interest of petitioners is small, it would be to their advantage to receive it in fee simple. Prayer accordingly. The petition is thus endorsed:—"We acknowledge the legal service of this petition 28th January, 1839. John McNish, Ann McNish, Laura McNish, T. J. McNish, Jane D. McNish, Mary C. McNish, Susannah D. McNish." Thus making all the parties in interest, parties to the petition.

At the same time an order was entered that the order of reference be extended to the next term.

In this state matters remained until 1841, when a report on the last named petition

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was filed, certifying that Dr. Screven \*conveyed by deed of 8th February, 1831, the land described in the petition, to Fickling and Davant in trust, and that in 1838, on the petition of Mrs. McNish, an order was made for change of trustees, on condition of the substitution being endorsed on the original deed by the commissioner and duly recorded. That the original deed had been sent to Charleston for registration and could not be found, and so the order in this respect could not be complied with. That he, the commissioner, had no evidence of the execution of the other deed; that from the testimony of George Pope, both the tracts are worth together not more than one thousand five-hundred dollars, and that a sale would be advantageous to the *cestui que trusts*. On the same day an order was entered modifying the order made in January, 1838, so far as to dispense with the endorsement on the original deed, directing the land described in the petition to be sold, and that on the trustees C. L. McNish and J. H. McNish giving bond and security, in double its value, the proceeds to be delivered to the trustees, to be held by them subject to the trusts respectively in the trust deeds.

On 1st March, 1841, Mr. Davant, the commissioner in Equity for Beaufort District, offered both tracts for sale in one lot, and set them down to C. L. McNish as purchaser, at one thousand five hundred dollars, and made him a deed bearing date the same day, and expressed to be for the consideration of one thousand five hundred dollars paid; and took a receipt from him for the purchase money, and took a bond from C. L. McNish, J. H. McNish, George Pope and F. H. Walsh, in the penal sum of three thousand dollars, reciting the appointment of C. L. McNish and J. H. McNish, as trustees, in place of Fickling and Davant, under a deed made by Thomas E. Screven, and conditioned for the faithful performance of their said trust. C. L. McNish on the same day, mortgaged their land to George Pope as a counter security against his bond. At the sitting of the Court in May, 1841, Mr. Davant reported that he had sold to C. L. McNish both tracts of land for one thousand

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\*five hundred dollars, and taken his receipt for the purchase money, deducting costs, which report, on the 19th February, 1841, was confirmed.

By deed, bearing date 29th December, 1843, C. L. McNish conveyed the same premises to B. E. Guerard, in consideration of two thousand and twenty-five dollars, which was received by George Pope, who signed the following memorandum: "Gillisonville,

29th December, 1843, received of Mr. C. L. McNish, through the hands of Mr. B. E. Guerard, two thousand and twenty-five dollars, which is to be applied to the trust bond given by him for the benefit of the McNish family." At the same time George Pope bound himself by a written contract with the purchaser to procure the consent of all the adult cestui que trusts interested in the two tracts of land purchased by him, "and to procure a relinquishment of dower from Sarah Jane McNish, the wife of C. L. McNish, or return the purchase money, and to give up his mortgage to be cancelled."

Prior to 5th January, 1844, a bill was filed by S. Lawrence as the next friend of Jane McNish, Susannah McNish and Mary McNish, infants, to restrain George Pope from paying over the money in his hands to C. L. McNish or John H. McNish; and an injunction was granted by the commissioner on the day last mentioned, which injunction, at the sitting of the Court in February, 1844, was continued; and a provisional order was made that, in case the defendants did not answer, the commissioner should inquire how much should be set aside out of the purchase money as the price of Stock Farm.

On that bill no further proceedings were had, and C. L. McNish died in the same year, leaving a widow and two children.

On 1st December, 1847, the same complainants and their mother filed their bill against B. E. Guerard, as well as J. Fickling, R. J. Davant, John McNish, John H. McNish, and the personal representatives of C. L. McNish, when they come within the jurisdiction, praying to set aside the sale

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to C. L. \*McNish, and to have the Bower and Stock Farm divided between them and B. E. Guerard, as the purchaser of the shares of C. L. McNish and J. H. McNish. Mr. Guerard put in his answer, claiming as a bona fide purchaser, without notice for valuable consideration, and the cause came on to be heard in January, 1849, when the bill was dismissed with costs as to Stock Farm, and retained for further inquiry as to the Bower, and with leave to make John H. McNish a party. On appeal, this decree was confirmed with a slight modification.

In February, 1850, the cause came on again, and the bill was dismissed with costs. Afterwards leave was obtained to sue the bond of George Pope at law, and an action was brought in the Court of Common Pleas in the name of the Commissioner. Pending this action, Mrs. McNish died on the 1st October, 1851. In April, 1852, the case *Davant v. Pope* was tried, and a verdict had for plaintiff, from which the defendant appealed, and the Court of Law ordered the judgment to stand as a security until an account should be taken in this Court.

A bill was then filed by Honoria, Laura, Thomas J., Jane D., Mary C. and Susannah D. McNish, against F. P. Pope, executor of

George Pope, John H. McNish, and the administrators of Ann McNish and C. L. McNish. The defendant Pope answered, denying that he was liable on the bond, because the bond was for the trustees of Stock Farm only; and denying that he was liable on his receipt of the money, because he received it as an indemnity against the dower of C. L. McNish's wife. The case was heard the 11th July, 1853, by Chancellor Wardlaw, who, on the 30th November, 1853, decreed, among other things, that the defendant F. P. Pope, executor, pay to the plaintiffs and John H. McNish, in equal shares, three-fourths of the aggregate price of two thousand and twenty-five dollars, with interest from December 29th, 1843, on so much thereof as represents the value of the Bower, and with interest from 1st October, 1851, on so much thereof

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\*as represents the value of Stock Farm; and that said defendant Pope pay to Thomas J. Bresnan, administrator of Ann McNish, the interest on three-fourths of so much of the aggregate price as represents Stock Farm from 29th December, 1843, to October 1, 1851. And that said executor be allowed to retain one-fourth of said aggregate price, with interest from December 29, 1843, until the further order of the Court, with leave to any of the parties, after the lapse of ten years from the death of C. L. McNish, to move for the payment of the amount reserved. From this decree all the parties, except Pope, appealed. The opinion of the Court was delivered by Chancellor Johnston, as follows: "The decision of the Chancellor is not that the widow of Lycurgus McNish is entitled to dower, in the premises purchased by him at the commissioner's sale, but merely, that, if she is, the fund in the hands of Pope should be subject to the value of her dower.

"We think his decision is right, and that he has properly exercised his discretion to retain, for a reasonable time, so much of the fund as may be required to meet her claim.

"The purchase of the premises by Lycurgus may have been subject to an avoidance by those interested in the land, on the ground that he was a trustee; but, being parties to the proceeding, under which the sale was made, they waived their equity by assenting to the confirmation of the purchase.

"That confirmation was a waiver of all equities in the land, and by his bond Lycurgus became trustee for the price of one thousand five hundred dollars, obtained for the land; and Pope became surety for the trusts undertaken.

"If by their subsequent sale to Guerard a profit was made on Lycurgus' purchase, it was for him alone to determine whether that profit should enure to the cestui que trusts of the one thousand five hundred dollars, or to himself: and, if by an act, entirely voluntary, he indicated an intention to convert it to them, neither he nor his surety should be



so harshly dealt with, as to deny them the privilege of discounting out of the profit the means by which it was to be secured.

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"It appears that Guerard stipulated for a title disencumbered from the dower of Lycurgus' wife: and that when Pope, as the agent of both parties, (Lycurgus and Guerard) received the two thousand and twenty-five dollars, to be applied to the bond, he at the same time bound himself to Guerard to procure an extinguishment of the dower, or to return the money to Guerard. Such a transaction means in substance, that the fund they received—less the amount of the dower—is trust money. So the Chancellor has held, and we approve his decision. It is ordered that the decree be affirmed, and the appeal dismissed."

In the meantime Alvin N. Miller, who had intermarried with Sarah Jane, the widow of C. L. McNish, and the said Sarah Jane, his wife, before the expiration of ten years from the death of C. L. McNish, instituted proceedings in the Court of Common Pleas, at Gillisonville, against the tenants in possession of the Stock Farm and Bower plantations, for the recovery of the dower of the said Sarah Jane therein, which proceedings are now pending.

On 6th April, 1855, Franklin P. Pope filed the bill in this case, praying, among other things, that the said Alvin N. Miller, and his wife may be enjoined from further prosecuting their suits at law against Bernard E. Guerard, Rev. J. Stoney, and R. H. Kirk, to recover her dower, or from suing out their writs for the admeasurement of her dower in the said land; and that the said Honoria McNish, Laura McNish, Jane D. McNish, Mary C. McNish, Thomas J. McNish, Susannah D. McNish, and John H. McNish, and John T. Bresnan, administrator of the estate of Mrs. Ann McNish, may implead with the said Alvin N. Miller and his wife, and the administrator of the estate of Lycurgus McNish, touching the right of the said Alvin N. Miller and wife to dower in the said land; and touching the right of the said Honoria McNish, Laura McNish, Jane D. McNish, Mary C. McNish, Thomas J. McNish, Susannah D. McNish, and John H. McNish, and

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John \*T. Bresnan, administrator of the estate of Mrs. Ann McNish to the said sum of money in the complainant's hands; and that the Complainant may be allowed to bring the said sum of money into Court, and for general relief. Whereupon, an order was granted by Master Gray, on April 6th, 1855, for a writ of injunction to issue according to the prayer of the bill. The defendants all answered—Miller and wife assenting—and the others denying her right to dower in the premises.

The case was heard in Charleston, in June,

1855, by Chancellor Dunkin, who on 14th August delivered the following decree:

Dunkin, Ch.—Chancellor Wardlaw's decree in McNish v. Pope, and the appeal decree affirming that judgment, left undecided the right of Lycurgus McNish's widow to dower in the premises. In the conclusion of the Circuit decree it is said—"As the widow of C. L. McNish and B. E. Guerard are not parties to the suit, it would be unsafe and improper to order the whole fund to be paid into Court without calling them in." Three-fourths of the fund was ordered to be paid to the parties, and in this respect the plaintiff, Franklin P. Pope, has complied with the decree of the Court. The other fourth the plaintiff "was allowed to retain until the further order of the Court, with leave to any of the parties, after the lapse of ten years from the death of C. L. McNish, to move for the payment of the amount reserved." It appears that Alvin N. Miller and his wife, (formerly the widow of Lycurgus McNish,) have recently instituted suits at law to recover dower in the Bower tract and Stock Farm. The bill, among other things, prays an injunction against the proceedings at law.

Chancellor Kent says, 4 Kent, 42, "It has been long held, and is now definitely settled, that the wife of a trustee is not entitled to dower in the trust estate; and if she attempts it at law, equity will restrain her." See also Hill on Trustees, 269.

The title to Stock Farm and the Bower

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was complicated, \*some of the parties interested were minors. All the orders and proceedings, prior to the sale by the commissioner, on 1st March, 1841, tend to show that the object was to effect an advantageous sale by placing the title in one for the benefit of all. Preliminary to the sale, both tracts were valued together, and a bond taken from J. H. McNish, as required by the Court. C. L. (or Lycurgus) McNish bid off the property, and the commissioner executed a conveyance to him, but he neither gave bond, nor paid money, as was required by the terms of sale. He merely gave to the Commissioner a receipt for the amount. When on the 29th December, 1843, Lycurgus McNish resold to B. E. Guerard, the receipt given on the same day for the purchase money, and declaring the purpose to which it was to be applied, is a sufficient acknowledgment of the real character of the transaction and of the understanding of the parties. Some confusion arises from the fact that Lycurgus McNish was one of the trustees. If a third person, Dr. Screven, for instance, had bid off the land at one thousand five hundred dollars, and received a conveyance, and on the same day, or the next day, had resold to B. E. Guerard for two thousand dollars, and had given a receipt acknowledging that the purchase and re-sale had been for the benefit of Mrs. McNish's children, and in conformity

with the previous arrangement to that effect, and had forthwith paid over the money to J. H. McNish and Lyeurgus McNish, as trustees for those children, the Court is unable to perceive upon what principle the widow of Dr. Screven would be afterwards permitted to prosecute a claim of dower against the purchaser, B. E. Guerard. If Dr. S., on the re-sale to Guerard, had executed to him a conveyance with full covenants, and after giving the receipt, &c., had delayed to pay over the full amount, and on his decease, his executor declined to pay the balance in consequence of a demand of dower instituted by his widow against the purchaser, it would be, in substance, this case. Another view may be taken with the same result. No money pass-

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ed \*between Lyeurgus McNish and the Commissioner on 1st March, 1841. But McNish took upon himself to represent all the parties in interest, and applied their money to enable him to procure the commissioner's title. Acting, as he did, in good faith and for the benefit of all, he might well do this. He took the title in his own name; but their money paid for it. Assuming that he was liable on his bond as trustee for the money, his responsibility was satisfied by showing the application of the funds to this purchase; affirmed, as it has been, by their subsequent conduct. Now the clear result of all the cases, as Mr. Justice Story says, "without a single exception," is that the trust of the legal estate is in the party who pays the money. "If the consideration money is expressed in the deed to be paid by the person in whose name the conveyance is taken, and nothing appears in such conveyance to create a presumption, that the purchase money belonged to another, then parol proof cannot be admitted, after the death of the nominal purchaser, to prove a resulting trust; for that would be contrary to the Statute of Frauds and Perjuries. But if the nominal purchaser, in his life time, gives a declaration of, or confesses the trust, then it takes it out of the statute." 2 Story Eq. Jur. Section 1201, and note. The principle has its "origin in the natural presumption, in the absence of all rebutting circumstances, that the person who supplies the money, means the purchase for his own benefit and not that of another; and that the conveyance in the name of the latter, is a matter of convenience and arrangement between the parties for other collateral purposes." There are not only "no rebutting circumstances," but all the circumstances confirm the presumption that Lyeurgus McNish did not purchase for himself alone, but for all those who had a common interest with him, and whose funds he had used to complete the purchase, and that the conveyance was taken in his name alone, "as a matter of convenience and arrangement," to facilitate an advantageous re-sale for the benefit of the parties.

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\*It is ordered and decreed that the defendants, Miller and wife, be restrained from further proceedings at law to recover dower in the premises. But as she is entitled to a distributive share in her late husband's interest in the proceeds of the "Bower," it is ordered that an enquiry be made as to the amount of the same. In the meantime it is ordered that the plaintiff have leave to pay into Court the one-fourth of the aggregate sum of two thousand and twenty-five dollars, with interest from 29th December, 1843, to await the final order upon the report of the master.

The defendants, Alvin N. Miller and wife, appealed on the grounds:

1. Because it is respectfully submitted that the widow of Charles Lyeurgus McNish is entitled to dower in the Stock Farm and Bower plantation, as lands of her deceased husband, and that his Honor erred in decreeing otherwise.

2. Because it is respectfully submitted that by the sale and conveyance of the said lands, made by order of the Court of Equity and confirmed in a case in which all the parties in interest were before the Court and consenting, the legal title to the said lands was perfected in the said Charles Lyeurgus McNish and his wife thereby became dowable of the same.

3. Because it is respectfully submitted that the receipt of George Pope, of 29th December, 1843, was no acknowledgment by C. L. McNish that he held said lands in trust.

4. That no subsequent act of C. L. McNish (the legal estate having once vested in him) could operate to defeat his wife's right of dower in said lands.

5. Because the decree of his Honor is in other respects contrary to law and equity.

Fickling, for appellants.

Petigru, De Treville, contra.

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\*The opinion of the Court was delivered by

DARGAN, Ch. I concur with the Chancellor who tried the cause on Circuit, that a widow is not dowable of lands held by her deceased husband in trust; and that the principle is the same in a case of resulting trust. But I think, that both in regard to the plantation called "the Bower," and that called "Stock Farm," the trusts were executed by the statute of uses eo instanti upon the execution of the deeds, by which they were conveyed to John McNish as trustee. And that, therefore, when at a subsequent period, Charles Lyeurgus McNish was by an order of the Court substituted as a trustee in the place of John McNish, there was in fact no trusteeship to which he could be substituted. According to this view, he was never seized of the legal estate as trustee.

But were it otherwise, I do not perceive,



that the case would be materially varied. Where a trustee becomes the purchaser of the trust estate, the beneficiaries can vacate the sale, or hold him as bound by the purchase at their option. If they acquiesce in, or confirm the purchase, the title remains in him, and cannot be disturbed, or questioned by any other person. Then it becomes an absolute estate in the trustee, discharged of the trust, and the widow is of course entitled to her dower. Supposing that Lycurgus McNish was seized of this land as trustee, by an order of the Court it was sold by the commissioner, and was purchased at one thousand five hundred dollars, (its true value,) by Lycurgus McNish, to whom the commissioner executed and delivered titles. The beneficiaries, (of whom Lycurgus himself was one,) now acquiesce in the sale, and do not proceed to vacate it. They do more; they confirm the sale by dividing, and appropriating among themselves the purchase money. Who else had a right to question his title? And how can it be said, that his title was not perfect, so as to give him an estate in fee; and his wife a right to her dower.

I am not sure, in a case like this, where

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the trustee was him\*self a beneficiary, and purchased, not at his own sale, but at a sale by a public officer under a decree or judgment, for a full price and without fraud, that the sale ought not to stand.

Suppose the case of a strictly technical trust, and that the cestui que trust sells, and transfers to the trustee his equity. The contract would stand until it was impeached by the cestui que trust. But if the latter never proceeded for a vacation of the sale, but acquiesced in, and confirmed it, the title of the trustee would become perfect, and discharged of the trust. And there would be no reason why the widow would not be entitled to her dower.

I have said, that Lycurgus McNish was never seized of the legal estate in the land as trustee; or if he was, that trust was discharged as respects the land by the sale and conveyance to him under the circumstances which I have noticed. But by his appointment as trustee, and his receipt of the purchase money from the commissioner in that capacity, a trust attached upon the fund arising from the sale of the land, and he became liable for it in that character.

Pope, the plaintiff in this suit, was the surety of Lycurgus McNish on his trust bond. And when the latter became the purchaser of the land, Pope took from him a mortgage of it, by way of indemnity, or collateral security, against his liability as surety on the trust bond. When Lycurgus McNish sold the land to Guerard, it was subject to two charges or incumbrances; namely, Pope's mortgage, and his own wife's contingent claim of dower. Pope was willing to discharge his mortgage, if Guerard would pay into his

hands the money due to the trust estate, for which he was responsible. This was done, and Pope's mortgage was released. It remained for Guerard to protect his title against the contingent claim of dower in the wife of Lycurgus McNish. This was done in the following manner: Guerard contracted for the land at two thousand and twenty-five dollars. The whole of this sum was paid to Pope, for the purpose of paying the

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debt due to the trust estate; \*and the balance, or so much of it as should be necessary, was to be applied to the extinction of the claim of dower. Pope stipulated with Guerard to procure the relinquishment of the dower, or otherwise to return him the money. It will be profitable to refer back to former proceedings between the same parties. In the case of Honoria McNish and others v. F. P. Pope and others, it is said in the appeal decree of this Court, "the decision of the Chancellor is, not that the widow of Lycurgus McNish is entitled to dower in the premises purchased by him at the Commissioner's sale, but merely, that if she is, the fund in the hands of Pope should be subject to the value of her dower. We think his decision is right, and that he has properly exercised his discretion to retain for a reasonable time so much of the fund as may be required to meet her claim." Here is an adjudication, that if the widow of Lycurgus McNish is entitled to dower, the money paid by Guerard to Pope is an appropriate fund for its satisfaction. The same appeal decree proceeds thus: "The purchase of the premises by Lycurgus may have been subject to an avoidance by those interested in the land, on the ground that he was a trustee; but being parties to the proceeding under which the sale was made, they waived their equity by assenting to the confirmation of the purchase."

"That confirmation was a waiver of all equities in the land, and by his bond Lycurgus became trustee for the price of one thousand five hundred dollars, obtained for the land; and Pope became surety for the trusts undertaken." Here it is decided, that Lycurgus McNish took from the commissioner a title discharged of the equities of the beneficiaries of the trust to have that title set aside. It follows as a necessary consequence that the widow is entitled to her dower, as that equity constituted the only objection to her claim, in the view of the Circuit Court.

We have thus arrived at the conclusion, that the widow is entitled to her dower, and

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that the fund in Pope's hands is a \*fund appropriate for its satisfaction. It does not follow, that her suits at law ought to have been enjoined, and she brought into this Court for the purpose of being compelled to take satisfaction of her dower out of a fund which third parties have provided for that

purpose, without her consent or contract. But as she is now a party before the Court, and consents to have satisfaction of her dower out of the fund in Pope's hands, and to prevent circuity of action, we have thought it best to retain her in this Court, and to award her that satisfaction on her claim of dower, which she was proceeding to recover, in the Law Court, when her action was arrested by the injunction of this Court.

It is ordered, and decreed, that so much of the circuit decree (from which this appeal is taken) as adjudges, that the widow of Lycurgus McNish, now Mrs. Miller, is not entitled to dower in the land conveyed by the commissioner in equity to Lycurgus McNish, by deed dated, 1st of March, 1841, be reversed.

It is ordered, and decreed, that the said Mrs. McNish, now Mrs. Miller, is entitled to her dower in said premises.

It is further ordered, and decreed, that satisfaction be made of said claim of dower, out of the balance of the fund in Pope's hands paid to him by Guerard, as has been stated, and that the said Pope do account for said balance, (being one-fourth of the purchase money of the land) from the date of the sale by the commissioner to Lycurgus McNish, to wit., from the first day of March, 1850.

By the Act of 1824, where the land has been alienated by the husband in his lifetime, the dower is to be assessed upon the valuation at the time of the alienation, with interest. By this provision I understand, that the dower is to be assessed upon the true value at the time of alienation, and that the interest is to be given from the death of the husband, when the right of dower accrues. She is not restricted to the price which the husband obtains (which in some cases may be nominal, or much beneath the market value.) but

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she may prove \*that the land is worth more, and have her dower assessed upon such higher estimate. It may be assumed however in this case, that the price given by Guerard to Lycurgus McNish, i. e., two thousand and twenty-five dollars, was a fair and full price; more particularly, as we have heard nothing to the contrary, and the counsel for the appellants has intimated a willingness to have the dower assessed upon that valuation.

It is therefore ordered, and decreed, that the said Mrs. McNish, now Mrs. Miller, is entitled as the value of her dower in said land, to the one-sixth part of the said sum of two thousand and twenty-five dollars, that is to say, the assessed value of her dower, according to the established rules for estimating the same, is three hundred and thirty-seven dollars and fifty cents, with the interest thereon from the death of Lycurgus McNish; the date of which event does not ap-

pear in the brief. It is ordered, that the commissioner do enquire as to the day of the death of Lycurgus McNish, and that he calculate the interest from that time on the said sum of three hundred and thirty-seven dollars and fifty cents, and that he collect the said principal and interest from the said Franklin P. Pope, and that he pay the same to the said Alvin N. Miller and Ann Miller his wife in satisfaction of her claim of dower aforesaid.

It is further ordered and decreed, that after satisfying the said claim, the remnant of said fund, be paid to the beneficiaries of the said trust.

It is further ordered and decreed, that the plaintiff Pope do pay the costs of this suit and the costs of the suits at law, for the recovery of dowry.

JOHNSTON, Ch., concurred.

DUNKIN, Ch., dissenting. I am constrained to dissent from this judgment, and principally for the reasons given in the circuit decree. In Chancellor Wardlaw's decree, 7

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Rich. Eq. \*193, it is stated that, on the 29th Dec., 1843, Lycurgus McNish, having sold and conveyed both tracts to B. E. Guerard, paid the purchase money, two thousand and twenty-five dollars, to George Pope, and took his receipt for the same, to be applied, to the trust bond given by him, (Lycurgus McNish), for the benefit of the McNish family." Referring to the alleged difference in the title of the Bower and Stock Farm, he says, "where, as in this case, the trustee consents that the estate for which he is trustee shall be mixed and consolidated with another estate of his beneficiaries, as to which he may have no fiduciary connection, and becomes purchaser of the mass at his own sale, his purchase of the whole is voidable. On this account greater effect is to be given to his subsequent acts and declarations, representing himself, notwithstanding his legal title, as remaining trustee for the whole. Beneficiaries are not bound to treat a voidable sale as void—they may affirm it and proceed for the amount of the resale and interest as the result of the management of their estate by the trustee." Such seems to me to have been the condition of these parties. By their previous acts, or acquiescence, they may well have been regarded as affirming the purchase made by their trustee, and their bill against B. E. Guerard was properly dismissed. But this does not change the character of the transaction, or preclude their recovery of the price at which the land was sold to Guerard "as the result of the management of their estate by the trustee."

Decree modified.



## 8 Rich. Eq. \*130

\*JAMES BECK, Ex'or. and Others, v. T. E. SEARSON and Wife and Others.

(Charleston. Jan. Term. 1856.)

[*Limitation of Actions* 99.]

Bill filed in February, 1852, to set aside, on the ground of fraud and undue influence, conveyances made in February 1844, *held*, barred by the statute of limitations. The bill contained no allegation that the undue influence was continued until a period within four years before the filing of the bill; and, therefore, the Court refused to consider, whether such an allegation, if proved, would prevent the bar of the statute.

[Ed. Note.—Cited in *Kirksey v. Keith*, 11 Rich. Eq. 38; *Brown v. Brown*, 44 S. C. 383, 22 S. E. 412.

For other cases, see *Limitation of Actions*, Cent. Dig. § 478; Dec. Dig. 99.]

Before Dunkin, Ch., at Beaufort, February, 1855.

Dunkin, Ch. A brief of the pleadings is indispensable to a proper understanding of this case—an outline is to this effect: The wife of the defendant, T. E. Searson, is the daughter of Stephen W. Blount, of the State of Georgia. On 3d January, 1844, Blount executed a deed, purporting to transfer, in cash, the sum of four thousand dollars, to Z. Z. Searson, brother of the defendant, T. E. Searson, “in trust, to suffer and permit the said T. E. Searson to take the said sum of money, and invest the same in any kind of property he may see fit, (the title thereto being taken in the name of the said trustee, Zachariah Z. Searson,) and from time to time, as he the said Thomas E. Searson may see fit, to sell, alien, exchange, re-invest, and otherwise change the same, (the title thereto being always taken to the said trustee, and he making title in all cases of sale or exchange.)”

The uses declared were, (among others,) for the joint use of husband and wife, and of the survivor, and then for the issue, &c. Z. Z. Searson formally accepted the trust in writing, and the deed was recorded in the Register's Office on 5th February, 1844. On 3d February, 1844, Eliza H. Searson, (the mother of Thomas E. and Z. Z. Searson,) reciting a consideration of three hundred dollars paid to her “by Z. Z. Searson, trustee

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\*for Thomas E. Searson and Elizabeth M. his wife,” conveyed to the said trustee the tract of land on which the said Thomas E. Searson then resided, containing four hundred acres; and by another deed of the same date, reciting the consideration of two thousand dollars to her in hand paid by Z. Z. Searson, trustee for Thomas E. Searson and Elizabeth M. his wife, she, the said Eliza H. Searson, bargained and sold ten negroes (by name) to the said Z. Z. Searson, trustee as aforesaid. Both these deeds were executed in the presence of two witnesses, and recorded on the 10th April, 1844.

It is alleged in the bill that, at the time of the execution of the deed of February, 1844,

Eliza H. Searson was “residing in the same house, or on the same plantation, with the said Thomas E. Searson;” that in July, 1851, Eliza H. Searson voluntarily removed to the residence of one of the plaintiffs, Z. Z. Searson, and then and there required him to write, at her dictation, a will, a copy of which is exhibited, which will was duly executed on the 19th July, 1851, and the testatrix died on 18th August of the same year. This instrument is preceded by a declaration on the part of the testatrix, that the deeds of February, 1844, were “an act of fraud committed by her (the testatrix) through the persuasion of her son Thomas E. Searson; that the fraud was committed by her (the testatrix) to shield the land and negro slaves from being sold under a decree that was likely to be had against her, as security on bond for her son, Z. Z. Searson;” that the said Z. Z. Searson, knew nothing of the matter, but that “the bills of sale were delivered by her to the said Thomas E. Searson in the presence of two witnesses, who said, the said Thomas E. Searson gave her in payment a small roll pertaining to be value received, but which roll she (the testatrix) then solemnly vowed and declared that she returned, the day after, to the said Thomas E. Searson, by his request, without opening the said roll, or knowing what was the contents, and that she had never received one cent in payment for the said land and negroes.” The

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testatrix devises and bequeathes fifty dollars a piece to her sons Thomas E. and Z. Z. Searson, and directs the residue of her estate to be divided among her grand-children, (the children of said Thomas E. Searson and Z. Z. Searson,) and her grandson James Beck. Thomas E. Searson was directed to have the management of his children's portion, giving to each his portion when arriving at the age of twenty-five years. Z. Z. Searson and James Beck were appointed executors of the will; the latter of whom alone qualified thereon, to wit, on the 29th August, 1851.

This bill was filed on 20th February, 1852, by James Beck and by Z. Z. Searson, for himself, and as next friend of his children. The plaintiffs charge that no consideration was paid to Eliza H. Searson for the deeds of February, 1844; or that, if any, it was very small, and inadequate, and paid merely as a form to cover the character of the transaction; and that even this small sum was restored by the said Eliza H. Searson to the said Thomas E. Searson, the day after the execution of the deeds, and that the said deeds were utterly fraudulent and void.

The defendant, Thomas E. Searson, answers fully and circumstantially all the allegations of the bill, but he insists that the plaintiffs occupy no more favorable position than Eliza H. Searson, if alive, could assume; and that if she ever had any cause

of suit against the defendant, arising out of the deeds of February, 1844, (which he in no sort admits,) the same occurred more than seven years before the filing of the bill in this case, and is therefore barred by lapse of time in analogy to the Statute of Limitations, and he craves the benefit of the same. The cause was heard on this issue alone, the Court entertaining an opinion that Eliza H. Searson, if she had ever any claim to the aid of the Court of Equity, arising out of the transaction of 3d February, 1844, was precluded by the plea; and that her executor, or those claiming as volunteers under her, were in no better situation, and were also bound.

Assuming as true the allegations of the

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bill, that the consideration of the deeds of February, 1844, was so grossly inadequate as to shock the conscience and warrant the inference of fraud; or that the consideration, trifling as it was, was returned the next day by the grantor; all this was well known at the time the deeds were put on the public records of the country. The plaintiff, Z. Z. Searson, too, resided within a mile or two of the parties, and admitted his knowledge of the deeds within seven months after their date. No circumstance of fraud alleged in the bill as invalidating the deeds was unknown, or could from necessity have been unknown to the testatrix at the time of the transaction. Then, in February, 1848, her right to impeach the deeds was gone. She lived until 1851, and died without adopting any proceedings to annul the deeds. It was said the deeds of February, 1844, were not known to the trustee, Z. Z. Searson, until some months after their execution. But Blount's deed expressly provides that the money shall be paid to Thomas E. Searson, who was to make the investments in the name of the trustee, who was specially exempted from liability for any property which did not actually, and not constructively, pass into his own possession. In this Z. Z. Searson acquiesced when he became a party to the deed executed by Blount, and he admits that he was aware that Eliza H. Searson had executed the deed of February, 1844, some seven months afterwards. It is not suggested in the bill that the character and effect of the deeds was not understood by Eliza H. Searson; or that, in this respect, any imposition was practised upon her; much less that she awoke to the knowledge of such imposition at a subsequent, or recent date. As was intimated by the Court in *Arnold v. Mattison*, 3 Rich. Eq. 154. (to which, in other respects, this case is not dissimilar,) no decree could be made upon a case not made by the bill, although the evidence might sustain it. According to the case as presented, the claim of the testatrix to relief, or to the aid of this Court, if any existed, was barred

in her lifetime, and no right passed to her representatives.

It is ordered and decreed that the bill be dismissed.

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\*The Complainants appealed and moved this Court to reverse the decree on the grounds:

1. Because the bill sets forth that the deeds were obtained by undue influence, and without consideration; and further, that at the time of the execution of them by Mrs. Searson, she was residing with Thomas E. Searson, and that he had exclusive control of all her property as her agent; which facts raised a presumption of undue influence in obtaining the deeds, and so long as said relations continued, the Statute of Limitations could not begin to run.

2. Because Mrs. Searson's declaration in her will, that the purpose of the deeds was to protect the property from creditors, does not rebut the presumption of undue influence arising from the relations of the parties, because she states that the deeds were executed by the persuasion or influence of her son Thomas E. Searson.

3. Because the Statute was not pleaded, but only set up in the answer; and the evidence should have been heard.

4. Because the Statute was no bar to the suit.

Tillinghast, for appellants.

Treville, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. This Court concurs with the Chancellor. Whatever may be our opinion as to the application of the Statute of Limitations to a case where the pleadings and proofs show that the undue influence, constituting the fraud, continued to a date within four years from filing the bill; it is sufficient for this occasion to say, that the

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bill in this cause makes no such allegation. The plaintiff's statement of fraud and undue influence is confined to the date of the execution of the deed; and the plaintiff Z. Z. Searson admits his discovery of the fraud seven years before filing the bill, and the plaintiff Beck has no equity superior to that of his testatrix. It is always safer to limit the relief of complainants to the claims regularly made by them, and not to permit the introduction of evidence foreign to their allegations, which might greatly surprise their adversaries.

It is ordered and decreed, that the appeal be dismissed, and the Circuit decree be affirmed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Appeal dismissed.



## 8 Rich. Eq. \*136

\*THOMAS RUMPH, Guardian, v. MARY S. WARING, Adm'x.

(Charleston. Jan. Term, 1856.)

[*Slaves* ⚡21.]

Equity has no jurisdiction to sustain a bill to establish the freedom of a person of color, filed by his guardian against one who has him in possession.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. § 81; Dec. Dig. ⚡21.]

Before Dunkin, Ch., at Colleton, February, 1855,

Dunkin, Ch. Isaac Perry of St. Paul's Parish, died in 1818. By his will, dated 15th August, 1818, he directed inter alia, as follows, viz: "It is further my will, that my two mulatto boys named Harry and Richard, should be free, and for this purpose I hereby specially empower by this deed or will, my executors hereinafter named, to manumit, emancipate and set free, by a due course of law, the above two named mulatto boys, Harry and Richard, in the same manner, and to all intents and purposes, as though it was done and executed by myself." Josiah Perry, son of the testator, proved the will on 12th March, 1819, and he alone qualified thereon as executor. Col. Richard Perry, (a witness examined by the commissioner on interrogatories prepared by the parties,) testified that he is seventy-one years of age, and is the cousin of Josiah Perry, (since deceased,) the son and executor of Isaac Perry; that in 1820, the witness, with others, was summoned by John B. Vaughan, (a Justice of the quorum,) that they, to wit, Morton Lindsey, Charles Tumblestone, Geo. Johnston, John Miles, and the witness, examined the boys, Harry and Richard, (the former being then about seven or eight years of age,) and after examination they signed the certificate required by law; and that Josiah Perry, as executor of Isaac Perry, deceased, executed a deed, emancipating the said boys, Harry and Richard; that on the same occasion the witness emancipated two of his own slaves, Mary and Selina; that after Josiah Perry executed the deed of emancipation for Harry and Richard, he landed it to the witness, and he and Josiah Perry went together to the register's

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\*office in Colleton, and that the certificate and deeds were placed in the register's hands, to be recorded, who gave a receipt for the same, (which witness produced, and which forms part of his evidence.) The original receipt was proved to be in the hand-writing of James Smith, who was the deputy of Richard Singleton, at that time clerk of the Court of Common Pleas for Colleton district, and runs as follows:

"Received of Richard Perry, and Josiah Perry, two instruments of emancipation, setting free a negro woman named Mary, and her child, Selina, also setting free two boys,

Richard and Harry. Received, in clerk's office, for recording, 22nd November, 1820.

(Signed) "James Smith, for  
Richard Singleton, C. C. P."

This witness further testified, that a short time after the emancipation, he heard that the papers had been lost; and being anxious about those in whom he (the witness) was interested, he made inquiry at the register's office, and ascertained that they were not to be found; that the witness then procured another certificate, signed by the same parties, except Morton Lindsey, who had died in the meantime, which he lodged with the register, and took his receipt for the same; "that his object was to ask the assistance of equity to correct the mishap which was done for those he represented." In connection with this evidence, was offered a bill in this Court, filed by the defendant's testator, Joseph Joor Waring, deceased, as guardian, and in behalf of a negro woman named Mary, and her two children, Selina and Sarah, against the witness, Richard Perry. It was filed with two exhibits, A. and B., on the 19th November, 1823; exhibit B. is a copy of the receipt of the deputy clerk above recited, and exhibit A. is a subsequent certificate of the surviving magistrate and freeholders, (of whom it appears Josiah Perry was one.) The answer admits all the allegations of the bill in rela-

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tion to the emancipation \*of Mary and Selina, the loss of the papers, &c. It was evidently an amicable proceeding, conducted by the same lawyer; and on 21st May, 1824, Chancellor Gaillard, after reciting that the facts had been substantiated, decreed that the defendant should execute another deed to take effect as of the date of the original deed of emancipation.

In corroboration of this testimony, an original certificate was given by the Magistrate and surviving freeholders, in relation to Harry and Richard. This certificate was produced by Jacob K. Linder, Esq., the present clerk of the Court of Common Pleas for Colleton district, which he deposed was found by him among the records of his office; that he had searched for the deed of emancipation, and the certificate, but had been unable to find them. The certificate of the freeholders produced by him, bears date April 11th, 1821; that of the magistrate, July 12th, 1821, and they were recorded in the clerk's office 7th December, 1821. They are as follows, to wit:

"We, the undersigned, freeholders of St. Paul's Parish, do hereby certify, that on the 17th November, one thousand eight hundred and twenty, we, together with Morton Lindsey, (since deceased,) were summoned by one John B. Vaughan, Q. U., to examine two mulatto boys, one named Richard, the other named Harry, late the property of Isaac Perry, deceased, who, by his last will and

testament, directed his executor, Mr. Josiah Perry, to emancipate and set free the said two boys, Richard and Harry, according to law; the said Josiah Perry being examined on oath relative to the character of the said two boys, Richard and Harry, we found that they were of good character, and capable of gaining a livelihood by honest means. We therefore agreed, together with the before mentioned Morton Lindsey, that the above mentioned two boys, Richard and Harry, should have a certificate to that effect, which was drawn up accordingly, and signed by each of us, together with the above mentioned Morton Lindsey. And that the said Josiah Perry did execute a deed of emancipation of

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the said two boys, \*Richard and Harry, and signed, sealed, and delivered the same, together with our certificate. We therefore declare that the said Richard and Harry were legally emancipated, and set free from slavery, on the 17th day of November, 1820.

(Signed) Richard Perry,  
George Johnson,  
Charles Tumblestone,  
John Miles."

"Dated April 10th, 1821."

Then follows, on the same sheet of paper, the certificate of the magistrate:

"This is to certify, that the above mentioned certificate and deed of emancipation were duly executed before me, on the 17th day of November, 1820; and the said two boys, Richard and Harry, were legally emancipated and set free from all slavery.

(Signed) John B. Vaughan, Q. U."

"Dated July 12th, 1820."

In November, 1820, the boy Harry was (as stated heretofore) seven or eight years old. From that time, and during the life-time of Josiah Perry, the executor, (who died in 1824,) Harry resided either with his aunt, a colored woman named Tenah, belonging to one Joseph Brownlee, or with the executor, Josiah Perry. Some time after his death, but at what time particularly is neither stated nor proved, Joseph Joor Waring, (defendant's testator,) whose then wife was a daughter of Isaac Perry, (the former owner of Harry,) and sister of Josiah Perry, his executor, sent for Harry, who continued to reside with him until his death, in December, 1852. After the decease of Joseph Joor Waring's former wife, he intermarried with defendant, who is his widow, and administratrix of his estate. In May, 1853, Harry left her possession, when he was taken by her directions in July of the same year, he having in the meantime, through his guardian, by

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letters of June, 1853, \*insisted on his right to freedom. The defendant pleads in bar, that after such a great lapse of time she has a right to presume either, that the deed, and certificate of emancipation, if ever executed, which she does not admit, never were deliv-

ered; or if delivered, that by reason of some irregularity attending the ceremony of emancipation, they were regarded as void, and Harry was seized by the intestate as a slave; or that the said negro was afterwards levied on as part of the estate of Isaac Perry, deceased, (his former owner,) and sold to pay his debts; and that the possession of Harry as a slave by the intestate for such a length of time, extinguished his claim, if he ever had any, to freedom, and vested a complete title in the intestate.

In reference to the character of Joseph Joor Waring's possession, the testimony of Col. Richard Perry is, that he had conversed with Mr. Waring upon the subject—that he was aware of Harry's being set free by the deed, which deed he knew was lost; that Harry resided with Mr. Waring until his death; that the last conversation which the witness had with Mr. Waring upon the subject, was, as he thinks, some six or seven years ago, when Mr. Waring said distinctly that "he did not consider Harry a slave." Col. Benjamin Perry also proved that he (the witness) was a son of Isaac Perry, deceased, and the brother of Josiah Perry, (the executor,) as well as of Josiah Joor Waring's former wife, and that Mrs. Bass was another sister: that Harry was always regarded as free by every one. Josiah B. Perry, Esq., proved that the year before the death of Joseph Joor Waring, either in 1851 or 1852, he met him in Walterboro, and had a conversation with him on the subject of Harry; that he informed Mr. Waring that Mr. Bass, whose wife was a daughter of Isaac Perry, (deceased) had written to him to inquire whether he, Mr. Waring, was deriving any benefit from Harry's services, for if so, he (Bass) had an equal right; that in reply, Mr. Waring referred the witness to the will of Isaac Perry, deceased; that witness accordingly examined the will, and on meeting Mr.

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Waring afterwards, he said \*to him that he had examined the will, and neither of them had any claim. Nothing more was said. All the evidence taken at the hearing accompanies this decree. No part of the conduct of Mr. Waring appears to the Court inconsistent with the declarations thus made, or with his acknowledgment of Harry's right to freedom—or that his enjoyment of his services was intended to bar or extinguish that right. At the same time it is proper to remark that the defendant was personally a stranger to all these transactions, and under the circumstances, representing as she does the estate of an intestate, she may well have required strict proof of the claim set up. The evidence establishes the execution and delivery of the deed of emancipation, on 17th November, 1820, with all the pre-requisites and formalities prescribed by the Act of 1800, and that the papers were duly lodged in the office of the clerk of the Court of Common



Pleas. According to the decision in *Monk v. Jenkins*, 2 Hill, Eq. 9, the right of the plaintiff was thereby complete. The subsequent loss of the papers, as of any other muniment of title, however it may embarrass the proof, has no effect upon the right.

But the defendant, after setting forth all the circumstances detailed in her plea, and insisting on the same as precluding the right of the plaintiff, interposes in the conclusion of her answer an objection to the jurisdiction. This is the only part of the case which, after hearing the evidence, has occasioned any embarrassment. In the case of her intestate, Joseph Joor Waring, guardian of Mary and Selina, against Richard Perry, Chancellor Gaillard, in 1824, entertained the bill and granted relief. But the question of jurisdiction was not made, and both parties were evidently desirous that the Court should act. *Monk v. Jenkins* was heard ten years later. The Circuit Chancellor entertained the cause so far as to overrule both the pleas interposed by the defendant, but was of opinion that the bill made a proper case of relief at law, and therefore dismissed the same. In delivery the judge-

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ment of the Appeal Court, \*Chancellor Harper says, "the appeal is only from so much of the decision of the Chancellor as overrules the pleas of the defendants. In this respect we agree with the Chancellor." If the plaintiff by his own showing, has a plain and adequate remedy at law, he must appeal to the ordinary tribunals for redress. If the plaintiff's ward is a free person of color, his arrest and detention by the defendant is a trespass, neither more nor less. By the Act of 1712, questions of freedom were determined by the Governor and Council, and by the Act of 1721, this Body was also vested with the powers of a Court of Chancery, which they exercised until the revolution. But by the Act of 1722, it was declared, that when a negro, mulatto, &c., shall lay claim to his or her freedom, the same shall be finally heard and determined by the justices of the General Court, or the County Court, and not elsewhere. 7 Stat. 371. So the law stood until 1744, when the Act was passed, defining with great particularity the mode of proceedings in the Court of Common Pleas, in such cases, under which not only the plaintiff's right to freedom might be established, but damages awarded for any injury sustained. On the other hand, in case of failure, the Court is authorized to affix a proper punishment on the ward of the plaintiff for his false clamor. It is true, there is a proviso in the Act, which the plaintiff's solicitor submitted, might well sanction the proceedings of this Court. It is as follows: "Provided, also, that nothing in this Act shall be construed to hinder or restrain any other Court of Law or Equity in this province from determining the property of slaves,

or their right of freedom, which now have cognizance or jurisdiction of the same, when the same shall happen to come in judgment before such Courts, or any of them, always taking this Act for their direction therein." This proviso, it appears to the Court, applies only in cases where the inquiry arises collaterally or incidentally, and so the language of the proviso implies. It may be that the person whom, from his color, the law would

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presume to be a slave, is in the partial \*enjoyment of freedom, molested by no one, and therefore could maintain no such proceedings as is contemplated by the Act. But it may be necessary for him to sue for a breach of contract, or institute proceedings in this Court for specific performance; or he may have died, and his representatives may sue. In all such cases, it is competent for the defendant to question his status, and rely on the presumption of law. The proviso reserves to the Courts, in which the question is thus made collaterally or incidentally, the power to determine the inquiry, "always taking the provisions of the Act for their direction therein:" as, for instance, that special matter may be given in evidence under the general issue; that judgment shall not be stayed for any defect in the proceedings, and that the burden of proof shall be on the party laying claim to freedom, &c. But where a defendant has the custody or possession of a negro, or mulatto, whom he claims as his property, but who alleges his right of freedom, the law affords a plain and adequate remedy, and the Court of Common Pleas is the appropriate forum for the adjudication of the issue.

Although the Court is of the opinion that the application of the plaintiff should be addressed to another tribunal, yet from the views heretofore taken of the evidence, it is plain this application is not intended to be prejudiced. It is therefore ordered and decreed that the bill be dismissed, but without prejudice, and without costs.

The complainant appealed and moved this Court to reserve the decree, on the grounds:

1. Because his Honor erred in deciding that the Court of Equity had no jurisdiction in this case, whereas it is submitted that the complainant had a right to seek relief either at law or equity, and that the Court of Equity could give more adequate relief.

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\*2. Because the decree of his Honor is, in others respects, contrary to law.

Carn. for appellant.

De Treville, contra.

PER CURIAM.—This Court is entirely satisfied with the proof of the freedom of the persons in whose behalf this suit is brought; but is compelled reluctantly to deny the

relief sought for want of jurisdiction. The decree is affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.  
Appeal dismissed.

8 Rich. Eq. \*145

\*J. H. READ, Jr., Adm'r, v. J. H. READ, Sr., and Others.

(Charleston. Jan. Term, 1856.)

[*Husband and Wife* ⚭35.]

J. H. and M. W., prior to their marriage in 1811, executed a settlement, whereby M. W. conveyed her land and negroes to two trustees, in trust, inter alia, that upon the death of either husband or wife, the property should be held to the joint use of the survivor, during his or her life, and the children of their marriage. M. W. died in 1817, leaving J. H. and four children of the marriage, two of whom died in infancy, one at the age of five and the other at the age of eight years. J. W., another of the children died in 1851, and this bill was filed by his administrator and the surviving child, against J. H. for an account of the rents and profits of the trust estate. Both the trustees were dead:—*Held*, that representatives of the survivor of the trustees were necessary parties to the bill; and also, that representatives of the two children who died in infancy should be made parties.

[Ed. Note.—Cited in *Markley v. Singletary*, 11 Rich. Eq. 403; *Strickland v. Bridges*, 21 S. C. 25.

For other cases, see *Husband and Wife*, Cent. Dig. § 216; Dec. Dig. ⚭35.]

Before Dargan, Ch., at Charleston, June, 1854.

Dargan, Ch. On the 18th July, A. D. 1811, a marriage being about to be solemnized between J. Harleston Read, Sr., and Mary Withers, a deed of marriage settlement was executed by them, by which they conveyed to Robert F. Withers and Francis Withers, their heirs, executors, and administrators, a plantation on Winyaw Bay, in the District of Georgetown, and eighty slaves, (which land and negroes are particularly described in the said deed, and all being the estate of the said Mary Withers in her own right, and then in her possession,) in trust for the use of the said Mary Withers, until the solemnization of the marriage; “and from and immediately after the solemnization of the said intended marriage, upon the further trust and confidence that they, the said Francis and Robert Withers, their heirs, executors, and administrators, shall well and truly permit and suffer the said John H. Read and the said Mary Withers to have the use, occupation, and enjoyment of the said lands and slaves, herein and hereby intended to be conveyed, and the future issue and increase of the female slaves, during their joint lives, and for

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their joint use; and to \*have, receive, and take the rents, issues, profits, and proceeds thereof, but so that the said lands and slaves,

and the said rents, issues, profits, and proceeds thereof, should not be subject to, or be liable for the debts of the said John H. Read; and in case of the death of the said John H. Read, or Mary Withers, (whichever may first happen,) without leaving issue of the said intended marriage, then upon the further trust and confidence that they, the said Robert and Francis Withers, their heirs, executors, and administrators, shall stand seized and possessed of the said lands and negroes, and the future issue and increase of the females, to and for the use of the survivor of them, the said John H. Read and Mary Withers, his or her heirs and assigns forever, and shall reconvey and be discharged from any further trusts or limitations whatsoever; but in case of the death of the said John H. Read, or Mary Withers, leaving issue of the said intended marriage, then upon this further trust and confidence, that the said Robert and Francis Withers, their heirs, executors, or administrators, shall stand seized and possessed of the said lands and negroes, and the future issue and increase of the females, to and for the joint use of the survivor of them, the said John H. Read and Mary Withers, during his or her natural life, and the children of the marriage; and from and immediately after the death of the survivor, (in case the said John H. Read shall survive the said Mary Withers,) in trust for all and singular the said child or children of the said intended marriage, his, her, or their heirs and assigns forever. But in case the said Mary Withers should survive the said John H. Read, then in trust (as aforesaid) during her natural life; and from and immediately after her death, in trust for all and singular the children of the said Mary Withers, his, her, or their heirs and assigns forever, freed and discharged from all other trusts and limitations whatsoever. But in case any child or children, hereinbefore provided for, should happen to die during the lifetime of the said John H. Read or Mary Withers, leaving is-

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sue, such issue shall immediately become entitled to the share or portion of said lands and negroes to which his, her, or their parent or parents may be entitled to, at his or her death.” Then follows a provision for a sale of all or any of the slaves, with a condition that the proceeds of the sale should be vested in other property, to be held by the trustees, subject to the same trusts and limitations, &c.

Shortly after the execution of the deed the marriage was solemnized, and John H. Read and Mary his wife went into the possession of the said lands and negroes. They continued in the joint use and enjoyment of the same until the month of May, 1817, when Mary Withers Read departed this life, leaving the said John H. Read surviving her. There were born of the marriage the following children: Sarah Ann, born in 1812, who died in



September, 1817. William was two years younger, died in September, 1822; John Harleston Read, Jr., born July, 1816; and James Withers Read, born May, 1817—his mother died at the time of his birth. I will remark in this connection, that in reference to the births and deaths of the children of this marriage, the statement of the defendant, John Harleston Read, Sr., in his answer, is fully sustained in every particular by the evidence of H. A. Desaussure, Esq., who was an intimate friend of the family. James Withers, who attained his majority in 1838, died intestate, in June, 1851, leaving surviving him his wife Caroline Laurens Read and three infant children, namely, John Laurens Read, Mary Withers Read, and Caroline Ball Read. Caroline Read, the widow of James Withers Read, intermarried with John W. Maffitt, 2d August, 1852. The trustees of the marriage settlement have long since departed this life, and John Harleston Read, Sr., has ever since the death of his wife been in the sole possession of the trust estate, and the enjoyment of the rents and profits. He has accounted for, and paid no part thereof, to any of the children or issue of the marriage;

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and the latter have received \*no benefit therefrom, except such education and maintenance as they have received from J. Harleston Read as their father.

The plaintiff, J. Harleston Read, Jr., who is the only surviving child of the marriage, has been duly appointed the administrator of the estate of his deceased brother, James Withers Read; and renouncing all claim for an account against his father in his own behalf, he has filed this bill against the said J. Harleston Read, Sr., for account of said estate, and for such share of the rents and profits thereof as his intestate may be entitled to, under the provision and limitation of the marriage settlement deed. The defendant, J. Harleston Read, Sr., has answered, and denies all liability to account. The plaintiff has made the widow of James Withers Read and her present husband, John Maffitt, parties defendant to the bill; as also the children of the said James Withers Read. They have answered, and concur in the general allegations of the bill and the prayer for an account.

I do not think there can be a serious doubt but that the plaintiff's estate was entitled, by the terms of the deed of marriage settlement, to a share of the rents and profits of the trust estate: for it is expressly declared, that "on the death of Mrs. Read, the said J. Harleston Read surviving, the estate shall be held in trust for him, and all and singular the child or children of the marriage, his, her, or their heirs and assigns forever."

I incline to the opinion that, as to the real estate, (but not as to the personalty,) all the trusts created by this deed were, at the

death of Mrs. Read, executed by the Statute of Uses.

"There are three circumstances necessary to the execution of a use by this statute; 1st, A person seized to the use of some other person; 2d, A cestui que use in esse; and, 3d, A use in esse in possession, remainder, or reversion." 1 Cruise Dig. 412; Harton v. Harton, 7 Durn. & East, 652; Jones v. Say & Scale, 1 Eq. Ca. Abr. 382. These three circumstances concur in this case. During

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the life of Mrs. Read, the uses \*remained unexecuted, because that was necessary to the preservation of the separate estate, otherwise the marital rights would have attached, and one of the principal intents of the settlement would have been defeated. Where the three circumstances above mentioned concur, in the question as to the execution of the uses by the statute, the test always is, whether the trustees have any other duties to perform, or whether there be any important or necessary purpose to be subserved by the continuance of the trust? If this question be solved in the negative, then the uses are executed. If in the affirmative, the trust continues, that the trustee may be able to perform his duties, and the beneficiaries of the trust have only an equitable estate, enforceable against the trustees. In McNish v. Guerard, 4 Strob. Eq. 74, it is said by the Circuit Chancellor, (whose decree in this respect was affirmed,) without going specially into the cases, it may be laid down as the result of them, that where he to whom a conveyance is made, has some duty to perform, for the perfect performance of which, it is necessary that the legal estate be in him, the statute does not apply. He shall be regarded as vested with the legal title; and the person interested in the performance of the duty required, with an equity which he may enforce against him in respect to the legal estate thus held by him. This is a trust, and not a use executed. In this case, the land in question was conveyed to John McNish, "as trustee of his eight children, (who were named,) and in trust for said children, and such other children as may be born of the body of Ann McNish, wife of John McNish, to be divided among them equally, share and share alike; and until such division takes place, to be occupied and used entirely and specially for the support and maintenance of the said children." The Court decided that the legal estate vested, not in John McNish, who was named as the trustee, but in the existing children of Ann McNish, subject to open and admit such other children as she might have.

But it does not appear to me to be of any

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importance to \*decide this question. For either as legal or equitable owners of a joint estate with J. Harleston Read, Sr., as to the land in question, the children of Mrs. Mary

Read are entitled to an account from him, he having received all the rents and profits to himself. Under either view, the result would be the same: the question could not arise as to the negroes, as trusts of personal estate are not embraced in the provisions of the Statute of Henry 8.

But the defendant, J. Harleston Read, Sr., has interposed the plea of the Statute of Limitations, and set up the same as a bar against any claim for an account, except for four years prior to the death of the said James Withers Read, and the plea must be sustained.

James W. Read attained his majority in May, A. D. 1838, and died on the 28th June, 1851. He slept over this claim without prosecuting it for nearly thirteen years after the disability of infancy ceased to exist. I cannot imagine a reason why the plea of the statute should not prevail.

There is another branch of this case, to which I must now direct my attention. Sarah Ann Read, who died in September, 1817, and William Read, who died in September, 1822, both after the decease of Mrs. Read, their mother, had vested estates in the said property, with the present right of enjoyment to the extent of their interest. Sarah Ann was entitled to one-fifth of the annual rents and profits, and William was also entitled to the one-fifth of the rents and profits, and to one-fourth of Sarah Ann's share. Their shares in the rents and profits, and their shares in the corpus of the property when that should be divided, constituted the estates of Sarah Ann and William Read respectively. The plaintiff has also prayed an account of the defendant, J. Harleston Read, Sr., for the shares to which his intestate was entitled in the estates of his said deceased brother and sister.

The said defendant pleads and insists that this is a stale demand, and must be consid-

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ered as satisfied by presumption of \*payment arising from the lapse of time; and so it would be, if the whole of this claim had subsisted twenty years or more before the filing of the bill; and as to so much of the claim as has existed for twenty years, it may be disposed of in favor of the defendant on that ground. But I cannot perceive how that doctrine can apply to so much of the account as has accrued within twenty years, and particularly as to that which has only accrued within a few years past, some of which was only due on the 1st January last. I think it is obvious, that so much of this account as has fallen due within twenty years, cannot be got rid of by presumption of payment arising from the lapse of time.

But the defendant has also pleaded the Statute of Limitations: and it remains to be considered whether the statute is applicable. The only plausible ground on which

the plea of the statute could be evaded is, that upon the estates of Sarah Ann and William Read, there has never been any administration; and that, in the absence of a legal representative who alone is entitled to sue, the operation of the statute is suspended. The rule is strictly true in a Court of Law, but in this Court there are exceptions.

Sarah Ann Read died at the age of about five years, and William at about the age of eight years. From their tender years, the Court will presume that they owed no debts; and in such cases it has been held, that the distributees may proceed in this Court without an administration. Walker, Adm'r, v. May, Bail. Eq. 58. The plaintiff's intestate might, therefore, have sued for his share of those estates at any time before his death. There was no disability. At least, if he can maintain his claim in this suit, he could have done so at any time before this after their death, for there is still no administration. If he was entitled to bring his suit, (as he has now,) the statute would run. I hold that the plea of the Statute of Limitations is a bar to the plaintiff's claim, except for four years prior to his intestate's death. It is

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ordered and decreed, that the plea \*of the Statute of Limitations be sustained against all the claims of account set up by the plaintiff in his bill against the defendant, J. Harleston Read, Sr., as well as regards the original share of James Withers Read, in the rents and profits of the said trust estate, as for his share of the estates of Sarah Ann and William Read, (arising to them from the said rents and profits,) except for four years previous to the death of the said James Withers Read, and the rents subsequently accruing.

It is ordered and decreed, that so far as the claims set up by the plaintiff are covered by the plea of the Statute of Limitations, the bill be dismissed.

It is ordered and decreed, that the plaintiff is entitled to an account in behalf of his intestate's estate, as to the rents and profits of the said trust estate, for four years prior to the said intestate's death, that is to say, from the year 1847 inclusive, and as to all the rents and profits that have subsequently accrued; and that one of the Masters do take such account, and report thereon.

It is further ordered and decreed, that in stating such account, the said J. Harleston Read, Sr., be allowed to set up, as discounts, any sums of money which the said intestate's estate may be justly owing to him, on any account whatsoever; and that the Master strike a balance.

Appeals were taken by the plaintiff, and some of the defendants.

Simons, Mitchell, for appellants.

—, contra.



The opinion of the Court was delivered by

WARDLAW, Ch. We have attained the conclusion in this Court, that this case is not ripe for adjudication until other parties be made: and we desire to be as reticent as

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practica\*ble of our opinions on the questions in the cause until all the interests of the parties may be fully concluded by our judgment.

Whether under the marriage settlement in this case, the trusts of the land were executed or not in the beneficiaries upon the death of Mrs. Read, (which is not determined by us), it is clear that the legal estate in the personalty abided in the trustees and their representatives, and that these representatives, or at least the representatives of the survivor of the trustees, are necessary parties to a litigation involving partition, perhaps of the corpus, certainly of the income of the personalty. If these representatives be necessary parties as to the personalty, they are proper parties as to the realty, as to which the extent of their estate and their consequent liability are directly involved. Where real and personal estate are conveyed to the same person by the same words in a single clause, or by the same words in different clauses of one instrument, this constitutes some reason for giving the same construction as to both descriptions of estate. *Genery v. Fitzgerald*, 1 Jacob.

We consider it safer, too, that representatives of the infants, Sarah Ann and William, be brought before the Court. That these children had some vested interests under the settlement can hardly be disputed, but the extent and the devolution of these interests may be disputable, and representatives of these interests are proper. It can scarcely ever be affirmed of decedent infants having estates, that they can owe no debts, at least, for the expenses of their last illness, and of their burial. The cases of *Thompson v. May*, *Riley's Eq. Ca.*, 33, and *Marsh v. Nail*, *Rich. Eq. Ca.*, 115, stand on their peculiar circumstances; and for the reasons assigned in *Petigru v. Ferguson*, 6 *Rich. Eq.*, 378, it is the better course to require the representatives of infants to be before the Court in contestations concerning their estates.

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\*It is ordered and decreed, that the Circuit decree in this case be set aside; and that the plaintiff proceed with convenient dispatch to make representatives of the surviving trustee of the marriage settlement, and of Sarah Ann and William Read, parties to this suit.

It is further ordered that the cause be remanded to the Circuit Court.

JOHNSTON, BUNKIN and DARGAN, CC., concurred.

Case remanded.

8 *Rich. Eq.* \*155

\*ASA GODBOLD v. JAMES LAMBERT, and Others.

(Charleston. Jan. Term, 1856.)

[*Creditors' Suit* ⚡8; *Fraudulent Conveyances* ⚡96.]

Bill by a creditor to subject land to his demand, sustained. The debtor had purchased the land and fraudulently procured the conveyance to be made to his children.

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. § 40; Dec. Dig. ⚡8; *Fraudulent Conveyances*, Cent. Dig. § 298; Dec. Dig. ⚡96.]

[*Limitation of Actions* ⚡195.]

Where plaintiff to avoid the bar of the statute of limitations avers ignorance of the fraud until within four years, the onus of showing notice is on the defendant.

[Ed. Note.—Cited in *Myers v. O'Hanlon*, 12 *Rich. Eq.* 205; *Means v. Feaster*, 4 S. C. 257.

For other cases, see *Limitation of Actions*, Cent. Dig. § 715; Dec. Dig. ⚡195.]

[*Limitation of Actions* ⚡179.]

No more is required in this averment, than that it should be sufficiently explicit to enable the defendant to meet the issue tendered.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 668; Dec. Dig. ⚡179.]

[*Vendor and Purchaser* ⚡231.]

Notice of a deed of conveyance of land is presumed from the time it is registered.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 532; Dec. Dig. ⚡231.]

[*Limitation of Actions* ⚡100.]

But proof that the party had notice of the deed, does not, ordinarily, show that he had notice of the fraud.

[Ed. Note.—Cited in *Means v. Feaster*, 4 S. C. 257.

For other cases, see *Limitation of Actions*, Cent. Dig. §§ 323, 480-493; Dec. Dig. ⚡100.]

[*Notice* ⚡5.]

[The registry of a deed is not notice to third persons of fraud in its execution.]

[Ed. Note.—For other cases, see *Notice*, Cent. Dig. § 3; Dec. Dig. ⚡5.]

Before Johnston, Ch., at Horry, February, 1855.

Johnston, Ch. The defendant, James Lambert, sometime in 1840, purchased from one Thompson, a tract of land, lying in Horry District, and containing about six hundred and three acres, and described in the pleadings and exhibits. He was indebted at the time; and among other dealings, he had on the 4th January, 1836, given his note (payable the first of the succeeding year) to one John Baker, for one hundred and one dollars and fifty cents, for the hire of a negro, to which note the plaintiff, Asa Godbold, was his surety. To avoid liability for those debts, he caused Thompson to convey the land to his three children, and co-defendants, all three minors;—accordingly, Thompson conveyed to them by deed, dated October 13, 1840, which was subsequently registered, March 16, 1841.

The children paid no part of the price of the land, nor does any valuable consideration appear to have proceeded from them to their

father for the conveyance which he caused to them.

On the 7th Oct., 1839, a credit of thirteen dollars had been endorsed on the note held by Baker. This sum was probably paid by Lambert.

Godbold, the surety, afterwards took up

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the note, and early \*in 1841, brought it to his attorney, Mr. Harlee, and by him obtained a confession from Lambert for one hundred and nine dollars and fifty-one cents, for the money he had paid on it as surety. On this confession, judgment was signed the 9th, and execution lodged the 10th of March, 1841.

Under a judgment and execution obtained against Lambert the 3d April, 1839, Gowan, the Sheriff of Horry, made sale of the tract of land before mentioned, as the property of Lambert, the 4th of October, 1841, and it was bid off by Josias T. Sessions, at the sum of ten dollars and fifty cents, (which was applied to the oldest execution,) and on the 10th of December, 1841, Gowan conveyed the land to Sessions.

In the mean time, Sessions was willing to relinquish his purchase upon being refunded his purchase money. Accordingly, Lambert called on him, and in a settlement of some other matters between them, allowed him a discount for the purchase money expended by him, and took from him a quit claim, to his children, dated the 16th of February, 1846, which was put on the registry along with Gowan's deed, the 27th March, 1851.

This quit claim recites that the ten dollars and fifty cents was paid by the children. But this is not corroborated by any answer in the case. According to the defence, no consideration was paid to Sessions, and his conveyance was gratuitous. Of course, if this were admitted, the children paid nothing. But it is clearly proved, in opposition to the answer and evidence of Lambert, that a consideration passed to Sessions, and passed from Lambert himself, and not from his children.

The plaintiff's judgment all this time, remained unsatisfied. It is possible that his executions had been permitted to lose their active energy. As heretofore stated, his original execution was lodged the 10th of March, 1841. An alias was not lodged till the 9th of January, 1850. Then followed a pluries, which was lodged 14th March, 1850, and was re-entered by a succeeding Sheriff the 10th March, 1851.

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\*On the 2d of November, 1850, this last execution was levied on the land, as Lambert's property; and on the 5th of May, 1852, the Sheriff made sale of it, and it was purchased by the plaintiff, at the sum of ten dollars, and conveyed to him by the Sheriff accordingly.

Having brought suit for the land, and find-

ing obstacles to his recovery, he filed his bill, in this case, the 10th January, 1855.

The object of the bill is to set aside the deeds to the children as a fraud on the creditors of the father, and that the Court either help the plaintiff in his suit at law, or grant him full relief in equity.

The plaintiff comes forward in the character of purchaser of the land; and as such, entitled to have the way cleared for his title; and in the character of creditor, and entitled as such, to have his demands satisfied out of the land.

He has not shown himself to be a purchaser. His purchase is void on account of the process, under which the sale was made. The Statute of 1827, 6 Stat. 325, does not extend the time for renewing executions, so as to take in the alias of 1850; so that the continuity of process was broken, and the judgment could not be renewed for execution but by scire facias, or action of debt.

Then we are to examine his rights as creditor.

There is no doubt of the fraudulency of both the deeds to Lambert's children. But the question is presented by the pleadings whether the plaintiff is not barred by the Statute of Limitations.

I take it to be established in this Court, that the Statute runs from the perpetration of a fraud, unless the injured party remains ignorant of it until a late date, in which case it runs from the discovery. But the general doctrine is, that if nothing be said in the case to the contrary, the discovery will be presumed to be contemporaneous with the fraudulent act. On the other hand, our cases show, that this presumption will not

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be \*applied, if the plaintiff, in his bill, aver that he was ignorant of the fraud at its perpetration, and remained so until a subsequent time, as this averment may be true, but, being negative in its character, the plaintiff cannot prove its truth. In such a case, the Court deems it but reasonable that he who contests the averment, and has it in his power to prove positive information in contradiction of it, should be put to such proof. Then the Statute will run from the earliest information brought home to the plaintiff.

In this case, the plaintiff has averred his ignorance of the fraudulent conveyance until within four years of filing his bill, and no information is brought home to him independently of the notice arising from the registration of the deeds.

Parties liable to be affected by notice, must take notice of deeds duly registered; and, indeed it has been lately decided against my opinion, that though a deed be not duly recorded—that is, not within the statutory period, yet it shall operate notice constructively from the time of its actual registration.



We are, therefore, to hold the plaintiff to notice from the time these deeds were put upon the registry.

There is nothing to bar him from the recording of Gowan's deed to Sessions, or Sessions' quit claim to Lambert's children. They were recorded the 27th March, 1851, and the bill was filed the 10th January, 1855. The interval was less than four years, and the Statute had not run out.

So far, I was clear at the hearing. But upon another point my opinion has undergone a change since that time.

At the hearing, I supposed the fraudulency of Thompson's deed to the children might be thrown out of the consideration. Its fraudulency could only consist in its imparting to the children, a title to property which really was the property of the father. But as the property had been subsequently sold as the father's, his creditors had received the same benefit as if his title had not been perverted.

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This was my view when the case was \*heard; and if it were correct, then the whole case would depend upon the latter deeds.

But Thompson's deed was registered the 15th March, 1841, and the registry was equivalent to notice of its existence to the plaintiff. On inspecting the bill, it does not appear that the plaintiff intended by his averment any thing more than that he had discovered the existence of this deed within four years. His language is, "And your orator further sheweth unto your Honors, that it is within four years he has discovered the fraud that was perpetrated upon his rights, by the fraudulent conveyance made by the said Lambert, through others, for the benefit of himself and children, to wit: he discovered the deed to Sessions in October, of the year 1852; and the conveyance of John Thompson to the children of said Lambert, in the Spring of the year 1853." In another place, his words are:—"That at the Spring term of the said Court," (the Law Court, where he had sued for the land,) "in the year 1853, when the said case would have come to a hearing, your orator first learned and discovered, that there had been a prior deed by the said John Thompson first mentioned, to the said children of the said Lambert, to wit:—Robert W. Lambert, Ann Jane Lambert, and James W. Lambert."

There is no where in the bill any statement of the facts constituting the fraud, with an allegation that those facts came to his knowledge only within four years. In the first passage just quoted, he does, indeed say:—"It is within four years he has discovered the fraud that was perpetrated on his rights by the fraudulent conveyance." But he immediately defines his meaning by saying that he had discovered the deed.

This is very loose. He does not, as he should have done, state what the ingredients

of the fraud were, and that he had remained ignorant of them until within four years. Using the word fraud is not charging a fraud; it is mere invective.

Proceeding no further than to call by a harsh name the deed whose existence he had

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discovered, he has not enabled the \*defendants to meet his averment otherwise than they have. If they had proved his knowledge of any of the constituents of the fraud, this would not have been a contradiction of his averment; and this establishes clearly, that the averment is not legally sufficient.

But as far as he has gone, to wit: the existence of the deed, they have done away his allegation by proof of registry, which was notice to him.

The Statute, then, commenced to run from the recording of this deed, and the plaintiff cannot come, after four years, from the registration, to set it aside, unless he shows some impediment which prevented his proceeding at an earlier day.

We need not say whether he may not be excused for omitting to proceed before he had paid off the note to Baker, or before he had obtained his judgment against Lambert, his principal. But his judgment was complete the 9th and the 10th March, 1841. He was then a full creditor. On the 16th of the same month, Thompson's deed was recorded. What prevented his proceeding to set it aside?

Being not set aside, and the right to set it aside being lost, it must operate as a valid conveyance in this Court.

Then I do not think that the sale of the land as Lambert's by his creditor, obviates this deed, as I had supposed at the hearing.

What though the land was sold as Lambert's land? The question is, whether that sale set aside the children's title under this deed? Certainly it did not. The purchaser from the Sheriff got no title so long as this deed stands.

The children are not concluded. It is ordered that the bill be dismissed.

The plaintiff appealed and moved this Court to reverse the decree on the grounds:

1. That the general averment, charging fraud, in a bill to set aside fraudulent con-

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veyances, the word "fraud" is not to \*be interpreted as a word of "invective," but is to be considered as a technical term, implying the unlawful and corrupt alienation of property, and the use of the word "fraud" is legally sufficient in a bill seeking relief from fraud, without stating the ingredients of the fraud.

2. That it is not necessary to allege formally that the fraud was discovered within four years. It is enough to aver and prove it substantially, that the fraud was discovered within the statutory period.

3. That the registry of a fraudulent conveyance operates only as constructive no-

tice of the deed and its contents, and not notice of fraud, unless there be apparent matter in the deed that will put the plaintiff on the inquiry.

Evans, for appellant.  
Phillips, contra.

The opinion of the Court was delivered by

DARGAN, Ch. It is manifest that James Lambert, one of the defendants, has committed a fraud upon the plaintiff, who was his surety, and whom he left to pay his debt, although he had means enough to pay his own debts. After the surety had paid the debt the defendant, Lambert, gave him a confession of judgment on the same, upon which judgment was entered up and execution was lodged. The defendant, Lambert, having bought land from one Thompson, (about 603 acres,) and fraudulently, and with the view of defeating his creditors, caused titles to be made by Thompson to his three infant children, (who are also parties to this suit); the deed of Thompson bearing date the 13th Oct., 1840.

Under a judgment and execution against

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Lambert, Gowan, \*the Sheriff of Horry, sold the land on the 4th Oct., 1841, to Sessions for \$10.50, and conveyed the land to Sessions by deed, bearing date 10th Oct., 1841.

In the meantime, by reimbursing Sessions for the purchase money, Lambert procured him to re-convey the land to his children; which was done by deed, dated 16th Feb'y, 1846.

The plaintiff's judgment remaining unsatisfied, by virtue of an execution under the same the Sheriff again levied on and sold the land as Lambert's property. It was bid off by the plaintiff to this suit for \$10, and conveyed to him by deed accordingly.

The plaintiff has instituted a suit at law for the land, but deeming his success doubtful, he has come into this Court. His bill was filed the 10th January, 1855. The bill prays that the deeds to the children may be set aside as fraudulent against the creditors of the father. The plaintiff asks that this Court will grant him aid auxiliary to his suit at law, or grant him plenary relief in this Court.

Whatever view may be taken of the case, this Court can grant him no aid in his suit at law. The execution, by virtue of which the land was sold to Godbold, was dormant. It had been renewed from time to time, but not in such a manner as to enable it to retain in unbroken continuity its active efficacy. This, at the time of the levy and sale, had been lost, and the Sheriff had no authority. The sale and conveyance to Godbold was simply null and void, and could convey no legal estate; without which the action at law cannot be maintained. It remains to be seen if this Court can give him

relief as a creditor. So the Chancellor has thought, and we concur.

As I have said, the whole transaction was a fraud upon the creditors of the defendant, James Lambert, and especially upon Godbold, whose kindness and friendly confidence he had most grossly abused. This Court can afford him relief as a creditor unless an impediment arises from the Statute of Limitations, which has been pleaded.

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\*Anticipating, and with the view of evading the operation of the statute, the plaintiff has averred, (but in a very imperfect manner,) that he has come to the knowledge of the fraud within four years previous to the filing of his bill. The Chancellor who heard the cause on the circuit, has well stated the rule on this subject. It is now the settled practice in this Court that an allegation of ignorance of the fraud, being a negative proposition and scarcely ever admitting of proof, it is incumbent on the party who wishes to set up the bar of the statute to prove the affirmative; that is to say, that the plaintiff did come to a knowledge of the fraud more than the period of the statutory limitation, before the commencement of the suit.

A question occurs, whether the plaintiff has made the averment as to the time of his coming to a knowledge of the fraud in such manner and form as will entitle him to its benefit. It must be made in the bill, and in a manner sufficiently explicit to enable the defendant to meet the issue tendered. This is what is required and no more. The Chancellor on the circuit thought, and still thinks, that the plaintiff's averment did not come up to this requirement. But a majority of the Court is of opinion that it does, though imperfect and obscure. And I certainly should not recommend it to the profession as a form or model.

Such being the state of the pleadings, on the trial of the issue whether the plaintiff had notice of the fraud more than four years before the commencement of the suit, and with the view of bringing home to the plaintiff prior notice, the defendants adduced in evidence the deeds and the registry thereof.

The deed of Sheriff Gowan to Sessions, and that of Sessions to James Lambert's children, were recorded 27th March, 1851, and the bill was filed 10th January, 1855. But Thompson's deed was registered 16th March, 1841. And it is argued that the implied notice, arising from the registry of Thompson's deed, is a sufficient notice of the fraud to the plaintiff, from the time of the registry; so as to

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defeat the averment of the plaintiff, that he came to a knowledge of the fraud within four years before filing his bill, and thus to give full operation to the statute, which the defendants had pleaded.

If notice of the deed is notice of the fraud, the plaintiff is barred. But that proposition



cannot be sustained. There is no rationality in it. Fraudulent deeds are always fair on their face. Parties, about to commit a fraud, do not blazon it upon the face of the deed, and invite the gaze of the world by spreading it upon the books of the Register. On the contrary, fraud most carefully masks its horrid and revolting features, whilst in all its external forms and shewings it assumes the semblance of purity and justice. This difficulty out of the way, the Court is of the opinion that the registry of a deed is only implied notice of its contents, and not of any fraud that may have been perpetrated in its execution.

The judgment of this Court is that the circuit decree be reversed, and that the deed of Thompson to the infant defendants, and also the deed of Sessions to the same parties, be set aside and vacated, as to the claims of this plaintiff; and that the plaintiff is entitled to have satisfaction of his claim, now in execution against the said James Lambert, out of the land described in the pleadings.

It is further ordered and decreed, unless the claim is otherwise satisfied, that the commissioner proceed on some convenient sale day, after due notice by advertisement, to sell the said land, and that out of the proceeds of said sale he pay the plaintiff the amount due him, on said execution, of debt, interest and costs; and that out of the proceeds of the sale he also pay the costs of this suit; and that he retain in his hands the balance of the proceeds of said sale for the infant defendants in this suit, whose claim is not intended to be otherwise impaired than is provided for in this decree.

As to the terms of the sale, it is further ordered that the commissioner sell the said land for so much cash as will be sufficient to pay the debt, interest and costs due on the

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plaintiff's execution, against the said James Lambert, and the costs of this suit, and that for the residue he sell, on a credit of one and two years, with interest from the day of sale, and that to secure the payment of the purchase money, he take from the purchaser bond and personal security, and a mortgage of the premises.

DUNKIN and WARDLAW, CC., concurred.

Decree reversed.

8 Rich. Eq. \*166

\*Ex parte C. L. BOYD, In re LAWTON v. HUNT.

(Charleston. Jan. Term, 1856.)

[Wills §82.]

Devises and legatees were ordered to pay money into Court to satisfy debts and pecuniary legacies. The money was paid and a portion of it wasted by the master: *Held*, that for the por-

tion thus wasted the parties could not resort again to the devisees and legatees, and that their only remedy was against the master and his sureties.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2141; Dec. Dig. §82.]

Before Dunkin, Ch., at Charleston, June, 1855.

The decree of Chancellor Dunkin, in July, 1851, in *Lawton v. Hunt*, sets forth the history of that case, and the facts upon which this petition is founded. The decree is as follows:

Dunkin, Ch.—The previous history of this case will be found in 4 Strob. Eq. 1.

It was not a bill preferred by the creditors of the testator for the purpose of marshalling the assets of the estate. No ground existed for such proceeding. The debts were plain legal demands; the estate ample and tangible, and the remedy at law for the satisfaction of their debts, plain and certain. They required no aid from this Court, and they sought none.

The original bill was filed by the executor for the purpose of obtaining the construction of the Court, upon certain provisions of the will; but more particularly to have an adjudication as to the relative rights of the executor and the devisees. The original bill was filed 6th December, 1848. What is termed a cross bill was filed by S. B. Hunt and others, devisees, in January, 1849. The prayer of this latter bill was that the executor might be discharged from his trust, and that the master might take charge of the estate, or rather that he should be "directed to take an account of all the testator's debts and legacies, and report a provisional division thereof." Upon these pleadings a decree was pronounced from which an appeal was taken. In May, 1849, an order was passed, at the

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instance of the executor, and with the urgent co-operation of the devisees, directing the master to call in the creditors, to report whether it was practicable to pay the debts and legacies from the income of the estate as directed by the testator, and, if not, whether any and what portion of the estate should be sold for the payment of the debts. An injunction was, at the same time, granted against any proceedings at law, on behalf of the creditors. The master afterwards submitted a report, from which it appeared that the debts and legacies amounted to about seventy thousand dollars, and that the income did not exceed six or seven thousand dollars.

In January, 1850, the cause was heard in the Court of Appeals. In delivering the decree the Court premise as follows: "All parties concur that the testator's project of paying his debts and legacies from the income must be abandoned as impracticable." After disposing of what were termed the rights of the executor, it is remarked, "the Court looks first to the interest of those for whom

the executor is trustee, to wit, the creditors, &c." The necessity of a sale under the order of this Court is shewn, in consequence of the right of the creditors to levy on any part of their debtor's estate, without regard to the provisions of the will. But they proceed "the Court, restraining the creditors, at law, is bound to provide a fund for their payment. By the provisions of the testator's will, the real and personal estate are inseparably connected in the devises and bequests. The executor has no estate in the realty, and no authority to dispose of the personalty. A sale by the authority of this Court, would alone confer a good title upon a purchaser. It has been already directed that the debts should be established before the master. The sales should, therefore, be made by the master, and the fund disbursed by him, under the direction of the Court. To carry into effect these principles, a decretal order was passed which had been submitted at the instance of the devisees," and which, with a slight modification, was adopted by the

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Court. It may be proper to re\*mark that the project of one class of the devisees for a provisional division, or apportionment of the debts and legacies had been strenuously resisted by the other class of devisees, had been rejected by the decree of the Circuit Court, and was not renewed in the Appeal Court.

It was declared by the Appeal decree, made 1st February, 1850, that "the debts of the testator are to be borne by his devisees, Mrs. Hunt and Mrs. Colburn in equal proportions: the intention of the testator to equalize their shares being sufficiently apparent on the face of the will." That the creditors who have proved their claims, have a right to immediate payment by a sale, and that the legatees have a right to be paid out of the income, with interest from one year after the death of the testator. That it is necessary that a sum sufficient to pay off the debts and legacies be raised by a sale, under the order of this Court, to prevent injustice and inequality by the arbitrary sale of property of either devisee, under execution, and to protect the legatees and tenants for life, from the indefinite postponement of the benefits intended for them by the testator. The creditors being thus declared entitled to "immediate payment by a sale," and that it was "necessary that a sum sufficient to pay off the debts and legacies" (then reported at seventy thousand dollars,) "be raised by a sale under the order of the Court," in such manner as would prevent the injustice and inequality which would fall on the devisees by an arbitrary sale of the property of either under execution; the devisees, respectively, represented in what manner they desired the object to be effected. "It is represented," say the Court, "that Mrs. Colburn desires her contributory part of the debts and legacies,

to be raised by an immediate sale, and that Mrs. Hunt desires time to make arrangements with the creditors for her part." It was, therefore, "ordered and decreed that the master, after appropriating the sales of the residue (which was very inconsiderable,) and the balance in the executor's hands, to

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the payment of the debts, proceed \*forthwith to raise, by a sale of real or personal estate devised and bequeathed to Mrs. Colburn, to be selected, if she thinks fit, by her, such a sum as, with what she has already contributed, will be equal to her portion of the amount, that may remain due for the testator's debts and legacies after such application of the residuary estate, and that the money so raised, be applied to the payment of her part of the debts and legacies." Mrs. Hunt "desiring time to make arrangements for paying off her part of the debts and legacies," it was ordered that "she have time till the first day of March ensuing, (one month,) for that purpose. And, in case the creditors be not fully paid and satisfied by the said first day of March, then the master shall raise by a sale of the real and personal estate devised and bequeathed to Mrs. Hunt, to be selected if she thinks fit, by her, a sum sufficient to pay off the residue of the testator's debts and legacies aforesaid." It was also provided, in regard, both to Mrs. Colburn and Mrs. Hunt, that upon the payment of their respective proportion of the debts and legacies, the estate real and personal, or what remained of it, devised and bequeathed to each of them should be delivered to, and held by each of them according to the provisions and limitations of the testator's will, "freed and discharged from any interference on the part of any of the parties to this suit, other than creditors of the testator." These latter words were not in the project as submitted by the devisees, but were specially added by the Court, for the obvious purpose of showing that it was not the intention of the Court to impair the right of creditors by any act of the Court; but to give to the devisees respectively, the possession and enjoyment of the property devised and bequeathed to them, when each had paid her moiety of the debts and legacies. The devisees had a right to no more than this. The creditors were not suitors asking aid. The interference of the court was invoked for the benefit of the devisees. In the language of the decree, "the Court, restraining the creditors at law, is bound to

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provide a fund for their \*payment." The devisees were the actors, seeking the benefit of the injunction, and undertaking to provide a fund for the payment of the creditors. The Court had distinctly refused to apportion the debts between them, even provisionally. The fund thus to be provided under the Appeal decree, exceeded at that time, the



sum of sixty thousand dollars. It was due to a large number of creditors, of various amounts, and the legacy to the Boyds. The creditors were declared entitled to immediate payment by a sale. The Master was ordered to raise forthwith by a sale of that part of the estate devised and bequeathed to Mrs. Colburn the sum to be contributed by her, and the residue by a sale of the estate devised and bequeathed to Mrs. Hunt, "if the creditors were not fully paid and satisfied by the first day of March."

The sales of the residuary estate amounted to about four hundred and forty-six dollars, and with some other funds received by the Master, reduced the sum to be raised by each devisee (as has been stated), to, at least, thirty thousand dollars, or, an aggregate of sixty thousand dollars. The scheme of the Appeal decree was that this sum should be immediately raised for the payment of all the creditors whose debts were declared to be established, and the legacy of the Boyds which was also fixed by the decree. It was important that the whole should be promptly paid in. No creditor could call on the Master and insist on payment in full until the entire fund had been raised. It was the duty of each of the devisees, Mrs. Hunt, and Mrs. Colburn, to see that the decree made chiefly at their instance, and for their benefit, should be carried into effect. Neither was entitled to the delivery of the property devised and bequeathed to them respectively until the proportion of each devisee of the debts and legacies was fully paid and satisfied. All the subsequent embarrassment, difficulty, and perhaps ultimate loss, is probably attributable to the failure of both devisees to comply with the provisions of the decree. They took immediate possession of

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the property devised and \*bequeathed to them respectively. The claim of each creditor, and of the pecuniary legatees was ascertained and of record when the decree of the Appeal Court was rendered on the 1st February, 1850. If the whole fund had been immediately raised as was directed, each creditor and legatee could have insisted on payment by the Master. But, until the whole was paid, it was very easy for the Master to answer the application by saying that he had not funds to pay the particular applicant. And such was the fact. From February, 1850, until May, 1851, inclusive, it appears from the report now submitted that the aggregate sum received from both legatees did not amount to twenty-five thousand dollars, that is to say, twenty-one thousand three hundred and seventy-seven dollars from Mrs. Colburn, and three thousand five hundred and forty-four dollars from Mrs. Hunt. Up to the hearing of this motion (1st July, 1851,) Mr. Tupper, the successor of Mr. Laurens, reports a deficiency of contribution, amounting to thirty three

thousand and fifty-six dollars. It was plainly the duty of Mr. Laurens, the former Master, to have raised Mrs. Colburn's moiety by an immediate sale, which, it is said in the Appeal decree, "she desired" to be done. Equally plain was it the duty of the Master under the Appeal decree, "if the creditors were not fully paid and satisfied by the first day of March, 1850, to raise by a sale of the real and personal estate devised and bequeathed to Mrs. Hunt, a sum sufficient to pay off the residue of the testator's debts and legacies." It seems impossible for language to be more clear and explicit, or less liable to misinterpretation. It was the language of the devisees themselves, asking the Court to take from the creditors the power to sacrifice their property by a sale for cash, through their agent, the Sheriff, and delegate it to the Master, who would make a sale for them on more advantageous terms. The reasons, or excuses, of the Master seem entitled to little consideration. It was sometimes said he had not raised the whole of Mrs. Colburn's contributory share, because she had the privilege of selecting what part

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of \*her property should be sold, and she had, as yet, failed to select. On the part of Mrs. Hunt it was suggested that she was not bound to contribute until Mrs. Colburn had contributed. Something was said, too, about an arrangement which had been made on the part of Mrs. Hunt for a loan of twenty thousand dollars, to be paid on certain conditions and stipulations, and something might have been said with equal force, but was not, of an arrangement which Mrs. Colburn had made with Legare and O'Hear, for an advance by them of a certain sum to make up the deficiency of her contributory share. The Court has nothing to do with these arrangements in decreeing upon the rights of the creditors. Whatever has been said about them, or done about them, was at the instance of the devisees to facilitate them in raising the money to comply with the decree of the Court. In reference to all these suggestions, it is only necessary to say, that on the first day of March, 1850, the Master had only to inquire whether the debts established and the legacies had been fully paid and satisfied. If not, it was his duty to have raised the fund by sales on the terms prescribed by the Appeal decree.

Mr. Tupper, in his report of 1st July, 1851, sets forth all the payments, or rather receipts from the respective devisees until that time. He also states the deficiency, and the amount yet to be paid by each devisee. It is the duty of Mr. Tupper under the Appeal decree, as it was the duty of his predecessor, to proceed forthwith to raise the amount, as reported by him to be due by the devisees respectively, in the manner prescribed by the Appeal Court. The sums, when raised, must be applied by him, in the first place, to

the satisfaction of the creditors, and then of the legatees.

It appears from the account of the late Master with the respective devisees, which accompanies Mr. Tupper's report, that he had received from Mrs. Hunt, on her account, five thousand eight hundred and three dollars and sixty-nine cents, reduced by charges, purchases, &c., to three thousand five hun-

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dred and \*forty-four dollars and eighty-six cents, and that he had received on account of Mrs. Colburn, in cash and bonds, twenty-one thousand three hundred and seventy-seven dollars and forty-nine cents, and that of the sums thus received on account of these parties, a balance yet remained in the hands of the former Master unaccounted for, of three thousand one hundred and fifty-six dollars and seventeen cents. Much discussion took place at the hearing, as to the consequences if this sum should not be paid over by the late Master, or should not be ultimately recovered. Perhaps it is not necessary to determine definitely upon that question at this time. The sum to be raised according to the report, is independent of the amount of three thousand one hundred and fifty-six dollars and seventeen cents, which is assumed to be available. Mr. Tupper, the Master, will, therefore, proceed to carry out the directions of the Appeal decree, for the purpose of raising the sum reported by him to be deficient. It is also ordered and decreed that the late Master pay over to his successor in office, the balance reported to be due by him, and that in default thereof, the Master adopt the proper legal measures for collecting the same.

The Court is of opinion that if bonds, on which the testator was only surety, have been paid out of the assets of his estate, the residuary legatees are entitled to an assignment of them; but before any decretal order to that effect, the evidence must be adduced and a report made.

Mr. Tupper's report of the 1st July, 1851, purports to be a statement of the balances due on claims heretofore established by decretal orders. In that respect it is only matter of information, and no clerical mistake, or error of calculation was suggested.

The Master has submitted in his report the reason for postponing the statement of an interest account between the devisees, and no information or statement was submitted, which rendered the reason unsatisfactory.

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\*It is ordered that the report of Mr. Tupper, bearing date 1st July, 1851, be filed, and that he report to the next Court his further proceedings under the Appeal decree of February, 1850, and also his proceedings, under the orders now made.

At the next Term of the Court, a motion was made that the Master should be required

to make the deficient money from the estate of Mathews in the hands of the devisees; but upon the intimation that no change was shown to have taken place since the last sittings, the motion was at that time informally disposed of by Chancellor Dargan, and no entry seems to have been made of an order of dismissal. During the sittings of the Court of Equity for Charleston District, in February, 1853, Chancellor Dunkin again presiding, the subject was brought to the notice of the Court, for the third time, by petition, which was disposed of as hereinafter mentioned.

At June sittings, 1855, the matter was again brought before the Court upon the following petition:

"The humble petition of Charles LeRoy Boyd, Jr., James W. Boyd and Mathews Barksdale Boyd, an infant by his guardian, Charles Le Roy Boyd, sheweth unto your Honors that your Petitioners, parties defendants in the above case, on the 2nd March, 1853, filed a petition in the said cause, to the effect following, to wit: 'That by a decree in the said cause a legacy of twelve thousand dollars, with interest, under the will of William Mathews, was ordered to be paid to your petitioners from funds to be raised by the Master in Equity, in Charleston District, from the estate of the said William Mathews in the hands of the devisees, and residuary legatees under the will of the said William Mathews.'

"They further shew that the amount due to them as aforesaid, was paid over to them by one of the Masters of this Court, less the sum of three thousand one hundred and fifty-six dollars and seventeen cents, the pay-

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ment by the Master \*being in conformity with a decree of this Court, filed 1st September, 1851. That by the Master's report at the June sittings of the Court, in 1851, upon which the Court acted in pronouncing said decree, it appears that the above amount of three thousand one hundred and fifty-six dollars and seventeen cents, was a sum unaccounted for by Master Edward R. Laurens, who had recently resigned to Master James Tupper, his successor in office. By the terms of the decree of September, 1851, the funds in his hands were to be paid in satisfaction of the debts of the estate of the testator, and then of the legacy due your petitioners, and Master Tupper was ordered to institute suit against said Master Laurens and his sureties, on his official bond, for the said sum of three thousand one hundred and fifty-six dollars and seventeen cents.

"Your petitioners shew that suit was accordingly immediately instituted, but that a defence set up by the sureties, and judgment has not as yet been obtained. They further shew that said Master Laurens is himself insolvent, and that his defalcations, as Master, are to such an amount, that it is believed



that even though the defence set up by the sureties should fail, it will exceed the penalty of the bond, and that said sum of three thousand one hundred and fifty-six dollars and seventeen cents can therefore never be raised by this suit; and that the part of said sum which may eventually be raised by this means, will, through the litigation threatened, be long withheld. Your petitioners shew, that from the principles declared in the decree already referred to, of 1st September, 1851, they are advised that the estate of William Mathews, in the hands of the devisees and residuary legatees, to wit: Ann A. Colburn and child, and George B. Hunt, William M. Hunt, B. F. Hunt, Jr., and Jane B., wife of William Mootry, (the life tenant, Mrs. Susan B. Hunt, having since the said decree was pronounced, deceased), is responsible to your petitioners for the residue of the legacy bequeathed by testator, remaining unpaid.

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"Your petitioners shew that on the 23rd February, 1853, an order for sale of the shares of the estate of William Mathews, held by the last named devisees, was ordered by this Court, for the purpose of partition, and that on the 28th of the same month, another order was granted for completing the partition and distribution of said estate; that said orders were made in a case in which George B. Hunt is complainant and William M. Hunt, B. F. Hunt, Jr., William Mootry and Jane B., his wife, are defendants; that your petitioners have not been made parties to these proceedings, and were, until last night, ignorant of the progress of the efforts at distribution. Your petitioners shew that if said distribution takes place, it must impede them in enforcing the decrees of this Court, awarding to them the legacy under the will of testator, and, perhaps endanger its ultimate collection.

"Your petitioners therefore pray that James Tupper, Master, to whom was committed the execution of the orders of 23d and 28th of January, be ordered to retain from the funds which may come into his hands, from the sales ordered, one-half the amount still due on the legacy bequeathed your petitioners by the will of William Mathews, deceased, and the same be paid over to your petitioners."

"Your petitioners further show, that the Chancellor having heard this petition, together with a motion for a reference, to ascertain the facts set forth, decided that such reference was quite unnecessary, inasmuch as all the facts were already within the knowledge of the Court.

"The Solicitor for the petitioners then submitted the two motions referred to, and sufficiently described in the order dismissing them, copied below. After argument they were received by the Court for consideration, and before the rising of the Court, the fol-

lowing order was made and entered in the case:

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"Ex parte—Charles LeRoy Boyd,  
In re—Lawton, Ex'or of Mathews,  
v.  
Hunt and Others.

"In this matter, two motions were submitted to the Court:

"1st. That the Master proceed to raise three thousand one hundred and fifty-five dollars and seventeen cents, with interest, from the estate of the late William Mathews, in the hands of his devisees;" and failing that motion then

"2. That the Master retain as much of the fund heretofore ordered to be partitioned in the case of George B. Hunt v. William M. Hunt, and others, as will pay one moiety of what is alleged to be still due on the legacy referred to in the pleadings."

"This is the substance and effect of the motions. To enter into the reasons of the judgment of the Court, would require a review not only of the decrees heretofore made, but also of the various proceedings under them in the office of the Master. After hearing the Solicitors in behalf of the several parties, it is ordered that the motion be dismissed." Benj. F. Dunkin.

March 14, 1853.

"From this order an appeal was taken by your petitioners to the Equity Court of Appeals, sitting in Charleston, in January, 1854. Among other grounds of Appeal, the Solicitor of your petitioners had inserted in his brief the following, to wit: "The fact being conceded that it is ascertained that by suit against Laurens and his sureties the deficiency in the legacies of the Boyds cannot be recovered, it is submitted that the time has arrived for definite action by the Court, on the point made as to the parties upon whom the loss must ultimately fall."

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"Your petitioners further shew that when said cause was called in its order, and the brief read, it was suggested by the Chancellor, from whose order the appeal was taken, that it was not considered by the Court as "conceded," or as ascertained, that "by the suit against Laurens and sureties the deficiency in the legacies of the Boyds could not be recovered;" whereupon leave was granted to your petitioners to withdraw the appeal, and to renew the motion whenever the proceedings against Laurens and sureties should have terminated, provided it should then appear that the deficiency in the legacies of your petitioners would not be made good to them in that way.

"Your petitioners now present the fact to your Honors, that said proceedings have terminated and that the deficiency in said legacies has not been recovered in full. It will appear in the report of Mr. Tupper, one of the Masters of this Court, made at the pres-

ent sittings in this case, that the amount of two thousand and thirty-four dollars and fifty-nine cents, has been paid over to the Solicitor of your petitioners on the claim against Laurens and his sureties, in his behalf, which is the full amount of the share of the penalty of the official bond of E. R. Laurens, the whole of which has been paid in by the sureties, to which this claim is entitled.

"Your petitioners further shew, that out of this sum their Attorney and Solicitor, who prosecuted the claim in the Courts of Law and Equity, is entitled to a fee, which your petitioners pray may be deducted, and the nett amount only charged to them.

"Your petitioners further pray that Mr. Tupper, the Master, be ordered to ascertain the amount of the legacies decreed to be paid to your petitioners by this Honorable Court, which remains at this time unpaid, and that he be ordered to raise said sum from the estate of the late William Mathews, in the hands of his devisees, and make pay-

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ment, in full, to your petitioners of the legacies which your Honors have decreed to be due to them from said estate."

Dunkin, Ch. The facts upon which this petition is presented will appear from the Circuit decree of July, 1851, and the subsequent proceedings. (It may be proper to remark, in passing, that the printed copy furnished to the Court is marred by italicising, etc., where nothing of the kind appears in the original decree. Running commentaries incorporated into the decree, or notes of interrogation, etc., would scarcely do more to embarrass the comprehension of what has been actually decided by the Chancellor.) It is stated in that decree that a balance yet remained in the hands of the former Master, unaccounted for, of three thousand one hundred and fifty-six dollars. And that "much discussion took place at the hearing, as to the consequences if this sum should not be paid over by the late Master, or should not be ultimately recovered." But it was deemed premature then to determine that question.

At the February Sittings, 1852, and again in February, 1853, applications were addressed to the Court, by the petitioners to subject the estate of the testator, William Mathews, deceased, in the possession of their co-defendants, his residuary devisees and legatees, to the payment of the above stated deficiency. As proceedings were then pending against the sureties of the late Master, the result of which would ascertain if any deficiency actually existed, and, if any, to what extent, the application of the petitioners was dismissed.

At June Sittings, 1855, Mr. Tupper reported that the amount ascertained to be due by the late Master for moneys received in the principal case was three thousand seven hundred and sixty-nine dollars and thirty-two

cents, which by the decree of the Court, had been charged on his fourth official bond; that from his sureties on that bond (who had paid the amount of the penalty) he had re-

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ceived two thousand two hundred and fifty-nine dollars and fifty-nine cents on this claim, which sum, after deducting the cost (two hundred and twenty-five dollars), he had paid over to the Solicitors of the Petitioners, leaving still due on their legacy a balance of one thousand seven hundred and thirty-four dollars and seventy-three cents, with interest from 27th June, 1854.

The original application of the petitioners is now renewed. It would be impracticable to explain the reasons of this judgment without a recapitulation of much that is said in the decree of 1851. The appeal decree of 1st February, 1850, was made at the instance, and chiefly for the benefit of the residuary devisees and legatees. The amount of the debts and legacies had been ascertained. The sum to be contributed by each residuary devisee was about thirty thousand dollars. According to the obvious meaning of that decree, the proportion of Mrs. Colburn was to be raised by an immediate sale of property (such as she should select) by the Master, and the portion of Mrs. Hunt was to be paid into the hands of the Master in thirty days, or the Master should sell property to raise the amount. If this decree had been carried out by the parties, for whose benefit principally the Court had interfered, then, in March, 1850, each creditor and legatee could have immediately demanded his money. Instead of this, so late as June, 1851, the sum of twenty-five thousand dollars was deficient on the part of Mrs. Hunt, and Mrs. Colburn had paid, in cash and bonds, about twenty-one thousand dollars. Each of these parties threw the blame on the other; but the consequence was, that no creditor could coerce payment from the Master, and importunities of a pecuniary legatee would be still more unreasonable and equally fruitless.

The Court has no precise information as to the payments made on behalf of Mrs. Colburn and Mrs. Hunt subsequent to September, 1851, and under the orders therein made. But it is certain that, at that time, neither of them had complied with the decree of February, 1850. The inconsiderable funds in

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the hands of the Master were not available either to creditors or legatees because of the default of the parties in making up the entire sum as required by the decree of the Appeal Court. The ultimate loss must fall upon those by whom it was probably occasioned. Mr. Laurens remained in office until May, 1851. The petitioners stand upon the same footing now, as they did in June, 1851, when they first insisted on their rights, and the residuary devisees stand in no dif-



ferent position from that which they then occupied.

The Court, in July, 1851, having deferred a decision upon the question upon whom this loss should fall, the claim against the sureties of the late Master was prosecuted by the solicitors of the petitioners. It is submitted that the professional services should be remunerated out of the fund recovered, and the surplus only be credited on the amount due to the petitioners. This seems reasonable, and the Master's report of the 4th June, 1855, should be reformed accordingly. A reference is ordered to ascertain the proper remuneration to be allowed.

It is ordered and decreed that James Tupper, Esquire, one of the Masters of this Court, raise from the estate late of William Mathews, deceased, in the hands of his devisees, under the decrees of this Court, such amount as is necessary to pay the legacy of Charles LeRoy Boyd, Junior, James W. Boyd, and Mathews B. Boyd, under the will of their grandfather, the testator, as ascertained by former decrees of this Court. It is further ordered and decreed that, in the first instance, one moiety of the said amount be raised from the estate in the possession of Mrs. Colburn, and the other moiety from any portion of the estate in the possession of the children of Mrs. Hunt, or which may be in the custody of the Court, and to which they are entitled. It is finally ordered that Mr. Tupper report upon the matters referred to him, and also his proceedings under this decree.

The defendants appealed on the grounds:

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\*1. That the defendants, devisees of William Mathews, did pay into the hands of the Master in Equity, as directed by the Court, the amount decreed to be paid by them; and that the decree against them was thereby, to that extent, satisfied.

2. That the loss to the petitioners was occasioned by the defalcation of the officer of the Court, and the insufficiency of his official bond to secure the funds in his hands; and it is respectfully submitted that the Court has no authority to require parties, who have satisfied a decree against them, to guarantee the solvency of its officers.

3. If parties in Court, against whom a decree has been pronounced, delay obedience to its requirements, other parties, who may have right to complain, are entitled to remedies according to the established rules of the Court, which they are at liberty to pursue or not, as they may be advised; but it is not competent for the Court to punish such delay, by requiring more than one satisfaction.

4. That the decree under which the defendants paid their money to the officer of the Court was for the benefit of the petitioners as well as of the other parties, and was not objected to by them, and they should

not be relieved from its consequences at the expense of the defendants.

5. That the decree is contrary to law and equity.

Northrop, for appellants.

Hayne, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. In the decree of 1850, 4

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Strob. Eq. 23, which was made in *Lawton v. Hunt*, to which the present petitioners, as well as the devisees and other legatees of William Mathews, were parties, the petitioners' claim as legatees was established; and the late Master (Laurens) was ordered by sale of property devised and bequeathed to Mrs. Colburn and Mrs. Hunt, severally, to raise money sufficient to pay off creditors of the estate and to pay and satisfy legacies, which had been ascertained and reported. This included the legacies of the present petitioners.

It appears that Mrs. Colburn and Mrs. Hunt paid to the Master a sum sufficient to satisfy these legacies; but that the Master wasted a portion of it, leaving the legatees unsatisfied to the extent of three thousand one hundred and fifty-six dollars and seventeen cents. By pursuing the sureties to the official bond of Laurens, the petitioners have been enabled to recover two thousand two hundred and fifty-nine dollars and fifty-nine cents, (less expenses of recovery, two hundred and twenty-five dollars); thus reducing their loss (interest being computed) to one thousand seven hundred and thirty-four dollars and seventy-three cents, on the 27th of June, 1854.

The petitioners have been let in by the present decree, to a remedy against the devisees, for the balance due the petitioners of money paid by the devisees to the Master, in satisfaction of their claim, but which the Master has wasted.

It appears to the Court, that when money is paid to an officer charged by law to coerce payment, the debt or demand on which it is paid, is extinguished as to him who makes the payment: (a) and the remedy of the party aggrieved by a subsequent misappropriation of the fund must be against the officer. The debtor is not to be converted into a surety of the officer whom he has not selected, and whom he has been unwillingly compelled to recognize. It is enough for a party of this description to have paid his debt once: and,

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besides, in the decree before referred to (of 1850), it is expressly provided, that when payment is made, the property of the devisees shall be "freed and discharged from any interference on the part of any of the parties to the suit."

(a) *O'Neill v. Lusk*, 1 Bail. 220.

It does not militate against this doctrine, that moneys deposited pendente lite, or as a security, or under interlocutory proceedings, may be at the risk of the depositor. (b) The money in this case was paid on a claim finally adjudicated and allowed, and under an authority in the Master to coerce payment and receive the money.

It is ordered that the petition so far as it seeks to subject the property of the defendants, be dismissed, and the decree so far as it gives a remedy by sale of their property reversed.

DARGAN, Ch., concurred.

WARDLAW, Ch., absent from sickness.

(b) 3 Danl. Pr. 2019.

8 Rich. Eq. \*185

\*GEORGE WAGNER & CO. v. ASSIGNEE OF E. LUDECUS and Wife.

(Charleston. Jan. Term, 1856.)

[Costs.  $\S$  56.]

Costs are allowed to a defendant upon a petition, which is litigated, as in other causes.

[Ed. Note.—For other cases, see Costs, Cent. Dig.  $\S$  27; Dec. Dig.  $\S$  56.]

Before Wardlaw, Ch., at Charleston, February, 1855.

This case came before the Court upon exceptions by defendants to a report of the Commissioner, which is as follows:

On the 2d March, 1852, Chancellor Johnston directed security for costs to be put in by the petitioners, who reside in New York. This was done before me on the 3d March, 1852. On the 30th March, 1853, Chancellor Dunkin, upon hearing the case, dismissed the petition. An appeal was taken, which resulted in the affirmation of Chancellor Dunkin's order. Subsequently, the defendants' solicitor applied to me to tax his costs for filing the answers and making their defence. The application was resisted, on the ground that no costs are allowed a defendant to a petition in Equity.

The Act of 1791, provides in certain cases for the presentation of complaints to this Court by petition, and directs that a copy shall be served on the opposite party, "in order to answer, if necessary, the contents of said petition." The fee bill of 1827 gives to the "defendant's solicitor, for drawing answer and exhibits, twenty dollars," without discriminating between answers to bills and petitions. In this case, the defendants were brought into Court by a form of proceeding authorized by law, to which they were bound to answer. Numerous references were held, and various questions raised upon the Master's report, which were strongly litigated, as is evidenced by the case being twice before the Circuit Court, and once before the

Court of Appeals. The result of the case

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shows that \*the defence was meritorious, which could not have appeared if the defendants (assuming that they are not entitled to costs) had been unable to employ counsel to represent their interests before the Court.

Under the decision of the Appeal Court in *ex parte McClelland*, 1 Hill's Eq. 412, (a case precisely similar to this,) I have, however, felt bound to refuse the application of the defendants' solicitor. I respectfully submit my action to the Court.

Wardlaw, Ch.—This cause coming up upon the report of the Master, and exceptions thereto, and counsel being heard, it is ordered that the exceptions of the defendants be over-ruled, and the report of the Master confirmed.

The defendants appealed on the ground:

Because it is respectfully submitted that the defendants are entitled to their costs in this case.

James Simons, for appellants.

Memminger, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. The Statute of 1791, "To establish a Court of Equity in this State," after reciting that, "in cases under the value of one hundred pounds, and in cases which may not be litigated, it may be unnecessary to proceed by bill and answer in the said Court," enacts that "in all such cases, it shall and may be lawful for the parties complaining to present his or their petition to the said Court, on oath, setting forth the true nature of the case, or sum really due—a copy of which petition shall be served on the opposite party, at least thirty days before the sitting of the Court, with notice thereon to

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appear on a certain day in Court, in order to answer, (if necessary,) the contents of the petition," &c.,—"Provided, always, that if the defendant or defendants should appear at the return of said petition, and show sufficient reason to the said Court, on oath, for going into a more ample investigation of the case, then, and in every such case, the said parties shall and may be at liberty to prove and substantiate their respective allegations, as in other cases."

It was under the latter part of this Act that the litigation between the parties to the present cause was conducted after the defendants' answer was put in. The Master, in his report, says:—"The defendants were brought into Court by a form of proceeding authorized by law, to which they were bound to answer." The result of the case (the petition being dismissed) "shows that the defence was meritorious, which could not have appeared, if the defendants (assuming that they are not entitled to costs,) had been una-



ble to employ counsel to represent their interests before the Court." He adds: "Numerous references were held, and various questions raised upon the Master's report, which were strongly litigated, as is evidenced by the case being twice before the Circuit Court, and once before the Court of Appeals."

Now, though justice requires that suitors should be protected against fraudulent or exorbitant charges of officers of Court, justice and the interests of the community equally require that the poor and weak should not be left defenceless, when dragged before judicial tribunals—which they must be, if compensation is not allowed to those who would defend them.

It may be doubted whether, when, by the answer to a petition, the cause becomes litigated, or contested—and the Court takes it up in that light; and proceeds "as in other cases"—it is not under the Act of 1791, before recited, to be regarded as if it arose on bill. This, however, need not be decided here.

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\*But the case of McClelland, 1 Hill Eq. 412, is objected to the allowance of costs to the defendants in the present case—regarded as a petition case.

This case proceeds upon grounds which we cannot recognize. The principle announced by the Judge who delivered the opinion in McClelland's case, is undoubtedly sound: that "costs are not allowed by the common law, and whoever claims to charge them, must put his finger upon the statute which allows it." But it is not admitted that "none of the Acts of the Legislature make any provision for a defence to a petition in the Court of Chancery."

On the contrary, we think the Statute of 1827 fixing a bill of costs (as well as the Statutes of 1791 and 1808 on the same subject, and which it superseded) makes provision, by annexing costs to specific services, such as were rendered in this case. This must be admitted in relation to the Master's, Commissioner's, register's, and sheriff's fees. Thus for references, reports, issuing of commissions, swearing witnesses, service of process, &c.—the fee being annexed in general terms to the service rendered, is to be allowed whenever the service is performed, and irrespective of the party, whether plaintiff or defendant, at whose instance it was performed. Whether the service was rendered in a petition case or a bill case, makes no difference, unless the Statute draws a distinction expressly.

On the same principle, the defendant's solicitor must be allowed such fees as are given him, as such, whether the cause arise on bill or petition:—as the plaintiff's solicitor would also have been, had not the Act confined him to certain charges in petition cases.

We think, then, that the defendants' solic-

itor in this case "can lay his finger on the Statute," allowing his claim.

If a defendant's solicitor is not entitled to costs in petition cases because the fees allowed him by the Statute are not stated

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\*to be in petition cases, neither is he entitled to any in bill cases, for they are not expressly stated to be given in bill cases: and so the defendant's solicitor would be entitled to no costs in any case, bill or petition, though the Statute expressly gives him fees. This construction is absurd.

Undoubtedly, the Statute is badly drawn. It should, (if it was so intended,) have drawn a distinction between the fees for defending in petition and bill cases, as it did in relation to prosecuting claims in the two kinds of cases. But the Court cannot help that. It must leave the remedy to be supplied by the legislature.

It is ordered that the decree be reversed; and that the cause be remanded, that the costs be taxed according to this opinion.

DARGAN and WARDLAW, CC., concurred.

DUNKIN, Ch., dissenting. I concur in the opinion expressed by Chancellor Wardlaw on the Circuit, that this case is concluded by the judgment in *ex parte McClelland*, 1 Hill, Eq., 412. But to allow to the defendant's solicitor twenty dollars for his answer to a petition, besides his subsequent costs, in cases in which the plaintiff's solicitor is allowed only ten dollars for petition and all incidental charges, seems to me not only without warrant in the fee bill of 1827, but without precedent in the practice of the Court since that time. I am, therefore, unable to concur in this judgment.

Decree reversed.

# 8 Rich. Eq. \*190

\*THE ATTORNEY GENERAL *ex relatione*, THE INDEPENDENT OR CONGREGATIONAL CHURCH OF WAPPETAU, CHRIST CHURCH PARISH, *v.* THE SOCIETY FOR THE RELIEF OF ELDERLY AND DISABLED MINISTERS AND OF THE WIDOWS AND ORPHANS OF THE CLERGY OF THE INDEPENDENT OR CONGREGATIONAL CHURCH IN THE CITY OF CHARLESTON, and Others.

(Charleston. Jan. Term, 1856.)

[*Charities* ⇨ 40.]

By an Act passed in 1789, a number of persons belonging to the "Independent or Congregational Church in Charleston," commonly called "The Circular Church," were incorporated under the name of "The Society for the relief of elderly and disabled Ministers, and of the Widows and Orphans of the Clergy, of the Independent or Congregational Church in the State of South Carolina." In 1834, by Act to amend the Charter, the Act of 1789 was repealed, the name of the corporation changed to that of "The Society for the relief of elderly

and disabled Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the City of Charleston," and the Society was authorized to appropriate its funds "to such charitable, benevolent, religious and other purposes, for the benefit of the said corporation, and of the said Independent or Congregational Church in the City of Charleston, in such manner as may be determined by a majority of the members thereof:—"

*Held*, that any Independent or Congregational Church in South Carolina, whether in existence in 1789, or afterwards established, was within the purview of the charter of 1789, and entitled to participate in the benefits of the charity; and that the amended charter of 1834, did not limit its benefits to the Circular Church in Charleston alone.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 100; Dec. Dig. ¶40.]

Other questions reserved with leave to plaintiff to amend his pleadings so as to bring them properly before the Court.

[This case is also cited in *Chichester & Co. v. Hastie*, 9 S. C. 335; *Green v. Iredell*, 31 S. C. 594, 10 S. E. 545, without specific application.]

Before Dunkin, Ch., at Charleston, June, 1855.

The information and bill is as follows:—

Informing, shows unto your Honors, Isaac W. Hayne, Attorney General of the State of South Carolina, by and at the relation of The Independent or Congregational Church of Wappetaw, Christ Church Parish, in the State aforesaid, of which the Rev. Edwin Cater is Minister; and Dr. Anthony V. Toomer, Dr. Daniel Legare, Messrs. J. T. White, Geo. White, and William Venning are Deacons; and Messrs. J. T. White and William McCants are Wardens: That the said Independent or Congregational Church was in-

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corporated by an Act of the \*General Assembly, dated 22d March, 1786, by the name of the Independent Church in Christ Church Parish, with a perpetual succession of officers and Members, and vested with all the rights, powers, privileges, and advantages which are specified and expressed in an Act for incorporating divers religious Societies, dated 26th March, 1784; and that the said Church desiring to establish a Branch Church at Mount Pleasant, their Summer Retreat, were re-incorporated by an Act of the General Assembly, dated 20th December, 1853, by the name of the Independent or Congregational Church of Wappetaw, Christ Church Parish, with power to establish a Branch Church at Mount Pleasant, in the said Parish, with the same succession of its officers and Members, and vested with the same powers, privileges, and advantages as previously granted; except limiting the right to hold property to the sum of fifty thousand dollars—all of which will more fully appear upon reference to the said Acts of the General Assembly. And the said Attorney General, at the relation aforesaid, also informs your Honors, that certain benevolent and charitable persons, sensible of their Christian obligation to provide for the relief of their el-

derly and disabled Ministers, and of the Widows and Orphans of their Clergy of the Independent or Congregational Church, in the State of South Carolina, which faith and form of worship they professed and held, formed themselves into a Society for establishing a fund for their relief, and bound themselves together in the following manner, viz: "We, the subscribers, desirous of carrying this good purpose into effect, and testifying our regard to those who have faithfully labored amongst us in the Gospel, do hereby solemnly associate and bind ourselves together under the following Rules:" to which Preamble, Rules and By-Laws of the said Society, your Relators beg leave to refer. And that the said Associates for the purposes aforesaid were incorporated by an Act of the General Assembly, dated 7th March, 1789, by the name of "The Society for the Relief of Elderly and Disabled Ministers,

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\*and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the State of South Carolina," with a perpetual succession of its officers and members, with power to hold lands, make rules and by-laws for their benefit and government; hold donations, and appropriate the same for the benefit of the corporation; and with power to retain the property it then possessed. And that the said Society by an Act of the General Assembly, dated 17th December, 1834, obtained an amendment to their former Charter, by which it was repealed, and they were re-incorporated as follows: "Sec. 2d. And be it further enacted by the authority aforesaid. That the persons and members hitherto known by the name of The Society for the Relief of Elderly and Disabled Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the State of South Carolina, and their successors, Officers, and Members, shall be hereafter, and are hereby declared to be, one body corporate, in name and in deed, by the name of 'The Society for the Relief of Elderly and Disabled Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the City of Charleston,' and by said name" to have a perpetual succession of officers and members, with right to hold property, and to sell and alien the same, to sue and be sued, to implead and be impleaded, answer and be answered unto, in any Court of Law and Equity in the State; to make rules and by-laws for the benefit and government of the Corporation, as the majority may agree upon; to hold lands and personal estate, and appropriate the same, as specified in the third section of the said Act of Incorporation, which reads as follows, to wit: "Sec. 3. And be it further enacted by the authority aforesaid. That it shall and may be lawful for the said Corporation hereby erected, to take and hold



to itself, and to its successors forever, any charitable donations or devises of lands and personal estate, and to appropriate, as also all other their funds, real and personal, to

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such charitable, benevolent, religious, and other purposes, for the benefit of the said Corporation, and of the said Independent or Congregational Church, in the City of Charleston, in such a manner as may be determined by a majority of the members thereof," with power to retain the property heretofore held by it; to which Acts of the General Assembly your Relators beg leave more particularly to refer. And the said Attorney General, at the relation aforesaid, further informs your Honors, that the Independent or Congregational Church of Wappetaw, Christ Church Parish, some of whose members were formerly, and some of whom are now members of the said Society, and have contributed to its funds, constitute a part; and that their Ministers are of the Clergy of the Independent or Congregational Church in the State of South Carolina; and that they are interested as well under the Constitution and By-Laws of the said Society as under the Acts of their incorporation, in all the funds of the said Society—and are entitled to benefits and advantages arising therefrom, and its proper application according to the charitable and benevolent purposes for which it was established. And the said Attorney General, at the relation aforesaid, further shows unto your Honors: That the funds of the said Society, in 1853, amounted to about fifty-eight thousand dollars; and that the said Society, or a majority of them, about that time, upon an application from the Circular Church of the City of Charleston, appropriated about eighteen thousand dollars of their said funds for the purpose of re-building or repairing that Church, an object totally disconnected with the purposes for which the said fund was established.

And the said Attorney General, at the relation aforesaid, further informs your Honors, That the said Society for the Relief of Elderly and Disabled Ministers, and of the Widows and Orphans of the Clergy of the independent or Congregational Church in the City of Charleston, at present consists of twenty-three members; that its business is regularly transacted by a President, Vice

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President, Treasurer, Secretary, and a \*Committee of Finance consisting of five chosen from among the members by a majority of those present, at every Annual Meeting; the Secretary and Treasurer to be residents in Charleston. That Henry A. DeSaussure is now President; Thomas Lehre, Vice President; Basil Lanneau, Treasurer; and Theodore Ruddock, Secretary; and that the present Committee of Finance consists of William Lloyd, Thomas Lehre, Richard Yeadon, Geo.

B. Locke, and H. A. DeSaussure. And that the seventh Rule of the said Society provides aid, by appropriation, for Elderly and Disabled Clergymen; and the eighth Rule provides, in like manner, for the Widows and Orphans of any deceased Clergyman entitled to the benefits of the Institution; and that no other appropriations are provided for in the Rules and By-Laws of the said Society; and that the President, Secretary, and Treasurer of the said Society, more especially the Treasurer, are in the habit of receiving, on behalf of the said Society, the rents and profits arising from the funds and estates of the said Society, and of settling the accounts respecting the same; and are entrusted with, and keep in their possession, the deeds, specialties, certificates of stock, choses in action, and money of the Society. The books and papers of the said Society furnish an annual statement of accounts, and the said Officers are well acquainted with all the particulars of the foundation of the said Society, endowments of the said Society, of all the funds and estates belonging to the same; the rents and profits thereof, and of all deeds, evidences, and writings relating thereto.

And the said Attorney General, at the relation aforesaid, further informs your Honors, That your Relators, upon being advised of the said misapplication of a portion of the said Trust funds of the said Society, (viz: eighteen thousand dollars,) by a majority of its members, immediately and frequently since, have applied to the said Society through its Officers, and to the Officers of the said Society, and requested them to restore the said sum of money to the Trust

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funds of the said Society, and \*to account for interest on the said sum, and to hold and apply the said funds in future only to the purposes of the Trusts upon which the said funds and estates were received by them, and are vested in them; and your Relators hoped that the said Society, through its officers aforesaid, would have so accounted for the said sum of eighteen thousand dollars, (so misapplied as aforesaid,) and would have paid it, or caused it to be paid back into the Treasury of the said Society, to be applied according to the Trusts, viz: to the benefit of such person or persons as are entitled thereto by virtue of the Constitution, Rules and By-Laws of the said Society, and the Acts of the General Assembly incorporating the said Society, and also of the benevolent and charitable intentions of the donors and founders of the said fund. But now so it is, may it please your Honors, that the said Society, and the Officers and Members of the said Society refuse to pay back into the Treasury of the said Society, the sum of money which they have misused as aforesaid, or to account for the same in any manner whatsoever, but allege that they had a power under their amended Charter so to ap-

propriate the said Trust funds, or any portion thereof; and that the Church at Wappetaw, since the Act of the General Assembly amending their Charter, has no right or interest in and to the said Trust funds of the said Society, or any of the benefits and advantages arising therefrom. Whereas, your Relators charge, that the Act of 1834 only changed the corporate name of the Society, and not its object and purposes; and does not limit the benefits and advantages to be derived from its funds to the Church in the City of Charleston alone; that the charitable intention of the founders of the said Fund and of the said Society, would be entirely frustrated by such a construction of that Act; and there is no power given by the said Act to the officers and Members of the said Society to apply the funds of the said Society to objects and purposes disconnected with, and not for the benefit of the specific charity; and that the Church at Wappetaw

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\*is not deprived by that Act of their interest in the said funds of the said Society, or of the right of their Clergy, and the Widows and Orphans of their Clergy to derive benefits and advantages from that fund. And your Relators further charge, that the Officers and Members of the said Society who misapplied that portion of the funds of the said Society, as aforesaid, ought to restore the same to the Treasury of the said Society, with interest; and that the said Society, and its officers and members, ought to be restrained from committing any further waste upon the funds of the said Society, or misapplication of the said funds, or any part thereof. All which actings and doings, pretences and refusals of the said Society, and of the Officers and Members of the said Society, are contrary to Equity and good conscience, and tend not only to the manifest wrong and injury of your Relators in the premises, but also to frustrate the charitable intention of the donors and founders of the said Fund, by applying them to other objects and purposes. In consideration whereof, and for as much as your Relators can only have adequate relief in the premises in a Court of Equity, where matters of this nature are properly cognizable and relievable. To the end, therefore, that the said Society for the Relief of Elderly and Disabled Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the City of Charleston, may by Henry A. DeSaussure, its President; Thomas Lehre, its Vice President; Basil Lanneau, its Treasurer; Theodore Ruddock, its Secretary; and William Lloyd, Thomas Lehre, Richard Yeaton, George B. Locke, and Henry A. DeSaussure, its Committee of Finance, both as officers of the said Society, and as Trustees for the Funds of the said Society, full, true, direct, and perfect answer make, to all and singular the matters aforesaid, upon their

several and respective corporal oaths, to the best and utmost of their several and respective knowledge, remembrance, information, and belief; and that as fully and particularly, as if the same were here repeated, and

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they and every \*of them distinctly interrogated thereto; and that they and every of them may more especially answer and set forth, what funds they have now in their hands belonging to the said Society, and in what does it consist, and what is the net annual income arising therefrom; what was the amount of said Fund previous to 1853; what appropriations have been made out of said Fund before and after 1853, and for what purposes were said appropriations made; has any appropriation been made for the re-building of the Circular Church, or for any other purposes connected with said Church, at any time, when, how often, and in what amounts; and more especially did not they appropriate about eighteen thousand dollars of the said Funds of the said Society, some time in 1853, for the purpose of improving the Building of the Circular Church in the City of Charleston? How many of the members were present at the meeting when that appropriation was made; who they were; and who voted in the affirmative, and who in the negative? Whether the money was raised by the transfer or sale of the Stocks, or other securities of the said Society, or not; and if not in that way, how it was realized? that the said Charity may be fully established, declared, and set forth; and what rights, interests, benefits, and advantages, your Relators, and their Clergy, and the Widows and Orphans of their Clergy, may have in the said Funds of the said Society; and that an account may be taken by and under the direction of this Court, of all and singular the Funds and Assets of the said Society; the receipts and disbursements of the said Funds; and that they may answer for such parts of the said Funds as shall appear to have been improperly applied by them, from such time as this Court shall direct; and that it may be referred to the Master to settle a plan for the future application of all the rents and profits of the estates, and other revenues belonging to the said Society, to the proper uses of the said Charity; and that the said Society, its Officers and Members, be in the mean time restrained by the Injunction of

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this Court, from making any \*further appropriations out of the said Funds of the said Society; and that for the purposes aforesaid, all necessary directions might be given; and that your Relators may have such other and further relief in the premises, or that such further and other directions may be given for the benefit of the said Charity, as the nature of the case may require, and to your Honors may seem meet, &c.



The answer of the defendants is as follows:—

That on reference to the Statute Law of the State of South Carolina, (8 Statutes at large, p. 134,) it will be found that a church was incorporated by an Act of Assembly, passed 22d March, 1786, by the name of "The Independent Church, in Christ Church Parish," which should have perpetual succession, and be vested with all the powers, privileges, and advantages specified in the Act for incorporating divers religious societies, passed 26th March, 1784.

2. That, by an Act of Assembly, passed 21st December, 1822, (8 Stat. p. 325,) "those persons who now are, or hereafter shall be, members of the Independent or Congregational Church at Wappetaw, in the Parish of Christ Church, be, and are hereby declared, a body politic and corporate by the style and title of "The Congregation of Wappetaw, in the Parish of Christ Church," for fourteen years from the passing thereof, and until the next meeting of the Legislature and no longer."

3. That, by an Act of Assembly passed 21st of December, 1836, (8 Stat. p. 448,) "those persons who are now, and may hereafter become members of 'The Congregational Church of Christ Church Parish,' shall be, and are hereby declared a body politic and corporate, by the name or style above assigned," for fourteen years.

4. That, by an Act of Assembly passed 20th December, \*1853, (12 Stat. 236,) all free white persons who now are, or hereafter may become, members of "The Independent or Congregational Church of Wappetaw," "with power to establish a Branch Church at Mount Pleasant, Christ Church Parish," are hereby declared and constituted to be a body politic and corporate by the name and style above assigned.

Whether the above-mentioned four several corporations, under the four several distinctive corporate names of,

1. "The Independent Church in Christ Church Parish," with a perpetual charter.

2. "The Congregation of Wappetaw, in the Parish of Christ Church," with a charter for fourteen years.

3. "The Congregational Church of Christ Church Parish," with a charter for fourteen years, (which expired in 1850.)

4. "The Independent or Congregational Church of Wappetaw," chartered in 1853, —are identical, and whether (notwithstanding the charter of the third body expired in 1850, and no new charter granted to Christ Church Parish or Wappetaw, until 1853,) they constitute the same church or corporation, are legal propositions denied by the defendants, and submitted to the judgment of the Court. It is more than doubtful whether any one, or all of those bodies could be brought within the category of "The Independent or Congregational Church,

in the State of South Carolina," but assuredly it is certain and conclusive that they cannot be included within the charity of the "Independent or Congregational Church in the City of Charleston."

And these defendants further answering, say, That by an Act of Assembly passed

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9th October, 1778, (8 Stat. p. 119,) \*entitled "an Act for Incorporating divers Religious Societies therein named," the Circular Church was incorporated by the name and style of "The Independent or Congregational Church in Charleston," under a perpetual charter, under which it still exists and acts.

And these defendants say, that a Society was formed in the said Circular Church, between the years 1778 and 1789, for the support of the elderly and disabled ministers of the said Church and their families. By an Act of Assembly passed 7th March, 1789, (8 Stat. p. 152,) the said Society was incorporated by the name of "The Society for the relief of Elderly and Disabled Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the State of South Carolina."

The preamble to the Act states its intent and object, by setting forth that William Hollinshead and Isaac S. Keith, and Josiah Smith, (the two collegiate pastors and the deacon of the (Circular) Independent or Congregational Church in Charleston,) with sundry other members of the Society for the relief of Elderly and Disabled Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the State of South Carolina, had taken into serious consideration the distressed situation in which many of the said Ministers and their families were frequently placed and left, and had associated themselves together for the charitable purpose of establishing a fund for their relief, but thinking so benevolent a design would be most effectually promoted by their being incorporated, they prayed that a law might be passed for incorporating them as a Society for that purpose. The Act therefore declares that the Society above-mentioned, and the persons who are, or shall hereafter be, members thereof, shall be, and are hereby declared to be a body corporate by the name herein before stated.

The venerable historian, Dr. David Ramsay, in his history of the said (Circular)

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(Church, published in the year 1815, \*(page 50,) says: "Besides the property belonging to the Church, the individuals composing it form so great a majority of the Society incorporated in 1789, for the relief of Elderly and Disabled Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church, in the State of South Carolina, that its capital stock, amounting to more than thirty thou-

said dollars, may, in a qualified sense, be considered as an appendage to the Church. An annual contribution, enforced by an appropriate sermon in its favor, is made by a standing order of the Church." No other contributors to the said funds or to the said Society, out of the said Church or Society, are known to the defendants, and their journals furnish no record of any other contributions. No annual collection in this behalf is made in any other church. If there shall have been any such contributors, and they have since died or withdrawn from the Independent or Congregational Church in the City of Charleston, and have united themselves with the Wappetaw Church, as alleged in the bill, or any other congregation, such contributors, if members of the Society, have forfeited their membership, and the rights and privileges incident thereto upon ceasing to be members or supporters of the said Independent or Congregational Church in the City of Charleston, as is declared and established by the Sixth Rule and By-Laws of the said Society, in the following words, viz: "That no person shall be eligible as a member of this Society, who is not at the time of his application a member or supporter of the said Independent or Congregational Church; and every member of the Society shall forfeit his membership, and the rights and privileges incident thereto upon his ceasing to be a member or supporter of the said Independent or Congregational Church in the City of Charleston."

And these defendants further answering, say, That for reasons and circumstances hereinafter stated, an alteration of the charter of the said Society was deemed expedient

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and proper; \*whereupon, by Act of Assembly, passed 17th December, 1834, (8 Stat. p. 388,) by and with the consent of the said Corporation, the Act of 7th March, 1789, incorporating in perpetuity, "the Society for the relief of Elderly and Disabled Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the State of South Carolina," was repealed, and its then and future members were incorporated for the term of twenty-one years, by the name of the "Society for the relief of Elderly and Disabled Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the City of Charleston." The new corporation was confirmed in the possession of the property it then held, and authorized to appropriate the same, and also all other their funds, real and personal, "to such charitable, benevolent, religious and other purposes for the benefit of the said corporation, and of the said Independent or Congregational Church in the City of Charleston, in such manner as may be de-

termined by a majority of the members thereof."

These defendants further answering, deny that the Attorney General, on behalf of the State, or the complainants, the Wappetaw Church, have any right to institute this suit, or call them to the account demanded by the bill of complaint. If this defendant, the corporation, has by any act violated its charter, it can only be called to account, and cognizance taken of it by the State, or the donors or founders of the charity. Now, in this case, the State is estopped by its own solemn act, for, by and with the consent of the corporation, (which assent would, undoubtedly, be sufficient for its dissolution,) the supreme Legislative power of the State repealed the old charter of the Society of 1789, authorized a different disposition of the funds, and prescribed a new mode of action, and new beneficiaries, under the new charter of 1834. The defendants, therefore, have acted, for upwards of twenty years, under express Legislative authority, and the

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State cannot call them to \*account for doing acts which it has deliberately and expressly authorized under its highest sanction—neither can the complainant, the Wappetaw Church, require an account from them, for it is not a cestui que trust or beneficiary under the Act of 1834, (neither is it the founder of the charity nor donor under the Act of 1789,) nor has any annual contribution ever been made by it as a body to the knowledge of these defendants. In the various transmigrations and ambiguous legal names through which this Wappetaw Church may have passed, there is no record of their contribution, as a church, to the funds of the Society, and if any individuals ever worshipped at both churches, and contributed to the Society, their union with the Wappetaw Church dissolved their membership in the Society, by its rules and by-laws; and the Wappetaw Church from the casual contribution of any of its worshippers to the funds of the Society, could scarcely predicate thereon a legal claim to participate in the bounty and funds of the Society. No temporal or ecclesiastical connexion has ever existed between the Church or Society in Charleston, and the church in Christ Church Parish, by whatsoever name it has been called. Each was independent of the other, formed its own articles of faith and government, and established its separate and distinctive organization. The real founders and donors of the Society are the members and supporters of the Independent or Congregational Church in Charleston, (commonly called the Circular Church, for brevity,) whose annual collections and donations for nearly two-thirds of a century, have created and accumulated its funds. There the Society originated; its meetings were held under officers of that church only: there it was located, managed and regulated,



and there, with scrupulous fidelity, its funds are solely and judiciously applied to the purposes of the trust. The alteration of the charter was made with the assent of the members and supporters of the Circular Church, who alone could be and were mem-

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bers of the Society, \*and who alone were interested in the disposition of the funds of the Society.

And these defendants, further answering, say, That by the original charter of the Society, in 1789, its funds were designed to provide for the "relief of Elderly and Disabled Ministers, and the Widows and Orphans of the Clergy of the Independent or Congregational Church in the State of South Carolina." If this clause be strictly and literally construed, none other can claim relief under it, but a clergyman of the Congregational Church, or his widow or orphans. The present Minister of the Wappetaw Church, whose name is recorded in the caption and forefront of this bill, is a Presbyterian minister, a member of the Charleston Presbytery, and in ecclesiastical connexion with the Presbyterian organization of this State, and of the General Assembly of the Presbyterian Church of the United States. Can such a pastor of another church have a legal claim on funds provided by Congregationalists only, in their domestic Society, for the relief of their own ministers? Is there either delicacy or morality in the claim? The quotation in the complainant's bill (page 2.) states that "we, the subscribers, desirous of testifying our regard to those who have faithfully labored amongst us in the gospel;" can the terms "labored amongst us," refer to any other but the ministers of the church in which the Society originated, existed and prospered under the fostering and exclusive care of its own members?

These defendants, further answering, say, that it is fairly inferable from the contemporaneous history of the Circular Church, that the society formed within it, and chartered in 1789, was designed for the benefit of elderly and disabled ministers, and of the widows and orphans of the clergy of the Independent or Congregational Church, in the State of South Carolina, which then worshipped in the church edifice in Meeting street, in the city of Charleston, in the State of South Carolina, and for none others.

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\*This inference is deducible,

1. From the name of the church mentioned in the charter of the society in 1789, there being no other church in the State chartered as "Independent or Congregational," until the complainants also assumed that name in the year 1853. There was one chartered "Independent"—another, "Independent Calvinist"—another, "Independent Presbyterian"—another, "Presbyterian or Congregational"—

but no church was then chartered in the State or known as the "Independent or Congregational Church," except the church worshipping in their house in Meeting street, in Charleston, now designated as the Circular Church.

2. If there had been any other churches in the State, chartered by the name of "Independent or Congregational," they could not have been legitimately included in the words used in the charter of the society, which words are, "Independent or Congregational Church," not churches. The fundamental principle of an "Independent or Congregational Church" (without which there can be no such church) is, that the church should ordinarily consist of only so "many members as can conveniently assemble together for public worship, the celebration of religious ordinances, and the transaction of church business," and that each congregation is a local church, complete in itself, separate and distinct from all others. The idea of an extended Independent or Congregational Church, composed of a number of such churches, would be self-contradictory, and has never been so applied. The names of the Roman Catholic Church, the Episcopal Church, the Presbyterian Church, the Methodist Church, are applied to extended bodies, having common and imperative subscriptions, and being amenable to some central or common power; but we never hear of the Independent or Congregational Church, as meaning a body composed of a number of such churches. When they are spoken of collectively, it is always in the plural number—as, the Independent

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churches \*of Great Britain, the Congregational Churches of Connecticut or Massachusetts. The charter term, then, "The Independent or Congregational Church in the State of South Carolina," must be restricted in its meaning and signification to some one church in the State, which church that was, is clearly indicated by the circumstances connected with the charter, and the conduct of the Society under it.

3. The only persons whose names are recited in the application for the charter of 1789, are Dr. William Hollinshead and Dr. Isaac S. Keith, the co-Pastors, and Josiah Smith, Deacon of the Independent or Congregational Church in Charleston. There is no evidence, nor is it believed, that any persons but members or supporters of the said church, joined in the petition, or belonged to the Society for which the charter was obtained. It is believed, and as to the best knowledge of these defendants averred, that the funds were raised by the members or supporters of the said church. An annual collection in its behalf was taken up in that church, "enforced by an appropriate sermon in its favor under a standing order of that church," for many years. No such collection for it is ever known, to these defendants,

to have been taken up in the Wappetaw or in any other church. Hence, upon recurring to the History of the Independent or Congregational Church in Charleston, by Dr. David Ramsay, published in the year 1815, (page 50) hereinbefore referred to, he says with propriety, that the capital stock of the said Society "may, in a qualified sense, be considered as an appendage to the church." This language (on same page) "the individuals composing it (the church) form so great a majority of the Society," may be satisfactorily explained by the fact, that a number of planters in the vicinity of Charleston, resided in Charleston for health during the summer, and rented pews in the said church, and thus were eligible, under the proviso in the Sixth Rule of the Society, to membership—but which "membership" and the

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rights and privileges incident thereto, was forfeited upon his ceasing to be a member or supporter of the said Independent or Congregational Church in the City of Charleston.

4. There has never been any relief extended by the Society to any elderly or disabled minister, or to any widow or orphan of any of the clergy of any of the other kinds of Independent Churches in the State, though it is probable such cases of necessity for relief may have existed among them; and if they had supposed themselves entitled to relief from the funds of the Society, doubtless, application would have been made for it. The records of the Society show that in 1827 and in 1834, application was made for relief to be extended to the widow of the Rev. Mr. Bascom, a Congregational Minister, who had been employed as a missionary in Charleston, and in different churches in it, and who died at Camden, in this State, while laboring there. The application, however, was twice unanimously rejected, as not coming within the scope of the charter of the Society. The records further show, that Dr. Anthony V. Toomer, (whose name is now enumerated among the Deacons of the Wappetaw Church, as stated in the caption of this bill,) then a member of the Society, was one of the committee appointed to consider the application of Mrs. Bascom, and reported against it. Dr. Toomer has since given up his pew, and left the Circular Church, and, by the Sixth Rule of the Society, has forfeited his membership therein.

5. When the Society was chartered in 1789, the Independent or Congregational Church in Charleston had two houses of worship, one in Meeting-street, and the other in Archdale-street, and two ministers, Drs. Hollinshead and Keith, who officiated in them alternately, every Sabbath morning and evening, though they met for the transaction of business as one body, constituted and were but one corporation and one body of communicants or members. Hence, the Society was

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formed and chartered for the relief of Elderly and Disabled Ministers, not minister, of "The Independent or Congregational Church, in the State of South Carolina." In the year 1814, a division took place in the church, which resulted in the Archdale street house of worship passing into the hands of Unitarians, who adopted, in the charter they subsequently obtained from the Legislature, the name of "The Second Independent or Congregational Church in Charleston." To prevent them (as they had departed from the fundamental doctrines and articles of faith of those who procured the charter of the Society in the year 1789) from ever making any application for assistance from the funds of the Society, was the reason why the Society applied to the Legislature in the year 1834, and obtained their present charter. The records of the Society show, that Dr. A. V. Toomer, then a member of the Society, was a member of the committee appointed by the Society to petition the Legislature for a new charter and for an amendment of the former charter, "so as to make the title of the Society apply only to the Independent [Circular] or Congregational Church in Charleston." On 17th October, 1834, the Committee reported to the Society [Dr. Toomer present] that the Society should apply to the Legislature for a new charter, and an amendment of the former charter, so as to confine its operation and benefits to the Independent or Congregational Church in the City of Charleston, which report was unanimously adopted by the Society.

6. If the complainant, the Wappetaw Church, by procuring a new charter in the year 1853, and adopting the name of the "Independent or Congregational Church," can claim, legally a share in the funds of the Society, [which they did not create,] then every other church in the State now chartered as "Independent," "Independent Calvinistic," "Independent Presbyterian," "Presbyterian or Congregation," "United Independent or Congregational Churches," or even by

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any other name may have a similar claim, simply by obtaining from the Legislature a new charter, and being re-baptized by a more politic and propitious name. This mode of proceeding might, peradventure, create capital for them in an unexpensive and summary manner; but, irrespective of its morality, would, doubtless, frustrate the intentions of the original donors and founders of the Society.

And these defendants, further answering, say, That the vested capital and funds of the Society, in the year 1852, amounted to fifty-eight thousand five hundred dollars.

Since which time, upon the special and formal application of the Corporation of the Independent or Congregational (Circular) Church in Charleston, the Society has grant-



ed to the said church the sum of about twenty-four thousand five hundred dollars for necessary repairs and improvements to the said church, which the latter had no means to make without such aid and assistance. The defendants deemed themselves fully justified in making such judicious appropriation, under the comprehensive terms of their charter of 1834, which authorized and empowered them to appropriate their funds to such charitable, benevolent, religious and other purposes for the benefit of said corporation, "and of the said Independent or Congregational Church, in the City of Charleston," in such manner as might be determined by a majority of the members thereof. The present vested capital and funds of the Society amount to about thirty-four thousand dollars.

The defendants, however, deny the right of the complainants to any claim for, or account of, the funds of the Society, or the appropriation thereof. If the persons named in the bill of complaint as officers of the Wappetaw Church, claim to be such, and rely thereon as a material allegation in the case, these defendants require that the fact be established by competent evidence, inasmuch as some of such persons have, to some individuals of these defendants, disclaimed

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the holding of \*the offices imputed to them. The individuals named as codefendants, admit that they hold the respective offices in the Society, alleged in the bill of complaint. And without that, that there is any other matter, cause or thing, in the complainant's said bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein, and hereby, well sufficiently answered, avoided, traversed or denied, true to the knowledge or belief of these defendants, pray to be hence dismissed, with their reasonable costs and charges in this behalf wrongfully sustained.

Dunkin, Ch. On 7th March, 1789, a society was incorporated under the name and style of "The Society for the Relief of Elderly and Disabled Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the State of South Carolina." The records of this society anterior to 1826, appear to have been lost, or mislaid; and the most authentic account of its origin is found in Dr. David Ramsay's "History of the Independent or Congregational Church in Charleston, South Carolina," published in 1815. It appears that about the year 1750, the Rev. Josiah Smith, who had been for many years, the faithful and highly esteemed pastor of this congregation, was struck with paralysis. He survived the shock more than thirty years. In the language of the historian, "this paralytic affection of the Rev. Mr. Smith rendered him, for more than thirty years, incapable of performing the duties of his office, and the inadequate support he had received for the preceding twenty-three years of active serv-

ice, put it out of his power to provide for the extraordinary emergency. He was, therefore, in a great degree dependent on his eldest son, Josiah Smith, for the means of a living. The providential affliction of the Rev. Mr. Smith suggested to the church, in its latter days of prosperity, the expediency of providing a permanent fund for the support of elderly and disabled ministers and

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their families. \*This has been so uncommonly prosperous, that the few objects within the strict letter of the Act incorporating it do not exhaust one half of the interest of its capital. In this manner a kind Providence has overruled a partial temporary evil for a general and permanent good." The Rev. Mr. Smith died at Philadelphia, a prisoner of war, in October, 1781. In consequence of the loss of records, it is not certainly known who were members of the Society at the time of the incorporation in 1789; but the preamble of the Act recites that the petitioners for a charter were William Hollinshead, Isaac S. Keith and Josiah Smith, with sundry other members of the Society for Relief, &c. William Hollinshead and Isaac S. Keith were at that time pastors, and Josiah Smith a deacon, of the Independent or Congregational Church in Charleston. By the rules of the Society, the annual meetings were held at the Independent Church in Charleston, in October, when a sermon suitable to the occasion was preached, and a collection taken up for the benefit of the institution. Nor was any person eligible as a member of the society, who was not a member, or supporter, of the Independent or Congregational Church in Charleston. It was proved by Kinsey Burden, a witness, born in August, 1775, that he had been a member of the Circular Church since 1793, and that he became a member of the Clergy Society between 1793 and 1795—that the annual meetings were always held in that Church, and for a great many years, an annual sermon was preached, and a collection made, for increasing the funds of the society—the members of the society contributed five dollars annually—for some years past, both sermon, collection and annual contribution have been discontinued,—he believes that the society originated with this Church—no members elsewhere were elected, except some from Wappetaw, who held pews in the Circular Church—he knows only of two of this class, who were Dr. Toomer and Dr. Legare—no collection was made in any other than the Circular

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Church\*—officers of the society were always selected from the Circular Church, and the society always met in that church.

No allowance was ever made by the society to any clergyman, or their families, who had not been pastors of the Circular Church, except a gift of five hundred dollars to the widow of Dr. Clarkson, a deceased clergy-

man, of John's Island, who had no claim on the society, but the gift was made at the request of Dr. Keith.

After enumerating the benefactors of the Circular Church, and referring to its financial condition, Dr. Ramsay (at page 50) says, "Besides the proper estate belonging to the church, the individuals composing it form so great a majority of the 'Society incorporated in 1789, for the relief of elderly and disabled ministers, and the widows and orphans of the clergy of the Independent and Congregational Church in the State of South Carolina,' that its capital stock, amounting to more than thirty thousand dollars, may, in a qualified sense, be considered as an appendage to the church. An annual collection, enforced by an appropriate sermon in its favor, is made by a standing order of the church."

In addition to these annual collections and the annual contributions of the members, it appears from the same book, (p. 18,) that the Rev. Andrew Bennet, who had been the pastor of this congregation, and who died at Bermuda in 1804, bequeathed to this society the sum of two thousand dollars.

In December, 1834, an Act was passed, entitled, "An Act to amend the charter of the Society for the Relief of Elderly and Disabled Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the State of South Carolina." By the first clause of the Act it is declared, that the Act of Incorporation ratified 7th March, 1789, be, and the same was, "thereby repealed, by and with the consent of the said corporation."

The second clause provides that the persons and members of the society hitherto

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known by the name of "The Society for the Relief of Elderly and Disabled Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the State of South Carolina" and their successors, &c., shall be hereafter, and they are thereby declared to be a body corporate, by the name of "The Society for the Relief of Elderly and Disabled Ministers, and of the Widows and Orphans, of the Clergy of the Independent or Congregational Church in the City of Charleston."

By the third clause, the society thus incorporated was authorized to take and hold any charitable donation, &c., "and to appropriate the same, as also all other their funds, real and personal, to such charitable, benevolent, religious and other purposes, for the benefit of the said corporation, and of the said Independent or Congregational Church in the City of Charleston, in such manner as may be determined by a majority of the members thereof."

The fourth clause declares that "the said corporation shall be able, and capable in law, to have, receive, enjoy, possess and retain all

such estate, &c., which it is now possessed of or entitled unto, or which has already been given, devised or bequeathed to it," &c.

By the fifth clause the charter is to continue for twenty-one years.

Upon reference to the minutes of the proceedings of what is concisely termed "the Clergy Society," it appears that the application to the Legislature, in 1834, was made on a resolution of the society, unanimously adopted, 17th October, 1834, and the new charter was accepted and adopted 12th October, 1835.

In 1854 these proceedings were instituted in the name of the Attorney General, at the relation of "the Independent or Congregational Church of Wappetaw, Christ Church Parish, of which the Rev. Edwin Cater is minister, and Dr. Anthony V. Toomer chairman," &c. The right of the relators to act is first set forth, to which reference will be here-

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after made. The Act of 1789 and of 1834, are then sufficiently set forth, together with the names of the officers and committee of finance, who are made defendants. It is alleged that, in 1853 the funds of the society amounted to fifty-eight thousand dollars, and that "about that time the said society, or a majority of them, upon an application of the Circular Church of the City of Charleston, appropriated about eighteen thousand dollars of said funds, for the purpose of re-building or repairing that Church." It is charged that this is a misapplication by the society of the funds held by them, and not warranted by the charter; and it is specifically charged "that the Act of 1834 only changed the corporate name of the society, and not its object and purposes; and does not limit the benefits and advantages to be derived from its funds to the church in the City of Charleston, alone; that the charitable intention of the founders of said fund, and of the said society, would be entirely frustrated by such a construction of that Act, and that there is no power given by the said Act to the officers and members of the said society to apply the funds of the said society to objects and purposes disconnected with, and not for the benefit of the specific charity." The prayer of the bill is, that "the officers and members of the said society who misapplied that portion of the funds of the society may be required to restore the same, with interest, to the treasury of the said society"—that the charity may be established and declared, as also the rights of the relators and their clergy, &c., that an account may be taken of the funds, and that it may be referred to the Master to settle a plan for the future administration of the charity, &c.

The answer of the defendants is full and elaborate, setting forth succinctly the origin not only of the society, but of the Independent or Congregational Church in Charleston, frequently called "The Circular Church."



The answer cannot be, with propriety, abridged. The inference, which the defendants deduce from the history of the church and

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the \*society, is, that the society was originally formed and chartered in 1789, "for the benefit of Elderly and Disabled Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church, in the State of South Carolina, which then worshipped in their Church edifice in Meeting-street, in the City of Charleston, in the State of South Carolina, and for none others." It is insisted that this was the only church then known as the Independent or Congregational Church; and that the relations were never incorporated under that title until 1853. The defendants, finally answering, admit the appropriation of funds, as charged, for the necessary improvements and repairs of the Circular Church; and submit that they were fully warranted, under the plain construction of the terms of the charter of 1834, which authorized the appropriation of the funds of the society "for the benefit of the said corporation, and of the said Independent or Congregational Church in the City of Charleston, in such manner as may be determined by a majority of the members thereof."

In order to ascertain the meaning of the terms used in the charter of 1789, it may be necessary to look at the situation of the various societies of Christians in the state at that period. By the 38th section of the constitution of 1778, it was declared that all denominations of Christian Protestants in this state shall enjoy equal rights and civil privileges, and it was provided, among other things, "that whenever fifteen or more male persons not under twenty-one years of age, professing the Christian Protestant religion, shall agree to unite themselves in a society for the purpose of religious worship, they shall (on complying with the terms hereinafter mentioned) be constituted a church, and be esteemed and regarded in law as of the established religion of the State, and on a petition to the Legislature, shall be entitled to be incorporated and to enjoy equal privileges—that every society of Christians so formed shall give themselves a name or denomination by which

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\*they shall be called and known in law, and all that associate with them for the purposes of worship, shall be esteemed as belonging to the society so called." The Constitution then provided five articles of belief, the subscription of which was necessary to entitle a religious society to the privileges of incorporation.

The Constitution was adopted on 19th March, 1778. On 9th October of that year an Act was passed, reciting this provision of the Constitution, and under it several religious societies were incorporated under their several appropriate names or denominations.

Among others, was incorporated "The Independent or Congregational Church in Charleston." In accepting this charter, and readily subscribing to the articles of belief as therein set forth, the congregation added an explanation of their particular creed, with this preamble: "Although we acknowledge that the foregoing articles (those provided by the Constitution) do not contain anything contrary to truth, yet, as they do not discriminate truth from error, and are no way declaratory of those distinguishing truths which this church has always heretofore acknowledged, and at this time do recognise to be the scripture doctrines of grace; and as the foregoing articles are now received by this church, merely in compliance with the requisitions of the legislative body of this country, and in order to entitle it to the privileges of establishment and incorporation, lest any persons should take occasion from them to attempt to introduce any doctrines into this church, not heretofore received and acknowledged by it as Scripture doctrines, we lay down the following three articles as the fundamental doctrines of this church." Then follow the three articles, embracing the doctrine of the Trinity—the Fall of Man, and the Atonement.

In 1787 was published "The Constitution or form of government of the Independent or Congregational Church, worshipping in Meeting and Archdale-streets, in Charleston, South Carolina." The preamble declares as

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follows: "In \*matters of church government, we hold it to be an unalienable right, as a Christian Church, to govern ourselves in such manner, as to us appears most expedient, and best suited to our circumstances, without control, in ecclesiastical matters, from any man, or set of men; nevertheless, in difficult cases, we think it prudent to ask advice of such Protestant Churches and ministers, as we may judge proper." The mode of government by the congregation within itself is then prescribed by the several articles.

Such was the creed and such the form of government of this church, in the body of which was formed the Society for the Relief of Disabled Ministers, &c., which was incorporated by Act of Assembly, 7th March, 1789.

The creed and the form of government have all the marked characteristics which distinguish this denomination of Christians. Thus Schaff (a recent writer of some celebrity) says, in speaking of this denomination, "they form the extreme left wing of orthodox Protestantism, maintaining the keenest and most unyielding hostility to Romanism." In matters of faith, he again says, "they are strictly orthodox, still holding to the Westminster confession and catechisms, drawn up by an Assembly of Calvinistic Divines in London, in 1642." "But the leading peculiarity of Congregationalism, which essentially distinguishes it, even from the Genevan Cal-

vinism and the Scottish Presbyterianism, lies in its theory of church government, which exalts and develops the independence of single congregations. It proceeds on the ground that each congregation (hence the name, Congregationalism,) is a complete church of Christ, and, as such, independent of all earthly supervision (hence the name, Independency); directly united to Christ, and only responsible to Him; therefore entitled and bound to choose and maintain its own officers, and conduct all its own affairs, internal and external, as prescribed by the Divine Word itself."—Schaff's America, 128, 131.

The preamble to the Act of 1789 sets forth

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the names of the \*most prominent petitioners—the general purposes of the society, and the motives of their application for a charter. The petitioners recited that "they, with many others, had taken into their serious consideration the distressed situation in which elderly and disabled ministers, and the widows and orphans of the Clergy of the Independent or Congregational Church were frequently placed and left, and therefore associated themselves together for the charitable purpose of establishing a fund towards their relief," and that they thought so benevolent a design would be most effectually promoted by an Act of Incorporation, under the name and style therein suggested. In accordance with this petition, the society was incorporated.

In order to maintain the conclusion that the object of the petitioners, as well as the Legislature, was to secure a fund for the support of the Clergy of the Congregation of which the petitioners were members, it was contended, and as the Court thought with truth, that this was the only congregation in the State of South Carolina which, at that time, answered the description in the charter. Whatever may have been the intention, it may be safely assumed that it was not the intention either of those petitioners or of the Legislature, to provide for the Clergy of any denomination other than that which professed their principles, adopted their form of church government, and which bore their name. By the Constitution of 1778, every society of Christians, asking for an Act of Incorporation, were required to "give themselves a name, or denomination, by which they shall be called and known in law." Between that time and the period when the Clergy Society was incorporated, about forty religious societies had been incorporated among those formerly called Dissenters, or who did not belong to the Episcopal Church. Each religious society had its appropriate name. Some were Presbyterians, some Baptists, some German Lutheran—"Calvinist Church of French Protestants"—"The Independent Calvinist Church

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in \*the City of Charleston"—"The Independ-

ent Church in Christ Church Parish." But the only religious society which had been incorporated, or was then in existence, bearing the name of "Independent or Congregational Church," was that to which the petitioners belonged, and which had been incorporated in 1778, with a perpetual charter, by the name and style of "The Independent or Congregational Church in Charleston." It is not necessary—it might be invidious—to institute an inquiry as to the particular creed or form of government of any of these numerous religious associations. If they have declined, or refrained from, assuming the title of Independent or Congregational Church, they had the right to do so for any reason, or for no reason. But it is not to be presumed that, in 1789, either the founders of this charity, or the Legislature, intended to include as objects of the bounty, ministers of any existing religious society which was well known by a different name.

But a charity may be created, not only for the benefit of those who are in existence, (communities or individuals,) but of those who may come into existence, or who may qualify themselves to become objects of the bounty. It may be more likely to suppose that known, and ascertained, and proximate objects were intended, than those more distant, or which may never exist. The defendants are entitled to the benefit of this presumption. The Court is well satisfied from the evidence that the society was formed by members or supporters of what is called familiarly "the Circular Church," that none but worshippers at that Church could be members of the Clergy Society—that the funds of the society were chiefly created by the contributions of these members, and the annual collections made in that Church—and that, at the time of the charter, no other religious denomination of Christians existed in South Carolina known in law as an Independent or Congregational Church—and, as an inference, that the pastors of the congregation with which these founders of the

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charity habitually worshipped \*would be the natural objects of their solicitude as they were of their veneration and affection. This presumption in favor of the construction adopted by the defendants may be also fortified by the consideration that, from the creation of the charter until the institution of these proceedings, a period of about sixty-five years, no one had been recognized as an object of the bounty of the society, except such as had been pastors or ministers of "the Independent or Congregational Church in Charleston," or the families of such ministers. Still, all such presumptions must yield to the declared will of the founders, and of the Legislature, as set forth in the Statute of Incorporation, if the language of the Statute be, in itself, susceptible of a plain and obvious interpretation at variance with such



presumptions derived from external circumstances.

In the preamble the petitioners are said to represent a Society for the Relief, &c., of Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the State of South Carolina. They set forth that the petitioners, "with many others, had taken into their serious consideration the distressed situation in which elderly and disabled ministers, and the widows and orphans of the Clergy of the Independent or Congregational Church were frequently placed and left," &c. There were in other States numerous religious societies of this denomination. The language plainly implies that the petitioners were moved by the contemplation of what frequently occurred to the Clergy (or other families) of this denomination of Christians.

It was argued (and with some force) that the term "Church" was not properly applicable to a body which is not united by any general organization. Dr. Baird, the author of *Religion in America*, while classing this among the Protestant Churches of America, and stating that it was the second which appeared in this country, intimates a doubt whether the term "Church" was strictly applicable to independent bodies of Christians of this denomination. But the inquiry is of a practical character, not so much as the ac-

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curacy of the term used in an ecclesiastical sense, but the object intended to be designated by those who used the expression. When the petitioners speak of the distressed situation in which the "Clergy of the Independent or Congregational Church are frequently left," it is difficult to doubt, that they referred to the Clergy of the societies of that denomination of Christians as distinguished from the Clergy of the Episcopal Church, the Presbyterian Church, or the pastors of any other Church. Influenced by these motives, and desirous of providing for the necessities of those who had served as ministers to congregations of this denomination, but at the same time limiting the sphere of their operations, they obtained a charter for "the Society for the relief of Elderly and Disabled Ministers, and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the State of South Carolina." If it had been contemplated still further to restrict the benevolent action of the society, and to confine the charity to the pastors of that congregation to which the members of the society belonged, it would have been so declared. Ten years previously this congregation had received an Act of Incorporation under the name and style of "The Independent or Congregational Church in Charleston." The comprehensive language of the charter of the society implies not merely that it was not exclusively for the relief of Ministers of "the Independent or Congregational Church in Charleston," but

that there were, or might be, other congregations in the State of South Carolina, whose Clergy were intended to be included in the scheme of charity thereby established. It may be here remarked, that the preamble of the Act of 1789 seems to have been borrowed from that of 1786, incorporating "The Society for the Relief of the Widows and Orphans of the Clergy of the Protestant Episcopal Church in the State of South Carolina;" and it is not improper to refer to that preamble, as well to indicate the sense in which the term "Church" was generally understood, as also the geographical limits of that Church within which the society was formed, and for whose benefit it was instituted.

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\*The charter of 1789 was not limited in its duration. Co-extensive with its existence might be the period within which objects for their bounty, according to the provisions of their charter, might be presented. In 1789 but one religious society existed in the State professing the faith, having the form of government, and bearing the name of "The Independent or Congregational Church." If, during the next succeeding ten years, (for instance,) as many religious societies had been incorporated having the same faith and form of government with the congregation in which the society originated, and bearing the corporate name of "The Independent or Congregational Church of Columbia, in the State of South Carolina," and another "of Camden," &c., in the judgment of the Court the elderly and disabled ministers of these several religious societies or congregations would fall within the purview of the charter of 1789, and might properly be the recipients of the bounty of the society thereby incorporated. The relators, "The Independent or Congregational Church of Wappetaw," never fell within the category until December, 1853. It remains to inquire whether they can have any interest in the fund, and are entitled to move in these proceedings. The solution of this inquiry requires an examination and construction of the Act of 1834.

It seems almost superfluous to premise that, in the exposition of statutes, where the language may admit of more than one interpretation, the Court will adopt such construction as will render the statute consistent with established rights, rather than, by a different construction, infer an intention of the Legislature to disregard or subvert those rights. The Act of 1834 purports by its title to be "an amendment" of the charter of 1789. The petition of the Society was for "an amendment" of their charter. The relators have put the argument strongly that the Act of 1834 only changed the corporate name of the Society, "but did not limit the benefits and advantages to be derived from its funds to the Church in the

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City of Charleston alone; that the charitable intention of the founders of the said fund, and of the said Society, would be frustrated by such construction of that Act." The clauses of the Act must be taken together; and the Court concurs in the construction that the language does not exclude from the benefit of the fund any objects who might become entitled to participate in it according to the provisions of the Act of 1789. The Court is, therefore, of opinion that the relators professing the principles and having the same form of government with the congregation in which the Society was formed, and now bearing the name of an "Independent or Congregational Church," have such interest as entitles them to become a party in these proceedings.

The last question to be considered is of far more difficult solution. It is not certainly known what was the amount of funds of the Society in 1789 when the Act of Incorporation was passed. From the recent origin of the association, they were probably inconsiderable, and the limited nature of their views may be inferred from the eighth rule of the Society, which provides that the maximum allowance of a disabled minister shall be four hundred dollars per annum, but that the annual allowance, thus made, "shall at no time exceed the annual income of the Society." In 1814 the funds of the Society amounted, it is said, to thirty thousand dollars, and the annual income exceeded two thousand dollars. In 1828 the funds of the Society had so largely increased, and so few were the demands on its bounty, that its funds were doubled since 1814, and, by a vote of the Society, the annual sermon and collection in aid of the Society were suspended, and have never since been resumed; and the annual contribution by members was either suspended or fell into disuse. Six or seven years afterwards, to wit: in December, 1834, the amendment of the charter was made "by and with the consent of the corporation," as is declared in the body of the Act.

On the part of the relators it is insisted

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that, by the Act of 1834, no power is given to the officers and members of the said Society to apply any portion of their funds towards assisting the Independent or Congregational Church in Charleston in repairing or re-building their Church. On the other hand, the defendants, admitting that, on the formal application of the said Church, the Society had made a grant of money to them for the improvement of the Church edifice, which the Church had no means to make without such aid, submit that their proceedings are fully justified under the comprehensive terms of the Act of 1834. In expounding an Act of the Legislature, the enquiry is, What was the meaning of the Legislature, as derived

from the language they have used? If this can be ascertained, it is entirely beside the question to enter into any scrutiny as to the purposes of those who proposed the law, or of any member of the Legislature who may have advocated its passage. It is sometimes very possible that if the Legislature were advised of all the views of those who proposed a law, or even of the construction which would hereafter be given to their language, they would refrain from a ratification of the Act. The Court has already declared that, after a careful analysis of the Act of 1834, the construction of the relators is so far sustained, that it was not the intention of the Legislature thereby to cut off from the benefits of the charity any who would have come within the purview of the charter of 1789. But it is at least equally clear that it was the object of the Legislature, by the Act of 1834, to enlarge the sphere of this charity, and to include, as an object of its bounty, what had not been theretofore included. By the third clause of the Act it is provided that the corporation thereby erected shall be authorized to appropriate their funds "to such charitable, benevolent, religious and other purposes, for the benefit of the said corporation, and of the said Independent or Congregational Church in the City of Charleston, in such manner as may be determined by a majority of the members thereof." It is not doubted that the grant in question was made

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on the vote of a majority of the members of the Society, and therefore in strict conformity with the plain language and manifest purpose of the Act. The only issue presented by the terms of the pleadings is upon the construction of the Act. At the hearing of the cause it was argued that, if this construction should prevail, the Act of 1834 was a violation of the Constitution. The counsel of the defendants insisted that the constitutionality of the Act of 1834, was a different issue from that presented, and was a surprise upon them—that a question of so grave a character should be distinctly presented by the pleadings, and opportunity afforded them to meet it in the same way. In reference to this branch of the case, the history of the Society, and of the Church were adverted to, and facts stated as susceptible of proof. In December, 1834, the Society had been in existence some forty-five years. During that time there had existed no religious congregation in the State of South Carolina, whose ministers, &c., were entitled to the aid of the Society, except that of "The Independent or Congregational Church in Charleston." The funds of the Society were swollen from five or six thousand dollars to some sixty thousand dollars—the annual income from four or five hundred dollars to, perhaps, as many thousand. The funds of the Society were continuing to accumulate, and judging from an experience of nearly half a century, the



objects within the strict letter of the charity would never require one-half, or one-fourth, of the annual income. It was alleged that this judgment was vindicated by the subsequent experience of nearly twenty years after the passage of the Act, during which no other religious community in the State had come within the purview of the charity. Many other facts and circumstances were suggested in the argument; but, in the opinion of the Court, enough has been already stated to require an amendment of the pleadings, if the judgment of the Court is demanded in reference to this inquiry.

In *Fletcher v. Peck*, 6 Cranch, 87 [3 L. Ed. 162], this is the language of the Court: "The question whether a law be void for its

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repug<sup>n</sup>ancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its Acts are to be considered as void. The opposition between the Constitution and the law should be such that the Judge feels a clear and strong conviction of their incompatibility with each other." And in *Dartmouth College v. Woodward*, 4 Wheat. 518 [4 L. Ed. 629], Chief Justice Marshall says, "On more than one occasion, this Court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that, in no doubtful case, would it pronounce a Legislative Act to be contrary to the Constitution."

The general positions assumed by the relators were well sustained both by argument and authority. The charter of 1789, created a private eleemosynary corporation. It is the duty of those who undertake to administer a charity, whether corporate bodies or individuals, to act up to the end or design, whatever it be for which it was established—and it is within the province of this Court to correct the malfeasance or neglect of those intrusted with this duty. Equally sound is the doctrine recognized and enforced in the *Dartmouth College* case, that an Act of the State Legislature, altering the charter of a corporation of a character similar to that created by the Act of 1789, "without the consent of the corporation, in a material respect, is an Act impairing the obligation of the charter, and is unconstitutional and void." That was a proceeding by the trustees of *Dartmouth College*, under a charter granted in 1769, impugning an Act of the Legislature of New Hampshire passed in 1816. The Court, in sustaining the right of the trustees to institute proceedings, remarked that, so

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soon as the charter \*was granted, "the founders of the charity, at least those whose contributions were in money, parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alterations in its constitution, and probably regardless of its form, or even of its existence." "Their descendants are, in this respect, not their representatives—they are represented by the corporation—the corporation is the assignee of their rights, and stands in their place." Although the trustees had no beneficial interest to be protected, they were held entitled to maintain the suit. It may here be added that in the event of the civil death of a corporation, either by surrender of its charter, or by a forfeiture of the same for any cause judicially ascertained and declared, or in any other way, the personal estate of the corporation, in England, vests in the king; and in our own country, in the people or State, as succeeding to the right and prerogative of the crown. *Co. Litt.* 136; 2 *Kent*, Com. 246, 247.

The principle settled in the *Dartmouth College* case was, that the charter of a private corporation, whether civil or eleemosynary is an executed contract between the Government and the corporators; and that, under the tenth section of the first article of the Constitution of the United States, the Legislature cannot repeal, impair, or alter the charter, against the consent, or without the default of the corporation judicially ascertained and declared. And, moreover, that it is competent for the trustees of a corporation to impeach the validity of such Act, and have the same declared null and void. It is not proposed, in any manner, to intrench upon the principles thus recognized and established. But, without impugning this and other authorities to the same effect, it remains to be determined (if it shall ever be so determined) that the Legislature may not, with the consent of such corporation, so amend and enlarge the charter as to embrace objects not directly contemplated or includ-

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ed in the \*original provisions. And if the power of the Legislature in such case be denied, it may still be worthy of inquiry whether it be competent for this Court, in proceedings instituted in the name of the State, to decree restitution against those who may have had no agency in procuring the amendment of the charter, and who have done no more than was enjoined or authorized by the statute. These questions will be properly made when that of the repugnancy of the Act of 1834 to the provisions of the Constitution is directly made by the pleadings. The solution of the principal inquiry may be of great practical importance, involving, not

only the validity of much past legislation, but the general power of the Legislature to protect corporate bodies of its own creation. Many religious societies are formed for the purpose of erecting and maintaining houses of worship in particular localities—the funds of the Society are made up by voluntary contributions among the members and by other benevolent individuals. The Society becomes incorporated for these purposes. In process of time Black Creek (or whatever be the locality) becomes unhealthy, and the congregation remove to a different and healthier part of the parish. The funds, by frugal management, have greatly increased; but they were subscribed for building and keeping in repair a Church at Black Creek. May not the Legislature, with the consent of the corporation, amend the charter and authorize the building and keeping up of the Church fifteen miles off, without violating the Constitution? But suppose the corporation and the Legislature refrain from acting, and the neighborhood is entirely deserted, but in the meantime the fund for erecting and maintaining the Church at Black Creek has greatly increased, can it be doubted that under those circumstances, and to avoid a forfeiture for non user, the corporation might surrender its charter, and accept a new charter by which the funds would be preserved for the same congregation? But the Dartmouth College case affords a more apt illustration. It was originally a charity school, established by Dr. Wheelock, in 1754 for the

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instruction of Indians in the Christian religion. He afterwards solicited and obtained contributions in England, through the Earl of Dartmouth, for carrying on and extending his undertaking. Dartmouth College was built at Hanover, on the banks of the Connecticut, "that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English." In 1769 the charter was granted to the trustees of Dartmouth College. It was this charter which the Legislature of New Hampshire, in 1816, undertook to alter against the consent of the trustees. But if, at that session of the Legislature the trustees had presented a petition, setting forth that the funds of the College had greatly increased—that very few Indian youth now remained to be converted, or instructed in the Christian religion, and that, from the circumstances of the Revolution, and other causes, not many presented themselves who might strictly be called English youth, and praying such amendment of their charter as would convert the College into a University, authorize the admission and instruction of youth of any nation, and the appropriation of a portion of their funds in the erection of buildings and endowment of professorships, it would be difficult to find any constitutional impediment in granting

the prayer of the petition and enacting a law in conformity to their wishes. If the purposes of the founders have been fulfilled, or are in the course of fulfilment, and a large surplus fund remains without any legitimate object of appropriation, within the strict letter of the charity, what violation of contract is committed by the Legislature in enlarging the powers of its trustees, consistently with the preservation of their original rights and duties? Although good faith should always be observed and maintained in the execution of trusts, it is against the policy of the country that funds of this character should be unnecessarily accumulated in the hands of eleemosynary corporations. Speaking in reference to the policy of the Mortmain Acts, Lord Hardwicke remarked

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that, "in former times the clergy got nearly half the real property of the kingdom into their hands, and he wondered they had not got the whole." One of the most disturbing controversies which has for years agitated the State of New York, is in relation to the property of Trinity Church. Originally a donation of unimproved land was made for the benefit and support of this Church, which exists under the ordinary charter of incorporation. The land given now constitutes the most populous and valuable portion of the City of New York—some have estimated the value at millions. Trinity Church not only maintains its rector, with several assistants, but, by an enlarged view of the charity, many of the churches in different parts of the State have been established, or their establishment materially aided. Still the Church funds accumulate to a degree which renders it an object of extreme jealousy, if not of well grounded alarm. The purposes of the charity are abundantly accomplished by a comparatively inconsiderable portion of the income of their property; but without an amendment of their charter, the trustees (if they were inclined) have no authority to appropriate their surplus funds. If the property of the Church had been made up of contributions in money which had thus accumulated, and the Legislature of New York, with the consent and at the instance of the corporation of Trinity Church, should so amend their charter as to authorize the appropriation of a portion of their surplus moneys to the support of the poor of that Church, or to the education of the blind of that congregation, what principle of the Constitution is violated by the State, or what fiduciary obligation would be disregarded by the trustees?

It is not deemed necessary at this time further to pursue these inquiries. While it is proper that this Court should hold individuals to the observance of perfect good faith in the discharge of their trusts, and should preserve the Constitution from infringement, even under legislative sanction, such conduct



should not be presumed, or lightly inferred. Although, by the first clause of the Act of

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1834, the Act of 1789 was repealed, \*yet, in the next clause, the officers, members and successors of the Society of 1789 are re-incorporated, so that the effect was to change the name, limit the charter to twenty-one years, and enlarge the powers. See *Smith v. Smith*, 3 Eq. R. No doubt was suggested—none is entertained by the Court—of the good faith of those who procured the amendment of the charter in 1834, nor of those who made the application of the funds in 1852. It would scarcely be competent for the relators—the Wappetaw Church—or those who represent them, to call in question the good faith of the proceedings in 1834. The present venerable chairman of the congregation, who now appears as relator, was in 1834 a member of the Society for the Relief of Elderly and Disabled Ministers—he was at the same time (as he had been for many years) Treasurer of the Wappetaw Church, situate in the neighboring parish of Christ Church, about fifteen miles from Charleston. It appears from the journals of the Church that they were about that time holding frequent meetings. In October, 1834, when the Clergy Society unanimously resolved to petition the Legislature for the amendments of their charter, this relator appears by the records of the Society to have been present at the meeting. Another prominent member of the Wappetaw Church was, at that time, Vice President of the Clergy Society, and was present at the meeting when the resolution was thus unanimously adopted. He presided at the meeting when the charter of 1834 was formally accepted; and, for several subsequent years, was the honored President of the Society. According to the evidence of the Reverend Mr. Cater, the congregation of Wappetaw Church has not more than fourteen voting members. The meetings, at which these proceedings were directed, did not consist of more than five members. If the Wappetaw Church, in 1834, deemed themselves interested in the funds of the Clergy Society, it is difficult to suppose that, with Dr. Toomer and the late Dr. Legare among their members, they were ignorant of the initiatory proceedings for the amendment of the charter. The Court is bound to presume that,

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for \*the succeeding nineteen or twenty years, they were fully advised of the statute by which the charter of the Society had been amended. All these circumstances, while they serve to vindicate the good faith of the defendants, and of those who preceded them, may very well warrant the inference that the proceedings of 1834 were not unknown to the Wappetaw Church, and were sanctioned either by their approbation or subsequent acquiescence. But, in the view taken by the Court, they had no interest in the funds of

the Society—had no authority to interfere—until the amendment of their own charter in December, 1853. Under the name and character which they now maintain, their elderly and disabled ministers, &c., fall within the sphere of the charity instituted by the Act of 1789, and enlarged by that of 1834. And it is so declared by the Court.

It is further ordered that, if the relators seek to hold the defendants responsible for a misappropriation of the funds on the ground of the alleged unconstitutionality of the Act of 1834, they have liberty to amend the pleadings in such manner as they may be advised. The costs of the proceedings, up to this time, to be paid out of the funds of the Society represented by the defendants.

The defendants appealed on the grounds,

1. That the Wappetaw Church was not within the original purview or scope of the Charity set forth in the bill, as founders or otherwise; but that the same was originally and exclusively confined to the Independent or Congregational Church in Charleston, commonly called the Circular Church, where the Clergy Society originated, and whose members were its corporators.

2. That the Wappetaw Church not having been originally within the scope of the said

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Charity, it is respectfully sub\*mitted; that its incorporation in the year 1853, cannot confer on it any participation therein.

3. That if the Wappetaw Church ever had any interest in the said Charity, it is excluded therefrom by the Act or Charter of 1834.

4. That if the object of the bill be, to vacate the Charter of 1834, either in whole or in part, the proceeding should be by scire facias or quo warranto at law, and not by bill in Equity in the nature of information.

5. That the application of a portion of the funds of the Society to the repair of the Circular Church (charged in the bill as a misapplication) having been expressly authorized by the Act of Charter of 1834, the proceeding by information in the name or the Attorney General cannot be sustained.

6. That the State, by its Charter of 1834 to the Society, having authorized the appropriation of the funds of the Corporation “to such charitable, benevolent, religious and other purposes, for the benefit of the said Corporation, and of the said Independent or Congregational Church in the City of Charleston, in such manner as may be determined by a majority of the members thereof,” is itself estopped, by its own solemn act from disputing or questioning such appropriation for repairs and improvements, for the benefit of the Independent or Congregational Church in the City of Charleston.

7. That his Honor the Chancellor having decreed, that the Relators, the Wappetaw Church, “had no interest in the funds of the Society until the amendment of their own

Charter on 20th December, 1853," it is respectfully submitted, that the Relators have no right to question the appropriation of its funds by the Society, made in August, 1852,

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being sixteen \*months before their rights and interests existed, according to the decree.

8. That the Attorney General and the Relators, having, in open Court, before the Chancellor, at the trial, disclaimed and repudiated all intention of making the defendants responsible for a supposed misappropriation of the funds for the repairs and improvements of the Circular Church, it is respectfully submitted, that leave should not have been given them (unasked for) to amend the pleadings, so as to controvert or repudiate their own public declarations in open Court.

9. That the Wappetaw Church presenting no beneficiary claiming the present benefit of the Charity, and there being no misapplication of the Charity or the funds of the Society, there is no case for the interposition of the Court of Equity, and the bill should be dismissed.

10. That the decree is, in these and other respects, contrary to law and evidence, and ought to be reversed.

[For subsequent opinion, see 10 Rich. Eq. 604.]

Yeadon, for appellant.

Rutledge, contra.

W. Whaley, same side. The decree decides that a Charity may be created for the benefit of those who may come into existence qualified to partake of its benefits. That the charity in the present case is for the benefit of the Congregational Churches in the State, and is not restricted to the Circular Church. That the original Charter of 1789 was not repealed, but only amended, by the Act of 1834. That Wappetaw Church falls within the scope of the Charity, and is enti-

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tled to be a \*party to these proceedings. That the Relators have leave to amend the pleadings to try the question of misappropriation and the constitutionality of the Act of 1834.

1. "That a Charity may be created not only for the benefit of those in existence (communities or individuals) but for those who may come into existence, or who may qualify themselves to become objects of the bounty." This principle is denied by the first and second grounds of appeal, and renders necessary a brief statement of the character of this Charity. It is a lay eleemosynary private corporation, endowed by individuals—incorporated and thereby perpetuated, but in no respect altered in nature. The Charter expressing the will of the founders is the foundation, and the incorporators trustees for the beneficiaries, whoever they may be and whenever they may come into existence. See Attorney General v. Governors of the Found-

ling Hospital, 2 Vesey, Jr., 42; Dartmouth College Case, 4 Wheaton, 518. Such is the general doctrine of Trusts, as exemplified in Marriage Settlements, settling estate for life, with power to appoint, or remainder to the issue of the marriage—until issue born or power executed the person entitled to take is uncertain, but, on the happening of the event, becomes entitled as of strict right. See *Vidall v. Executors of Girard*, 2 Howard, 127.

The decree decides,

2. "That this Charity was founded on Charter for the benefit of the Elderly and Disabled Ministers and of the Widows and Orphans of the Clergy of the Independent or Congregational Church in the State of South Carolina, as a denomination." This is, from its nature, purely a question of construction, and whether the word church is to be considered as designating one particular congregation, or as referring to all congregations of the same denomination within the specified locality (the State) can only be decided by reference to the History of the Society and the language of the founders, express-

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ing their intentions \*at the time of its incorporation—and the evidences furnished from both these sources clearly show that the Charity was intended for the denomination throughout the State, and not for the Church in Charleston alone.

3. That the Act of 1789, is the foundation of the Charity, and was not repealed by the Act of 1834, but amended; the effect of which was to change the corporate name of the Society, enlarge its powers, and limit its Charter to twenty-one years, but not to limit its benefits to the church in the City of Charleston alone, or exclude from its benefits any objects who might be entitled to participate in it according to the provisions of the Act of 1789. The opinion of the Court thus expressed is fully sustained by the authorities. See *State v. Fields*, 2 Bail. 554; *State v. Stephenson*, 2 Bail. 334; *King v. Rogers*, 10 East, 537; *Dwarris on Statutes*, 534.

4. That the Wappetaw Church is an Independent or Congregational Church and within the scope of this Charity. It having been already shown that the Charity is co-extensive with the limits of the State, and embraces all churches of that denomination which exist or may exist within those limits, and as it is admitted that the Wappetaw Church has since the last Act of Incorporation in 1853 been, and considered to be, an Independent or Congregational Church, as such, it falls within the provisions of the decree, and is entitled to the benefit of the fund. It might be sufficient to rest here, but it is susceptible of easy proof that the church at Wappetaw has, from its earliest organization been recognized as an Independent or Congregational Church—in faith and government—although incorporated at different times under different names.



Wappetaw Church was first incorporated in 1786 (8 Stat., 134) by the name of "The Independent Church in Christ Church Parish," with a perpetual charter, and in the Articles of Faith in her Record Book of

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that date, she is styled "The \*Independent or Congregational Church worshipping at Wappetaw." By Act in 1822 (8 Stat. 325) this corporation was re-incorporated, with a limited charter, as "Members of the Independent or Congregational Church at Wappetaw," under the name of "The Congregation of Wappetaw in the Parish of Christ Church." In 1836 (8 Stat. 448) the corporation was re-incorporated under the same title as above, and in 1853 was again incorporated by the name and style of "The Independent or Congregational Church of Wappetaw."

The original charter of 1786 was perpetual, and never repealed in any of the subsequent incorporations which were for a limited period and expired by their own limitation, and never being repealed, remained in force at the granting of the last charter in 1853. See Lord Raym., 399.

5. That the Relators have such an interest as entitles them to be a party to these proceedings. As a question of the mismanagement of Charity funds by trustees, Chancery has jurisdiction of the case. *St. John's College case*, (1 Burr, 200); 2 Fonblanque's Equity, 207, and will interfere to protect the beneficiaries; but when, as in the present case, the beneficiary—the *cestui que trust*—is not in existence, but liable to be in existence, and who has fixed rights in the trust whenever he is in existence, and for whom the corporators are trustees to preserve the trusts, the mode of procedure is in the name of the Attorney General, with a Relator who may even be a stranger, devoid of interest. *Attorney General v. Maddeton*, 2 Vesey, sen., 328; *Story Equity*, § 1191; 3 *Blackstone*, 427; *Hill on Trustees*, 667, 668; *Corporation of New Castle v. Attorney General*, 12 Clark & Fin. 402; *Attorney General v. Vivian*, 1 Russel, 236; *Story Equity Pleadings*, § 8; *Attorney General v. Jolly*, 1 Rich. Eq., 106; *The Presbyterian Church Case*, 2 Rich. Eq.

6. That the Relators should have leave to

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amend their bill \*to try the question of misappropriation under the constitutionality of the Act of 1834. But it is respectfully submitted that the amendment of the pleadings can merely present in form what is now in substance before the Court, and upon which the Court can act. The circuit decree decides that the appropriation to the Circular Church is not a misapplication of the funds under the enlarged power given in the Charter of 1834. The act of 1834 is, as the circuit decree decides, but an amendment of the Act of 1789—not a repeal; and the two are to be construed in *pari materia*. It has also been decided that Wappetaw Church has

equal right to partake of the benefits of the Charity—but if the appropriation of the funds here complained of is sustained by the Court, it will in effect establish the principle that the trustees can admit a single beneficiary to the enjoyment of the Charity in exclusion of others equally entitled to participate. Now, the Acts of 1789 and 1834 are to be construed in *pari materia*, and, taken in connection, constitute the Charter of the Society; and the appropriation made under the supposed authority of the Act of 1834, to a purpose foreign to the intention of the founders of the Charity, and not by any construction within the original scope of the Charity, as declared in its original Charter—is an encroachment upon the established rights of those entitled to claim under the Charity as originally established. Having vested rights under the original Charter, they cannot be deprived of them by subsequent legislation operating an indirect repeal. The amount so misappropriated cannot affect the principle. If permitted as to a part, it may be allowed as to the whole, and the entire Charity monopolized by a single beneficiary. The trusts declared were for the support of the Elderly and Disabled Ministers and of the Widows and Orphans of the Clergy of the Independent or Congregational Churches in the State, and that the Court will interfere to enforce the trusts as they are declared, and to prevent the trustees from doing any acts tending to alter, impair or destroy the rights of the *cestui que trusts*, is

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clear both \*upon principle and authority. See *Attorney General v. South Sea Company*, 4 Beav. 458; *Attorney General v. Kerr*, 2 Beav. 428; *Bush v. Bush*, 1 Strob., 377; *Mayrant v. Guigard*, 3 Strob. Eq., 112.

It is equally clear that a Charity must be accepted upon the same terms upon which it is given, and once accepted, no subsequent agreement can alter the rights so vested. See *Story, Equity Juris.*, § 1175; *Ambler*, 373; *Langdon v. Plymouth Congregational Society*, 12 Conn. 113. These principles are at variance with that construction of the Act of 1834 which would extend the benefits of the Charity to purposes not contemplated by the founders, and sustained as they are by authority so weighty, must, it is respectfully submitted, override such construction.

De Saussure, in reply.

The opinion of the Court was delivered by

DUNKIN, Ch.—The defendants (the Clergy Society) have appealed from the decree of the Circuit Court on various grounds. Upon the points definitively adjudicated by the decree, and which are called in question by these grounds of appeal, this Court concurs in the conclusions of the Chancellor.

It is not important now to determine at what time the relators held or acquired the

character which placed them within the purview of the Act of 1789. It is enough for the decision that they maintained the character of an Independent or Congregational Church prior to the institution of these proceedings. And it is not intended now to declare that they may not have held that character ante-

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rior to the charter of 1853. \*In any subsequent proceedings this inquiry may be important as well to the defendants as to the relators.

The eighth ground of appeal objects to the order granting leave to the plaintiffs to amend their pleadings, if they should be so advised. In ordinary cases, this Court rarely interferes with the exercise of the Chancellor's discretion in such matters, as is

stated in *Lancaster v. Seay*, 6 Rich. Eq. 111. But in this case leave was given in order to meet the reasonable objection made by the defendants, that they ought not to be called on to defend the constitutionality of the Act of 1834, until it had been properly put in issue by the pleadings. It is hardly necessary to superadd that if, upon the amended pleadings, the constitutionality or validity of that statute should be successfully assailed, the propriety of the appropriation of the funds of the charity made by the defendants will be fully open for inquiry.

The appeal is dismissed.

JOHNSTON and DARGAN, CC., concurred.

Appeal dismissed.





# CASES IN EQUITY,

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA—MAY TERM, 1856.

CHANCELLORS PRESENT,

HON. JOB JOHNSTON,

" BENJAMIN F. DUNKIN,

" GEORGE W. DARGAN,

" F. H. WARDLAW.

8 Rich. Eq. \*241

\*JAMES LOWRY v. WARREN A. MUL-DROW.

(Columbia. May Term, 1856.)

[*Perpetuities* ⚡4.]

Testator devised as follows: "I give and devise to my brother W. L., for and during his natural life, my plantation, &c., and from and after his death, I give and devise the said plantation to his sons during their natural lives, and after their death their parts thereof to their children forever." W. L. survived the testator, and at his death the plantation was divided among his sons, J. L. being one, all of whom were in esse at the death of the testator:—*Held*, that J. L. took, in the part of the land which he got in the division, only an estate for life—the limitation to his children not being void for remoteness.

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. §§ 4-44; Dec. Dig. ⚡4.]

[*Perpetuities* ⚡4; *Wills* ⚡473.]

Where land is devised to be divided upon a future event,—as upon the death of A.—between a class of persons—as the sons of A.—each son to take his part for life, with remainder to his children, it does not follow that the remainder to the children of a son who was in esse at the death of the testator is void for remoteness, because other sons might have been born to A. after the death of testator who would have been entitled to take in the division, and to whose children the limitation would have been void for remoteness.

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. § 43; Dec. Dig. ⚡4; *Wills*, Cent. Dig. § 994; Dec. Dig. ⚡473.]

[*Specific Performance* ⚡95.]

On a bill for specific performance by the vendor, the Court will not compel the defendant to take a title which is reasonably doubtful.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 257; Dec. Dig. ⚡95.]

[*Wills* ⚡473.]

Courts will give effect to the lawful dispositions of a testator, although portions of his will may be invalid by some rule of law.]

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 992; Dec. Dig. ⚡473.]

Before Dargan, Ch., at Sumter, January, 1856.

Dargan, Ch. On the 25th of October, A. D. 1853, the plaintiff and Warren A. Muldrow

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entered into a contract, \*under seal, by which the former, for the consideration of six dollars per acre, agreed to convey to the latter, in fee simple, a certain tract of land therein described. The particulars of the agreement (for the purposes of this case) need not be further noticed. Muldrow has been inducted into the possession of the premises, according to the terms of the agreement, and has given his note for one installment of the purchase-money. The plaintiff has tendered him a title in fee simple, with a general warranty, which Muldrow has refused to receive, and declines further fulfilment of the contract, on the ground that the plaintiff is unable to make him a good and sufficient title in fee simple; he having only a life estate. The plaintiff has filed this bill for a specific performance of the contract. The only question discussed on the trial relates to the sufficiency of the title of the plaintiff. He will be entitled to the relief which he seeks, if he can make a title according to his covenant. The title of the plaintiff to the land in question was derived under the will of Samuel Lowry, executed on the 13th September, 1825. By the first clause of the will, the testator says: "I give and devise to my brother, William Lowry, for and during his natural life, my plantation whereon I now live, it being formed of several adjoining tracts of land, and from and after his death, I give and devise the said plantation to his sons during their natural lives, and after their death their parts thereof to their children forever."



On the death of the testator, William Lowry, the brother and devisee of the said testator and the father of this plaintiff, took possession of the land devised to him in the clause of the will which has been cited, and continued in the possession thereof until his death, which took place in the month of June, A. D. 1831. At the date of this event, William Lowry (the devisee) had several sons, of whom James Lowry, the plaintiff was one and all of whom were in esse at the death of the testator. On the death of their father, the first taker and tenant for life, there was a partition of the property among his said

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\*sons, each of whom went into the possession of his share. The land which is the subject of this controversy was assigned to James Lowry, the present plaintiff. His title thus derived is undisputed. We are only to enquire as to the quantity of his interest or estate. He has now three children, Samuel, James and Sarah Lowry, all born after the death of Samuel Lowry, the testator, and of William Lowry, the devisee and tenant for life, and they are infants.

It is clear that William Lowry took a life-estate with remainder to his sons born or to be born. But what estate did the sons of William take? Did they take an estate for life with remainder to their children as purchasers, as the testator seems to have intended? This would probably have been the construction, had the testator in the first instance limited the estate to the sons of William living at the death of the testator. But by physical possibility, and even probability, William might have had other sons born unto him after the testator's death. And in that event the post nati as well as the ante nati would have been entitled: for they would have come within the description of persons who were to take on the death of William. It is clear that the post nati and the ante nati would have taken the same estate. But as to the limitation in favor of the children of the after born sons of William, it would have been too remote. It would not have been within the rule which the law prescribes against perpetuities. It could not have taken effect within life or lives in being and twenty-one years afterwards. It is perfectly legitimate to test the construction of a will in questions of this character, by showing that, on a particular construction contended for, results might take place which the law would not permit. To prove the unsoundness of a given construction, we may not only appeal to facts which have happened, but to consequences which grow out of such a construction from facts that might have happened. In this point of view, I

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think that the gift to the \*children of the sons of William is too remote, and that they cannot take as purchasers.

If this construction be correct, what estate

did James (the son of William) take? Did he take a fee simple or a fee conditional? One or the other of these estates he must take, if the remainder to his children is too remote.

This is an embarrassing question, and, as it is not necessary for the purposes of this case that it should be decided, I waive its discussion at the present time. Whether James Lowry has a fee simple or fee conditional, he has such a title as the defendant is bound to accept.

It is ordered and decreed that the defendant do specifically execute and perform the contract set forth in the plaintiff's bill.

It is further ordered and decreed that the costs of this suit be paid according to the stipulations of said contract.

The defendant appealed, and moved this Court to reverse the decree.

Because the complainant has no estate of inheritance in the land agreed to be sold; not having either an estate in fee simple absolute, or conditional.

Moses, for appellant.

Haynsworth, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. Samuel Lowry by the first clause of his will, made the following disposition of a portion of his estate; "I give and devise to my brother William Lowry, for and during his natural life, my plantation whereon I now live, it being formed of several adjoining tracts of land, and from and after his death I give and devise the said

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plantation to his sons \*during their natural lives, and after their death their parts thereof to their children forever." At the death of the testator all the sons, including James the plaintiff, of William the first tenant for life were in existence. Upon the death of William the plantation devised was divided among his sons, and to the plaintiff was assigned the tract of land now in controversy. The plaintiff agreed under seal to convey this tract to the defendant, and has tendered to defendant a conveyance in fee simple with general warranty, which defendant refuses to receive, supposing the plaintiff to have a life estate only in the land. The bill prays specific performance of the contract, and the question in the cause is, whether plaintiff has title in fee. We hold with the Chancellor, that the validity of a limitation over on a question of remoteness, must depend on events possible at the time of the creation of the gift, and that it is not generally to be controlled by the events which have actually occurred. The contingency upon which a gift over is to take effect, must necessarily happen within lives in being and twenty-one years afterwards from the creation of the gift. We agree too that the donation to the sons of William includes all of his sons who

may come into existence before the period of distribution which is the death of William; and, that by possibility William might have sons born more than twenty-one years after the death of the testator, and that the limitation over to the children of such unborn sons, would be void for remoteness. But the exact question in the case is whether the whole limitation over to the children of the sons of William is to be declared void, because the limitation over would be too remote as to the children of such sons of William as might possibly be born after the legitimate era from the death of the testator. On this point we differ from the Chancellor's conclusion, although he has not discussed the question, nor have the counsel on either side discussed it before this Court.

By the devise under consideration, the testator manifestly contemplated a division

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of his plantation among the sons of \*William, at the expiration of a life in being, namely that of William, and in fact such division was made. The testator further directs that the sons of William should hold for life only, and that their "parts" on their deaths respectively, should proceed to their children in fee. If the limitation over had been confined to the children of the sons of William in esse, at the death of the testator, or more largely to the children of such sons as might be born with twenty-one years after the death of the testator, it would have been unquestionably valid. Is the limitation over to the children of sons within the rule against perpetuities to be defeated by the possibility that the life tenant might have sons whose children might be without the rule? We think not, because the testator has directed separation of his plantation into parts, and, that these parts shall go to the children of the previous life tenants. Possibly, although the fact is otherwise, some of the children of the sons of William might not be enabled to take by purchase, but why should this disable others to take their shares when the estate is given partitively? The "parts" of the sons of William are to go to their children. Suppose the testator after providing for division of the estate at the death of William, had proceeded to declare expressly that the share of James should be held for his life only and then go to his children, and that the same course should be taken as to the share of any son of William unborn at testator's death, surely the invalidity for remoteness of the gift over to the children of the unborn son would not disturb the gift over to the children of James, which is within the era allowed by the rule against perpetuities. Yet the testator has in substance made this precise disposition. He has directed division at the death of William among his sons, and that their parts should be held for life only, and then go to their children in fee.

It is a settled rule of construction that Courts will give effect to the lawful dispositions of a testator, although some portions of his disposition may be invalid by some rule of law. His intention is to be consummated so far as it is legitimate. Thus

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\*where real and personal estate are given over in the same clause, upon the death of the first taker without leaving issue, the gift over of the personalty is supported although the gift over of the realty fails. *Forth v. Chapman*, 1 P. Wms. 665; *Mazyck v. Vanderhorst*, Bail. Eq. 48. If this distribution of the terms of donation be allowable as to the subjects of gift, there is no reason why it should not also prevail as to the objects of gift. So, where there are distinct limitations to two different classes, with one general gift over upon an event equally applicable to the members of both classes, good as to one class, and void as to the other for remoteness, the gift over will be supported as to one class although void as to the other class. *Lewis on Perpetuities*, 461; *Cromek v. Lamb*, 3 You. & Col. 565. So also, on gifts over upon a contingency with a double aspect, if in fact one of the contingencies happens within the line of perpetuity, the gifts over are supported. *Lewis on Perpetuities*, 503. Other analogies might be presented.

It may be that we have not conclusively demonstrated that the estate of the plaintiff in the land in controversy is for life only, but it is sufficient for the defendant that the plaintiff's title in fee is reasonably doubtful. On bills for specific performance of contracts concerning lands, and the present case is of this character, Courts of Equity do not force the purchasers to take anything but a good title, and do not compel them to buy law suits. Courts of Law consider a title as doubtful only in matters of fact, but Courts of Equity, in deference to the Law Courts, consider a title as doubtful in law as well as in fact, where the law is not settled. We consider the plaintiff's title as at least doubtful. *Lewis on Per.* 116.

It is ordered and decreed that the Chancellor's decree be reversed, and that the bill be dismissed.

JOHNSTON and DUNKIN, CC., concurred.  
Decree reversed.

**8 Rich. Eq. \*248**

**\*J. B. FLOYD and Wife v. D. B. PRIESTER,**  
et al. Adm'rs.

(Columbia. May Term, 1856.)

[*Executors and Administrators* ⚡516.]

Upon a petition to open a settlement and surcharge the account, it is proper to open it so as to correct errors on both sides.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 22, 32; Dec. Dig. ⚡516.]



[*Guardian and Ward* Ⓒ151.]

Where the amount due by a deceased guardian to his ward, is paid over by the administrator of the guardian to the ward, commissions for paying it over are not allowed.

[Ed. Note.—Cited in *Ex parte Spragins*, Buck & Co., 44 S. C. 74, 21 S. E. 543.

For other cases, see *Guardian and Ward*, Cent. Dig. § 501; Dec. Dig. Ⓒ151.]

Before Johnston, Ch., at Newberry, July, 1855.

In 1846, J. P. Neel was appointed, by the Court of Equity, the guardian of the petitioner, Drucilla A. Floyd, (then Drucilla A. Williams,) and received considerable sums of money for his ward; all of which he returned, except the sum of two hundred and seventy-four dollars and sixty-nine cents, received by him from the Commissioner in Equity on the 3d day of March, 1846. The petitioners intermarried in 1850; J. P. Neel, the guardian, died in June, 1851, without having made a settlement with his said ward. The defendants administered on his estate; and on the 23d day of July, 1851, procured a settlement to be made of said ward's estate, as contained in J. P. Neel's returns, (omitting by mistake in the settlement, which was intended as a full one, the two hundred and seventy-four dollars and sixty-nine cents,) and paid over to the petitioners the amount ascertained by said settlement. In this settlement no commissions were credited to the estate of J. P. Neel, for paying out the amount ascertained to be due by said settlement, the defendants supposing they were not entitled to the same. The petition is filed in this case to make the said administrators of J. P. Neel, deceased, account for, and pay over to the petitioners the said sum of two hundred and seventy-four dollars and sixty-nine cents, with interest from the 3d of March, 1846. The defendants filed their answer, in which they admit the facts, and consent to the payment of the sum claimed in

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\*the petition, upon the condition that the said settlement should be opened and commissions allowed to the estate of their intestate, for paying out the sum ascertained by said settlement.

His Honor decreed that the estate of J. P. Neel was entitled to two and a half commissions for paying out the sum ascertained by the said settlement, and five per cent. for receiving and paying out the sum of two hundred and seventy-four dollars and sixty-nine cents, claimed in the petition, and that his estate account for and pay over to the petitioners the amount claimed by them, subject to these deductions.

The petitioners appealed on the grounds:

1. Because it is respectfully submitted, that his Honor erred in ruling that the estate of J. P. Neel was entitled to two and a half commissions for paying out his ward's estate, although it was in his hands at his

death, and was paid out by his administrator after his death, upon a settlement.

2. Because his Honor erred in ruling that after a settlement had been made, and the money paid over without allowing commissions, that it could be opened and commissions allowed.

Jones, for appellant.

Garlington, contra.

The opinion of the Court was delivered by

DARGAN, Ch. Defendants' intestate was the guardian of plaintiff's wife. After the decease of the guardian, there was a settlement in full between his administrators, the defendants, and the plaintiffs upon the guardianship accounts. In this settlement there was an inadvertent omission of a cred-

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it to \*which the plaintiffs were entitled. The guardian had received a sum of money (two hundred and seventy-four dollars and sixty-nine cents) with which he was not charged in the settlement. "In this settlement no commissions were credited to the estate of the guardian for paying out the amount ascertained to be due by the said settlement, the defendants supposing they were not entitled to the same."

The plaintiffs filed a petition against the administrators of the guardian, to open the settlement, and to surcharge the account of the guardian by crediting the ward with the said sum accidentally or inadvertently omitted as above stated. To this the defendants did not object, but insisted, that in opening the settlement it should be opened on both sides, and that in restating the account, the estate of the guardian should be credited with the commissions to which he was entitled and which had been omitted. The presiding Chancellor decreed, that the settlement should be opened on this condition.

The plaintiffs' second ground of appeal is, because the Chancellor "erred in ruling, that after a settlement had been made, and the money paid over without allowing commissions, it could be opened, and commissions allowed." The Chancellor did not, and I apprehend would not have opened the settlement simply for the purpose of allowing commissions, under the circumstances of this case. But the plaintiffs asked that the settlement should be opened for their benefit, and for the purpose of correcting an error which operated against them. The Chancellor decreed, that the settlement should be opened on the condition that errors should be corrected on both sides. Surely this is even-handed justice. That he who asks equity must do equity, is a maxim of this Court. This Court is of opinion, that the principle upon which the settlement was opened is correct, and the appeal in this respect is overruled.

But upon the question, whether the estate of the guardian was entitled to be credited with commissions for paying out the funds of the ward on a settlement with the ad-

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ministrators of the guardian, after the decease of the guardian, this Court entertains a different opinion from that of the Chancellor who tried this cause on circuit. The guardian died with the funds of his ward in his hands. The guardianship is a personal trust, and its duties, responsibilities and rights are not transmitted to his legal representatives, who are only to hold and take care of the ward's funds, and to account for, and to pay them over to the party who may be legally entitled to receive them as a common debt of his intestate, or testator, (as the case may be,) and for which the administrators are entitled to commissions as on the payment of any other debt of their intestate.

It is certainly true, that the commissions allowed to a guardian is the compensation which the law gives for all his services and responsibilities connected with the appointment. But whatever may be his services and responsibilities, he is not entitled to his two and a half per cent. for receiving, until he does receive, nor to his two and a half per cent. for paying out, until he does pay out. Until this is done, he has not earned his commissions, or consummated his right thereto. And according to the language of the Act, it must be done in the course of his management or administration. Commissions were not allowed at Common Law. They depend entirely upon statutory provisions, and he who claims them must take them according to the terms of the only charter by which they were allowed.

A factor or other agent may be entitled to two and a half per cent. on all moneys paid away on account of his principal. Would the estate of a deceased factor be entitled to two and a half per cent. on the sum of one thousand dollars found in his hands, at the time of his death, belonging to his principal? It is difficult to perceive a distinction. The duties of the guardian and of the factor, as such, both end with their lives; and the compensation for their services are then fixed. The amount due to the ward, or to the principal, is a debt

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due and unpaid; and the right to recover which is suspended by law for a certain period. On the death of the guardian, the duty of paying this, as all other debts, devolves on his legal representative, who, in turn, is compensated by law for paying over this sum remaining in the hands of the intestate at the time of his death.

The case of *Ex-parte Witherspoon* (3 Rich. Eq., 13) is very analogous to this. There, as here, the guardian had died with the funds of his ward in his hands. There was another guardian appointed. And on a set-

tlement by the administrator of the deceased guardian with his successor in the guardianship, and on the payment of the ward's funds to him, it was held, that the estate of the former was not entitled to commissions for paying out, upon the principle, that by the death of the first guardian, the guardianship had ceased to exist before the money was paid out, and the commissions had not been earned by paying out money in the course of his administration as guardian.

It is ordered and decreed, that the circuit decree be modified according to the principles of this appeal decree, that the case be remanded to the Circuit Court, and that the Commissioner restate the account, and conform his report with this decree.

DUNKIN and WARDLAW, CC., concurred.

JOHNSTON, Ch., dissenting. Neel, in his lifetime, had received as guardian of Mrs. Floyd, several sums of money; all of which he had acknowledged in his annual returns, except the sum of two hundred and seventy-four dollars and sixty-nine cents. Soon after his death, Priester and Nelson, his administrators, stated an account with the ward, in which both parties being ignorant of the two hundred and seventy-four dollars and sixty-nine cents, it was omitted. For paying over the other sums no commissions were claimed or allowed.

On discovering the two hundred and seventy-four dollars and sixty-nine cents, the ward and her husband filed their petition,

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\*praying that the settlement be opened and corrected, by adding that sum to the balance of the account; to which the administrators assented, on condition that errors and mistakes be corrected on both sides; and claiming commissions for their intestate on the sum which they had paid over; and also for the receiving and paying over the two hundred and seventy-four dollars and sixty-nine cents. And the decree opened the account on these terms.

The second ground of appeal insists, that the Court "erred in ruling, after a settlement had been made, and the money paid over, without allowing commissions, that it could be opened and commissions allowed."

The settlement was opened at the instance of the petitioners themselves; and certainly they cannot complain of that; and I suppose nothing is better understood here than that he who would have equity, must get it upon equitable terms. If the defendants' intestate was justly entitled to the commissions claimed it would have been a partial administration of justice to open the account on the other side and keep it closed against them.

Besides, the case of *Vance v. Gary*, Rice Eq. 2, is express that commissions for paying out, are not forfeited by a settlement and



actual payment, even under a decree, in which the commissions have not been noticed.

The only question therefore, arises under the remaining (or first) ground of appeal, which affirms that the Court erred, in ruling that the estate of Neel was entitled to two and a half per cent. commissions for paying out his ward's estate, though it remained in his hands at his death, and was not paid out by him, but by his administrators after his death.

The amount involved in this case is trifling, and the principle is not of the first magni-

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tude; but still it is important in practice; and it is of consequence that it should be settled in conformity with justice, if the rules of law permit.

The statute of 1745 is the only one regulating the commissions of guardians, and is only accessible in Judge Brevard's Digest. (a) After a clause rendering it the duty among others, of guardians and trustees, having the custody of the estates of minors and infants, to make returns; it is enacted that "every executor, administrator, guardian or trustee, shall \* \* for his trouble and attendance, in the execution of their several duties, take and receive, or retain in his \* \* hands, a sum not exceeding two pounds ten shillings, for every one hundred pounds which he \* \* shall hereafter receive; and the sum of two pounds ten shillings for every one hundred pounds which he \* \* shall hereafter pay away, in credits, debts, legacies, or otherwise \* \* and so in proportion," &c.

There is no doubt that the administrators of Neel's estate are entitled to two and a half per cent. as a charge on his estate, for the sum paid out by them on the settlement, and to a like per centage for the two hundred and seventy-four dollars and sixty-nine cents, to be added to that sum and now decreed against that estate. It is a debt due by Neel, and which they are bound to satisfy out of the assets in their hands.

But the question now raised, and I think for the first time, is whether they are not

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entitled to receive or retain, for the \*benefit of that estate—(not for their own benefit) a similar and equal commission, due to Neel, as guardian, when he or his representative pays over the trust fund to his ward. There is no double commission in the case, as has been argued at the bar, but a mere scruple whether the ward has not received as full justice by the administrator's payment of the money as if the guardian himself had paid it. What difference can it make by what agency, or by whose hands the guardian discharges his obligation, or the ward receives satisfaction of her claim?

In numberless instances, the Court has allowed to the sureties of administrators and guardians who have been held responsible for the administration of their principals, the same commission the principals would have been entitled to, if they had been solvent and had themselves paid the balance of their account, and I do not remember that it ever made any difference whether the administrator or guardian was dead or alive at the time, or had or had not ceased to occupy his office. This certainly countenances the idea that it is not the official character of the person who discharges the claim that entitles to the commission, and, that the only question is, whether the cestui que trust on receiving his money, is not bound to render the commission due on its payment.

What difference in the eye of justice can possibly arise from the fact that Neel's estate, and not Neel himself, pays the ward's estate to her?

It is objected that when the administrator pays it, it is a debt. And what else would it have been if Neel had paid it?

It is and always was a debt; but the difference between a debt due to a ward and other ordinary debts is this, and it is a very material one; that ordinary creditors are not chargeable by any law with commissions for receiving their money. Is it so with money due to a ward? The statute answers the question, by declaring that for the guardian's trouble and care in his office he is entitled to

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two and a half per cent. at the paying \*over the funds—not for the mere payment, but for the superintendence of the estate.

When the administrators of Neel came to the account, the law gave them this offset on behalf of their intestate for his official labors; and, though they had actually paid over the whole fund without first making the offset, even though they did it under decree, the case of *Vance v. Gary*, Rice Eq. 2, shows they were entitled to recompense for the commission.

Let it be granted that the guardian's power of further administering his trust ceased at his death, and was not transmitted to his administrators. It was no more so than if his appointment had been revoked, and his ward

(a) 3 Brev. Dig. 392, Sect. 2.

Dr. Cooper, in compiling the statutes, omitted this clause of the statute of 1745, supplying its place with the remark, "Altered by A. A. 13th March, 1789." (See 3 Statutes at Large, by Cooper, 666, et seq.) Judge Grimke, in his edition of the statutes, acting under a similar impression, and incorrectly conceiving this clause superseded by the Act of 1789, entirely omitted it. (See Public Laws, by Grimke, 494.) The clause of the Act of 1789, relating to compensation, is in the words above quoted from the statute of 1745, except that while the words executors and administrators are retained, those designating guardians and trustees are omitted. Judge Brevard perceiving the mistake of the previous compiler, Grimke, (Cooper had not then made his compilation) inserted the clause entire from the Statute of 1745, as well as a previous clause, showing that the trustees intended were such as had the custody of infants' estates.

coming of age about the same time had called him to account. Was it ever heard that in such a case, the man accountable for the funds though no longer guardian, would not be entitled to commissions on fully satisfying the claims of his former ward?

I cannot see how the personal representative of a deceased guardian, liable to account, and actually called to account, as representative, does not represent him in the payment of the sum found to be due as fully as in the taking of the account, or in any other transaction for which the law requires him to represent him. When he performs a duty in his place, it seems to me, the law by implication puts it to the credit of him in whose stead it is performed.

There are some observations in the circuit opinion in *Ex parte Witherspoon*, 3 Rich. Eq. 13, which have been pressed in argument, far beyond the point decided in that case, and certainly far beyond anything to which this Court, if we look to the opinion given by it, can be said to have given its sanction. Though I concurred in the latter judgment, I certainly never assented to those dicta in any general sense, but only as applicable to the case under appeal. An administrator of an estate paid out the share of an infant distributee to himself as guardian

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of that \*distributee; and was allowed a commission for the payment. This was proper, but does not concern this case. He was allowed a commission as guardian, for receiving his ward's share. This was also proper, but is not inconsistent with the decree in the present case. He died, and his administrator was not allowed a commission; not for paying over the fund to the ward, for this he never did—but for transferring it to a succeeding guardian, to be by him paid over. He was not allowed commissions on this transfer, nor was the successor allowed commissions for becoming the depository of it. And why? Simply because the ward received no benefit by the transfer. The guardianship was an unit, and was simply continued by the act done. There was no payment over. How does this apply to the present case, where the ward has received a benefit and been put in possession of the fund entrusted to him whom she holds responsible, and from whom she withholds the compensation which the law allows.

The view I am combating, is contrary to the general practice, as I am well assured by an attentive observation of that practice in all parts of the State during the twenty-five years of my judicial life.<sup>(b)</sup> It is founded on

(b) In the very office from which this case came, the practice was uniformly according to my view, under all its able commissioners, until the appellant's counsel, (for many years one of the commissioners) was induced by the unfortunate dicta, in the circuit opinion in *Ex parte Witherspoon*, to make the point.

a very narrow construction of the statute. The construction should be liberal, and made to conform to justice and policy—especially when sustained by general and well settled practice in the offices of Masters and Commissioners in Equity, as I know it to be. But the construction now adopted defeats justice and policy, as well as contravenes usage. By this construction, a guardian against whom there is not the slightest imputation is made loser, simply because he happens to die before he closes his trust, although it is closed up by his administrator

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acting as his representative. \*Mr. Neel's estate for example, gets two and a half per cent. for receiving his ward's funds. But, on the other hand, it is charged with a commission to his administrators of five per cent. for their receipt and disbursement of it. Is this just? Is it politic? Who will accept the trust upon such terms?

On the whole I have no doubt that justice and the fair construction of the statute require that the decree should be affirmed, and the appeal dismissed.

Decree modified.

#### 8 Rich. Eq. \*259

\*JAMES T. CARSON v. JOHN C. KENNERLY and Others.

(Columbia. May Term, 1856.)

[Wills  $\S$  602.]

Testator, having a wife and three children, bequeathed to each of them, by separate clauses of his will, certain negroes, in terms which would carry an absolute estate. By another clause he declared as follows: "I desire that all of the above legacies to continue to the legatees during their natural lives:—and if any of them should die without heirs of their bodies, begotten lawfully,—then, their and every of their parts, so dying without lawful issue,—their parts of my estate, to be equally divided among my surviving heirs:—"*Held*, that P. C. one of the children took in his legacy an absolute estate, defeasible,—and not a life estate merely; and that the limitation to "surviving heirs" was valid.

[Ed. Note.—Cited in *Thomson v. Peake*, 38 S. C. 440, 451, 17 S. E. 45, 725; *Marshall v. Marshall*, 42 S. C. 445, 20 S. E. 298; *Bischoff v. Atlantic Realty Corp.*, 95 S. C. 288, 78 S. E. 988.

For other cases, see Wills, Cent. Dig. § 1354; Dec. Dig.  $\S$  602.]

[Remainders  $\S$  11.]

One entitled to a contingent interest in slaves, may or may not, according to the circumstances, be entitled to have his rights protected, where they are in danger from the acts of the party in possession.

[Ed. Note.—Cited in *Clarke v. Deveau*, 1 S. C. 179.

For other cases, see Remainders, Cent. Dig. § 8; Dec. Dig.  $\S$  11.]

Before Johnston, Ch., at Orangeburg, February, 1856.



Johnston, Ch. The plaintiff brings this bill to secure his expectant interests in slaves bequeathed by his father James Carson, to his (plaintiff's) brother, Patrick Carson, which are alleged to be endangered by circumstances stated in the bill.

James Carson died early in 1826, leaving a will executed the 10th of March in the same year, and leaving a widow, Mary M. Carson, and three children, Patrick Carson, James T. Carson, [the plaintiff,] and Juliana, now the wife of Wm. R. Bull.

By his will, he disposed, inter alia, as follows:—

"Item, I give and bequeath to my beloved son, Patrick Carson, four negroes, Primus, Adam, Deborah and Phoebe."

\* \* \* \* \*

"Item, I desire that all and every of the negroes bequeathed above, should remain on the plantation, for and during the term of five years from my decease, for the support

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of my wife \*and her child, and for the payment of my lawful debts,—(including what is due to me by notes.) I desire that all my lands, not disposed of above, may be sold, and equally divided among all my heirs."

"Item, I desire that all of the above legacies to continue to the legatees during their natural lives:—and, if any of them should die without heirs of their bodies, begotten lawfully,—then, their and every of their parts, so dying without lawful issue,—their parts of my estate,—to be equally divided among my surviving heirs,"(a)

(a) The following is a copy of the disposing clauses of the will:

"I give and bequeath to my beloved wife Mary M., four negro slaves, Tim, Anthony, Sall and Jenny, with two hundred acres of land including the house and plantation, wherein I now reside, one horse and gig, with all my household and kitchen furniture, and three Mules, to be hers as long as she lives—with an equal part of my Cattle and Sheep, (and all my Hogs to remain for the use of my wife and child Juliana,) also my Island field and all the land about it to belong to my wife and daughter.

"Item, I give to my beloved daughter, Juliana, four negroes, Toney, Jim, Catey, and Tenah, and two hundred acres of land of the River Tract, adjoining her mother's. Two hundred and fifty dollars to be put out on interest, for her education if so much can be made out of the labor of the negroes before the division takes place, and an equal part of my stock of Cattle and Sheep, and I do hereby appoint my wife, Mary M., and my son Patrick to be her guardian until she becomes of age, or shall marry.

"Item, I give and bequeath to my beloved son, Patrick Carson, four negroes, Primus, Adam, Deborah and Phoebe, with two hundred acres of land on the River Tract, say to begin at my Island field, to come on this way, until he has the complement, and an equal share of my stock of Cattle and Sheep, with two beds and their Furniture; also Forty dollars in two annual payments for Furniture.

"Item, I give and bequeath to my son, James T. Carson, three negroes, Mary, June and Affe, and her future increase, also, two hundred acres of land on the River Tract, to be taken off of

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\*The testator's wife, Mary M. Carson, and his son, Patrick Carson, under the appointment of the will, qualified as executrix and executor the 12th of April, 1826. She is now dead, having deceased in 1834.

At the expiration of the five years limited by the will, Patrick Carson obtained possession, as legatee, of the four slaves bequeathed to him. He became embarrassed, and sale has been made of three of the slaves [with the issue of the females:]

1. Deborah and her three children then existing, were levied on by the Sheriff of Orangeburg, as the property of Patrick Carson, and sold about the year 1832 to the defendant Thomas Gleaton, who subsequently conveyed some of the family, then greatly increased, to his children; he also sold others. Most of the grantees of Thomas Gleaton are defendants.

There is no plea of purchase for full price

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without notice put \*in by any of the defendants, who hold Deborah or her increase;—some of the stock have been removed out of the State.

2. Phoebe was sold by Patrick Carson to one Robert Pou, as to whom want of notice is not averred or pleaded. Pou sold to the defendant Kennerly, and the stock of Phoebe is now increased to eleven or twelve. Express notice is proved on Kennerly and not denied by him. He sold the slaves, before claim by the plaintiff, for four thousand dollars, as he states in his answer.

the east side of the House wherein I now reside, and an equal part of my stock of Cattle and Sheep.

"Item, I desire that all and every of the ne-

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groes, bequeathed above, should re\*main on the Plantation, for and during the term of five years from my decease, for the support of my wife and her child, and for the payment of my lawful debts Including what is due to me in notes. I desire that all my lands not disposed of above may be sold and the money equally divided among all my Heirs.

"Item, I desire that all the above legacies to continue to the legatees during their natural lives, and if any of them should die without heirs of their bodies begotten lawfully, then their and every of their parts so dying without lawful issue, their parts of my Estate to be equally divided among my surviving Heirs.

"Lastly, I do hereby nominate and appoint my wife, Mary M., and my son Patrick, executrix and executor of this my last Will and Testament, and for, and during the term of five years, the negroes to remain, my son Patrick is to take charge of them, and make as good crops with them as he can for one-sixth part of what he may make. But, and if my son Patrick, should neglect and by his conduct, prove himself incompetent to manage the negroes, then in such case my wife shall have the liberty of employing a more competent person to overlook the farm, and I do hereby ratify and confirm this to be my last Will and Testament, revoking and annulling all former Wills, Legacies and executors by me made and ordained."

3. Adam was sold by Patrick Carson to one Winningham, who sold again to John Corbit; and in the division of the estate of the latter, he was allotted to the defendant, William Corbit. Notice in this case is not denied.

Patrick Carson, who is a defendant, was married and had a child. The mother died; but the child was removed by its maternal grand-parents to Florida. The grandfather being dead, the grandmother is reported to have gone to Texas, carrying the child with her where it is reported to have died. Its death was reported among its relatives in this State more than seven years before the suit.

It appears that Patrick Carson is now old and quite infirm: from which the improbability of future marriage or issue is inferred. He is insolvent and unable to compensate the plaintiff and Mrs. Bull, (who is a defendant), for such interest as they claim in the property after his death.

The bill is brought to set up an interest, by way of remainder, in the plaintiff and Mrs. Bull, contingent upon the death of Patrick Carson without issue: to have the evidences of their right here perpetuated and for a decree of security for the forthcoming at the death of Patrick of the property which came to the hands of the several defendants, or a full account of its value.

If the will, properly construed, contains a

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limitation over to \*the parties claiming under this bill, although the claim be subject to a contingency, I apprehend they are entitled to maintain a bill for the protection of their interests. He who has an apparent right at the time he institutes the suit, has a claim to protection, though it may turn out by his own death, or by some other event, that his right is subsequently defeated and passes over to another. The objection, therefore, that the right now insisted on is merely contingent, though strongly pressed, cannot avail the defendants.

The want of notice of the character of the title of Patrick Carson, under whom the defendants claim, cannot avail them; nor, indeed, is such a defence pleaded.

Nor is the defence made by some of the parties,—that they sold some of the negroes before demand or claim made by the remaindermen,—sufficient. It is true, I apprehend, that if a party purchase, and afterwards aliene, property encumbered with a trust or a lien, all the time acting without notice of the incumbrance, and in good faith, he is not liable for the value of the property, but those who may be injured must follow the specific property and take their remedy out of it. But, as I have said, there is no plea, or pretence, of such ignorance on the part of these defendants; but the contrary.

Therefore, if the will of James Carson makes good the claim set up by this bill, I

see no reason why the bill should not be sustained.

The question, then, is, what is the proper construction of the will?

The construction is to be made from the whole instrument. It has been contended that inasmuch as the testator, in the first instance, gives the four slaves to Patrick in terms which, taken by themselves, confer an absolute interest on him, the effect of these words is not to be abridged by the subsequent words, in which the desire is expressed that the legatee retain his legacy for life. The principle is sound, that when an instrument, in certain parts, confers a clear right,

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\*the duty of the court is to adhere to that, until it shall find other modifying words in the paper, clear of ambiguity. (*Jesson v. Wright*, 1 Bligh, 1.) But still my persuasion is that these two parts of this will should be put together; and that, subjected to this process, they create a legacy to Patrick, *habendum durante vita*: a life-estate in the negroes.

Assuming it to be a life-estate, the question is, what is the effect of the words, that if he die without heirs of his body, or issue, the legacy is to be divided among testator's surviving heirs.

Dying without issue, when applied to a will like this, which came into operation before our recent statute, always (if there be nothing to control the words) refers to the failure of the party's issue, whenever that may occur: and any limitation over, grafted on such an event, is too remote.

Certainly it is a circumstance worthy of attention that the direct interest is confined by the will to the life of Patrick, and that there is no limitation to his issue. Though he should have issue nothing is expressly given to them. All that the testator has done was to give the slaves to Patrick, and failing his issue, then over. But if there had been an express limitation to Patrick's issue, generally, would the limitation over, on their failure, have been good? Is the limitation over in this case any less remote because nothing is given to the issue, than if there had been a gift to them? The event on which the limitation over is to take effect (the failure of the issue) would still be the same in either case; indefinitely remote and void. If the limitation over had been to testator's two other children, by name, or other personal description, the cases of *Cox v. Buck*, 5 Rich. 604, and *Shephard v. Shephard*, 2 Rich. Eq. 142 [46 Am. Dec. 41], and *Postell v. Postell*, Bail. Eq. 390, are to the point that this circumstance would not be sufficient to divert the words "dying without issue" from their established technical meaning. The failure of the issue would still be too indefinite and remote. If, however, to the



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name or description of an existing child, a testator annexes the condition of his surviving the event, this has always been held to indicate an intention of personal enjoyment on his part; and has the desired effect, because as he can only take as survivor, the event will be construed to be within such range, that he may survive it and thus have the benefit of the condition.

But if the limitation be to a survivor with superadded words, showing an intention to give him not only a personal but a transmissible interest, (such as, "to him, his heirs executors or administrators and assigns.") then the intention of giving him a personal enjoyment is negatived, as explained in *Massey v. Hudson*, 2 Meri. 129.

The limitation over in the present case is to testator's "surviving heirs." Are these heirs existing persons, or persons who must exist within lives in being? If not, the limitation to them has no effect in bringing the event on which they are to take within the required period. In *Evans v. Godbold*, 6 Rich. Eq. 26, it was determined that such words are not confined to the heirs of a testator existing at his death, but apply to such as shall exist when the estate, or interest, which they are to take, falls in. That is to say, the class of heirs fluctuates from time to time, and is only determined by a survey of those who can present themselves when the event occurs on which their interest depends. (b) The only heirs to take the limitation over, are those surviving at that time.

What is the time at which the limitation over is to take effect in the present case? (For it is at that time that the heirs must survive.) To assume that the time is at the death of Patrick is to beg the question. The will describes the time. It is upon the failure of Patrick's issue; an indefinitely remote period. At that time the testator may have

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heirs surviving, \*very different from his children, but their interests under the will cannot be supported by law. They are void for remoteness.

I have attained this conclusion not without hesitation, and am of opinion an appeal will not be unreasonable.

It is ordered that the bill be dismissed. Each party to pay his own costs.

The complainant and the defendant Bull and wife, appealed and moved this Court to reverse the decree on the ground:

That his Honor erred, it is respectfully submitted, in holding that the limitation to the surviving heirs of testator was void for remoteness.

Glover, Bellinger, for appellants.  
De Saussure, Brewster, contra.

(b) Under another aspect, see *Hicks v. Pegues*, 4 Rich. Eq. 415.—and *Enist v. Dawes*, *id. ibid.* [4 Rich. Eq. 415, note]. The limitation in these cases was to heirs,—not heirs surviving.

The opinion of the Court was delivered by

DARGAN, Ch. When the testator said in his will, "I give and bequeath to my beloved son, Patrick Carson, four negroes, Primus, Adam, Deborah and Phœbe," &c., he gave them in terms which by their legal force and meaning would convey to Patrick an absolute estate in said negroes. This clause, in which the testator evidently disposed of his whole estate in the negroes named, must be construed in *pari materia* with the subsequent clause, in which he says, "I desire all the above legacies" (including the one to Patrick, just recited,) "to continue to the legatees during their natural lives, and if any should die without heirs of their bodies begotten lawfully, then their and every of their parts so dying without lawful issue, their parts of my estate to be

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equally divided among \*my surviving heirs." Upon a superficial examination, these clauses would seem to be inconsistent. While the first gives an estate in fee, the last seems to restrict the estate given to the life of the legatee. It is the duty of the Court so to construe the will, as to give efficacy, if that be possible, to every part or clause, so as to make it a harmonious whole. There is a construction of which the will is susceptible, by which both of these apparently inconsistent clauses may stand harmoniously together.

When the testator expresses himself to the effect that the legacy should continue during the life of the legatee, he does not mean to cut down the estate in fee, previously given, to a life estate; but intended to engraft upon it a limitation which was to take effect upon a contingency. The will of the testator, according to this construction, would read thus: He gave the negroes, Primus, &c., to his son, Patrick, and his heirs forever, but if Patrick should die without lawful issue, then the estate of Patrick was to be merely a life estate, and he gave the negroes to be equally divided among his surviving heirs; thus creating, as is by no means uncommon, an estate in fee, defeasible upon a future contingent event.

Such is what we understand to have been the intention of the testator. We have now to enquire whether the intention of the testator as respects the limitation over can be carried into effect; in other words, whether it be valid as being within the period of remoteness.

"Dying without issue," technically imports a dying without issue generally; and a limitation predicated upon such indefinite failure of issue cannot take effect for remoteness. But if qualifying and restrictive words are employed, which explain the meaning to be a dying without issue at a particular time within life or lives in being, and twenty-one years afterwards, then the limitation over, if sufficiently certain, may take effect.

Among these explanatory words, or provisions of a will which have been considered as

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restrictive upon the meaning of the \*expression dying without issue, none have been more potential than a gift to the survivors of a class who should be living at a period within the time prescribed by the law against perpetuities. Where the gift is to survivors, the testator is supposed to intend a personal benefit to those who do survive. Only those who survive can take, and those who die before the time to which the survivorship refers take no transmissible interest. If the gift be to the survivors, or their issue, or legal representatives, as in *Postell v. Postell*, *Bail. Eq.*, 390, and other cases, it is evident that no personal benefit was intended to the survivors as such, but a transmissible interest; in which case the gift to survivors would have no qualifying effect upon the generality of the expression, dying without issue.

When we apply these well settled principles to the construction of this will, the result cannot be uncertain. The testator, in substance says, that if his son Patrick shall die without issue, the legacy given to him shall be equally divided among his surviving heirs. The very term surviving necessarily implies a period at which the survivorship is to exist. It has no sense or meaning otherwise. To what period then does the survivorship relate? There are but two periods to which it can reasonably be referred, namely the death of the testator, or the death of the first taker, Patrick. The idea that the survivorship relates to the death of the testator is excluded by the express terms of the will. For the legacy to Patrick, as to the other legatees, was to continue to them during life. Besides this, it is now well settled, that where the survivorship refers to no definite period, those who can bring themselves within the description at the death of the testator are supposed to be intended. But where a remoter period is referred to as the time of distribution, or of the vesting of the rights of the survivors; as where a precedent life estate is interposed, at the termination of which the survivors are to take, then those and those only who can bring themselves within the description, are entitled to take. They take as survivors,

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\*to the exclusion of the representatives of those who may have died before that time. The period of survivorship in this case must be referred to the death of Patrick, in which event the legacy given to him is to go to such of the testator's heirs as should be then living. Upon the foregoing views, we are of opinion that the limitation over to the surviving heirs is valid, and must take effect on the happening of the contingencies on which it is made to depend. This construction is

fully sustained by the analogous case of *Evans v. Godbold*, 6 *Rich. Eq.* 27.

It is obvious that the plaintiff's right depends upon a double contingency. Before he would be entitled to take, Patrick must die without issue living at his death, and he (the plaintiff) must be at that time surviving. On the failure of either event he takes nothing.

A question has been made in this case whether a party entitled to a contingent remainder, or interest, should have the remedy sought by the plaintiff for the preservation of the property in case his contingent rights should hereafter become vested. It would be unwise and unsafe to hold that no contingent interest shall be protected in this way. An interest may be legally contingent, and yet so certain as to amount in value to a vested estate. Take the case of an estate to one and his issue, and if he should die without issue living at the time of his death, then over to a third person with a transmissible interest. Suppose the first taker to be without issue, and so superannuated as to preclude the physical possibility of having issue. Yet by legal possibility such a person might have issue, and the estate of the remainderman, though technically, and by every legal definition is contingent, its future vesting would be more than probable. Would such a party not be entitled to the remedy? On the other hand, between the lapse or expiration of the estate of the first taker, and the vesting of the contingent remainder, there might be interposed the lives of a large number of ro-

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bust children, \*grand-children, &c., all of whom must die in the life time of the first taker, before the contingent remainder can vest; making the vesting of that estate a very remote possibility.<sup>(c)</sup> It would not be consistent that a person under these circumstances should be allowed to harass and vex the party in possession with a proceeding like this. I have supposed extreme cases, but they illustrate the difficulty, and show that it would be unsafe to lay down any arbitrary or inflexible rule.

In this case, the Court is of opinion, that the plaintiff has made a reasonable showing, to entitle him to relief. He has established a claim, the vesting of which, though still contingent, is within a reasonable probability. Patrick Carson is advanced in years, infirm, and unmarried. He is not likely to marry hereafter, or to have issue. He has or had one child, who has been removed by relatives from South Carolina, and who, by the last accounts, seven years ago, was reported to be dead. If Patrick Carson dies without leaving issue, which under the circumstances is highly probable; and if this plaintiff should then be living, which is also not improbable, then he (this plaintiff) would have a vested interest. Under these circumstances, the

(c) 3 *Danl. Pr.* 1851; *Williams v. Duke of Bolton*, 3 *P. Wms.*, 268, n.



Court is of the opinion, that he is entitled to protection and relief. It is so ordered and decreed.

It is further ordered and decreed, that the circuit decree dismissing the bill be reversed, and that the case be remanded to the Circuit Court, to the intent, that the said court may consider and adjudge the mode and measure of relief to which the plaintiff is entitled.

DUNKIN and WARDLAW, CC., concurred.  
Decree reversed.

### 8 Rich. Eq. \*271

\*ALWIN S. BRITTON and Others v. WILLIAM LEWIS and Others.

(Columbia. May Term, 1856.)

[*Executors and Administrators* ⚭168.]

Bill against his administrator to set aside a sale of negroes made by an executor, on the ground that the executor was himself the purchaser at the sale, and for his own benefit. The answer of the administrator denied that the executor was the purchaser at the sale; and the evidence was, that the possession of the negroes was never changed, but remained with the executor until his death, and were then sold as his property; and, that a son-in-law of the executor was the bidder at the sale, and was entered on the sale bill as the purchaser: *Held*, that the evidence was insufficient to show that the executor was himself the purchaser at the sale; for as stated in the answer, he may have purchased from his son-in-law.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 646; Dec. Dig. ⚭168.]

[*Executors and Administrators* ⚭126; *Powers* ⚭30.]

Where there are several executors, and but one qualifies, he alone may execute a power authorizing the executor to sell lands.

[Ed. Note.—Cited in *DeSaussure v. Lyons*, 9 S. C. 499; *Jennings v. Teague*, 14 S. C. 238.

For other cases, see *Executors and Administrators*, Cent. Dig. § 525; Dec. Dig. ⚭126; *Powers*, Cent. Dig. § 89; Dec. Dig. ⚭30.]

[*Trusts* ⚭231.]

An executor with power to sell land sold on credit and took from the purchaser bond and mortgage of the premises. The purchaser's equity of redemption was afterwards sold and purchased by the executor: *Held*, that the executor could purchase the equity of redemption for his own benefit; and, that the cestui que trust had no further interest in the land than a lien thereon for the amount of the bond.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 331; Dec. Dig. ⚭231.]

[*Account Stated* ⚭8.]

Settlement with plaintiff's agent, purporting to be in full, *held*, to bar his bill for account.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 50-56; Dec. Dig. ⚭8; *Account*, Cent. Dig. § 138.]

[*Limitation of Actions* ⚭102.]

Bill filed more than five years after settlement with trustee, *held*, barred by statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 505; Dec. Dig. ⚭102.]

[*Trusts* ⚭332.]

Plaintiff's wife was entitled, as cestui que trust, to funds in trustee's hands, to her separ-

ate use. Trustee settled with plaintiff, and paid him a balance due. The wife afterwards died, and then her infant child, the sole remainderman of the fund also died, whereby plaintiff became entitled to the fund as heir of the child: *Held*, that plaintiff's claim for an account against the trustee was barred by the settlement.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 495; Dec. Dig. ⚭332.]

Before Dargan, Ch., at Sumter, January, 1856.

Dargan, Ch. Henry Britton, died 20th July, 1842. He owned about sixteen slaves and a valuable tract of land, known as the Bradford Springs tract. He left a will duly executed, by which he appointed three executors, namely—Leonard White, Jos. B. White, and Thomas M. Dick, of whom Leonard White alone qualified.

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\*The residuary clause under which this litigation arises, is as follows: "All the rest and residue of my property of every description, I will to be disposed of as follows: It is my wish that my executors sell all my visible property in such manner as they shall think most advantageous; out of the proceeds of which and with what money I may have in hand, and what may be due to me, I wish my debts to be paid, and the rest I give to my children by my second marriage, to wit: Alwin Sidney, Sarah Jane, and Susan Ann, to be put into their possession upon their respectively attaining the age of twenty-one years, or marrying; the share of Sarah Jane and Susan Ann to be to their sole and separate use, in case of their marriage, for their lives respectively, and after their death to their children; the issue of a deceased child, if any, taking by representation the share of such deceased child; but should any of my said children die before the time directed for the payment of his or her share, or part, it is my will that such part or share shall be divided according to the Acts now of force in this State for the distribution of estates of intestates."

The plaintiffs are the residuary legatees. Sarah Ann, has intermarried with the plaintiff, Wesley W. Brunson: Sarah Jane is still an infant and sues by her next friend the said Wesley W. Brunson.

By a deed bearing date the 30th October, 1846, the said Leonard White, acting under the power given under the will, conveyed to Julius J. DuBose in fee, the said Bradford Springs tract, said to contain one thousand two hundred and forty-six acres, for the consideration of four thousand five hundred dollars. The payment of the purchase money was secured by a bond of Julius J. DuBose in the penal sum of nine thousand dollars, and a mortgage of the premises, but no part thereof was ever paid, by reason of the insolvency of DuBose.

After the execution of the said mortgage, by virtue of sundry writs of fieri facias in his

hands against said DuBose, the Sheriff of Sumter District levied upon the equity of re-

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demption of said \*DuBose in the Bradford Springs tract of land. The same was sold by the Sheriff on the 7th February, 1848, and Leonard White became the purchaser for the sum of twenty dollars. He caused the Sheriff's deed to be made to his son William N. White, and on the 30th June, 1849, William N. White, by a deed bearing that date, conveyed the equity of redemption for the sum of twenty dollars to Leonard White. After the sale by the Sheriff, Leonard White took possession of the property, cultivated portions of it and made crops, and in every respect used it as his own until the 7th July, 1849, when, in consideration of five thousand six hundred dollars, he sold and conveyed the same to "the Bradford Springs Female Institute Company," a body corporate, of which he himself was a stockholder.

Thereupon the said Company took and retained possession of the said land until the 28th July, 1853, when they sold and conveyed five hundred and nineteen acres of the same to Gilbert Morgan, for the sum of ten thousand dollars; of which the greater part still remains due. The sale to Morgan embraced all the improvements by which I roughly estimate the land to have increased to at least double its value, since the first sale to Julius J. DuBose. Morgan himself since his occupancy, has expended several thousand dollars in improvements upon the place.

In addition to the foregoing facts, which are not controverted, the plaintiffs charge that on the 2d January, 1847, thirteen of the slaves of the testator were sold by Leonard White, that three of the slaves were not then, nor have been since sold; that the remaining thirteen slaves were in fact, bid off by Leonard White for his own use, at the sum of four thousand three hundred and eighty-one dollars; a sum much below their real value, and, that the said Leonard White caused the name of his son-in-law, Thomas M. Dick, to be entered on the sale book as purchaser of twelve of said negroes, and the name of J. S. Bartlett, another son-in-law, to

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be entered as purchaser of another of \*said negroes; and, that the said Leonard White thus became the purchaser of the said negroes at his own sale, without complying with the provisions of the Act of 1849.

The plaintiffs further charge that the said executor possessed himself of other goods and chattels, &c., of his testator, which remain to be accounted for; that the testator's debts have been fully satisfied, and, that they are now entitled to receive their shares under the residuary bequest of the said will.

They pray that the sale of the said land and negroes be set aside as null and void; that the Bradford Springs Female Institute Company, and the said Gilbert Morgan, do

account for the rents and profits of the said land while in their possession respectively, and, that the slaves be sold, and the executor of Leonard White do account for the hire and profits of the same, and, that the proceeds of said sales, and the rents and profits of said land and negroes be divided among the said plaintiffs, and for a general account and relief.

The statement of the several answers will be noticed hereafter, when they become material in the consideration of the evidence.

The three negroes stated in the bill not to have been sold by the executor White, and to have been retained by him, were of no value, and were offered for sale without a bid. Two of them, Nancy and Hardtimes, were superannuated, and Ben, though not old, was palsied and worth nothing. They are dead now; or if living would be a charge upon their owner.

The charge in the bill that the other thirteen slaves were actually bought at the sale by the said Leonard White, is positively denied in the answer, and does not appear to me to be sustained by the proof. The sale bill shows that one of the negroes, Pedro, was sold to J. S. Bartlett, and the residue, eleven in number, were knocked off to Dr. Thomas M. Dick. The defendant, the administrator of White, states, that the sale was bona fide, that Bartlett and Dick executed their bonds to Leonard White for the amount of their bids

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for the negroes \*purchased by them respectively, and that afterwards the said White became the purchaser from Dick, of the negroes purchased by him at said sale, with the exception of Tom and Caroline, who were and are still retained by the said Dick. There is no proof that Tom and Caroline were ever after the sale in the possession of the defendant's intestate (White), or that Pedro, purchased by Bartlett, ever was. The sale is not impeached for want of being fairly conducted, the prices were full, and there is no circumstance to cast suspicion upon the sale, save the after possession by the executor of a large portion of the negroes. This has been satisfactorily explained, if the statements of the answer be true: and there is not a fact in evidence that may not co-exist with the truth of the answer. Though an executor may not purchase at his own sale unless he complies with the provisions of the Act of 1839 (which was not done in this case) yet, if a stranger to the trust acquire a good title at such sale, he may undoubtedly transfer (if there be no collusion) his title to the executor for his personal benefit, discharged of the trust. The Court, however, would look with great jealousy at such a transaction; more particularly where the transfer of bids or title takes place very soon after the sale. Regarding the case in this jealous point of view, I do not perceive in the evidence anything to impeach the



character of the transaction as explained by the defendant's answer. There was one thing that excited my surprise at the trial. Mr. Bartlett and Mr. Dick were both within call. The former was present at the trial. Why were they not examined? I can imagine that from motives of delicacy the defendants might refrain from calling them if they could otherwise sustain themselves. But why did the plaintiffs not put them upon the witnesses' stand? From the considerations foregoing the Court is of the opinion that the claim of the plaintiffs as respects the vacating the sale of the negroes must fail. I now pass on to the consideration of the questions raised in regard to the land.

In the first place, the will of Henry Britton

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did confer upon \*his executors the power to sell his land. Of the three persons named as executors, only one qualified, namely: Leonard White, defendant's intestate. Where lands are devised to be sold by the executors, it is necessary that all the qualified executors should unite in the execution of the conveyance. At common law, the rule was the same where some of the executors did not qualify and others did. Where some qualified, and others (one or more,) did not, those who qualified could not execute the power. But by the Statute 21 Henry the 8th, 2 Stat. 257, where there are several executors, those who take upon themselves the execution of the will are declared to be competent to execute the powers conferred by the will to sell and convey lands.

The sale of the Bradford Springs tract to Julius J. DuBose by White the executor of Henry Britton, was made under competent authority. The power was legally exercised and the sale valid. The price agreed to be paid (four thousand five hundred dollars) was full and fair, as the property stood at that time, and probably at the present, but for the subsequent improvements. It is not pretended that this sale is impeachable for any cause whatever. The sale being valid, the property was changed. The residuary legatees of Henry Britton no longer had any interest in the land, except as to the mortgage. Their sole connection with the land was through that instrument, which was a security merely. Their claim was transferred to the purchase money, with the interest that might accrue. Thus stood the case when DuBose's equity of redemption was sold by the Sheriff.

When Leonard White sold and conveyed the land, he was free and discharged of all his fiduciary relations as to said land. He was thenceforward a trustee as to the fund arising from the sale of the land. As to the land itself he was as any stranger. There is no doubt he may have bought it from DuBose at a greater or less price than the latter gave for it, and for his own benefit. If he could have become the purchaser of the entire estate of DuBose in the land, what

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impe\*diment could exist in his becoming the purchaser of DuBose's equity redemption?

Under a sale to foreclose the mortgage, when the mortgagee becomes the purchaser of the mortgaged property, he purchases the equity of redemption, and thereby extinguishes the mortgage debt. *McLure v. Wheeler*, 6 Rich. Eq., 343. This is the result wherever the same person is the mortgagee and the purchaser of the equity of redemption. It must be so, to prevent the grossest injustice. Otherwise the mortgagee, having thus become the owner of the fee, would have his debt still open against the mortgagor, and would be entitled to enforce it against his other estate.

When Leonard White became the purchaser of the equity of redemption, he thereby extinguished the mortgage debt. He was then as trustee chargeable for the purchase money as for cash in hand. He purchased the equity of redemption for himself as a stranger might do, and was personally entitled to the benefit of the contract. The legatees of Britton had no other interest in this transaction, than that the purchase money due by DuBose should be secured to them. But inasmuch as White stood on the mortgage in the character of a trustee, I think that the land in his hands as a purchaser, would be subject to a lien for the payment to the cestui que trusts of the sum agreed to be given by the mortgagor and the interest. To this extent he must be considered as having bought for the benefit of the cestui que trusts. This lien would remain impressed upon the land in the possession of any who might be purchasers from or through White with a knowledge of the equity. This latter view might be very material, if White was insolvent. But as his estate is amply good, it is of no practical importance.

My judgment therefore is, that Leonard White as executor could only be responsible for the purchase money which he obtained for the land, namely, four thousand five hundred dollars, with the accruing interest. My judgment further is, that when he subsequently became the purchaser of said land in

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his own \*right, a lien attached upon it to the extent of said purchase money and interest, and that this lien remains upon the land in the possession of purchasers from White, with notice of this equity. The Bradford Springs Female Institute Company, a defendant in the case, was charged in the bill with notice of the plaintiffs' equity. This is not denied in the answer. It must, therefore, be considered as admitted. So much, therefore, of the said land as remains to them, undisposed of to third parties, would be subject to this lien; and is hereby declared to be so subject, the estate of Leonard White being primarily liable.

This company sold to the other defendant, Gilbert Morgan. He was charged with, but denies notice, and notice has not been brought home to him.

When one purchases property from a trustee, having the legal estate, for valuable consideration without notice of the trust, he takes the estate discharged of the claims of the cestui que trusts. By the payment of full value, without notice, his equity is equal to that of the beneficiaries of the trust; and where the equities are equal, the legal title will prevail, and not be disturbed.

Where the purchaser under the like circumstances has not paid the purchase money before a bill is filed in behalf of the cestui que trusts, or before a notice of their equity, the purchase money in his hands, or so much thereof as remains unpaid, is subject to the equity of the cestui que trusts. This title however remains good, it is only the purchase money unpaid at the time of notice which the Court assumes to direct and control, and will decree, that, instead of being paid to the trustee who has abused his trust, it shall be paid to them to whom in equity it belongs.

In this case Gilbert Morgan had no notice of the equity which attached upon the property in favor of the plaintiffs prior to his purchase, and if he had then paid the purchase money to his vendors, he would be en-

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titled to have the bill dismissed \*as to him. But he bought on a credit, and the greater part of the purchase money is still due. And so far as the same is unpaid, and as to the portions thereof that he has paid since the filing of the bill, the said purchase money is subject to such claim as the plaintiffs or either of them may have on the estate of Leonard White arising from the sale of the Bradford Springs property in the way of a secondary liability—the estate of the said Leonard White being primarily liable. And whatever payments the said Gilbert Morgan may make on account of his secondary liability, as herein declared, shall go to his credit on his debt due to his co-defendant, the said Bradford Springs Female Institute Company. And if a resort to this secondary liability of the said Gilbert Morgan should hereafter be found necessary or important, the party entitled to such remedy shall have a reference to the Commissioner to ascertain the extent of the secondary liability according to the principles of this decree. I am obliged to decide these questions, as they arise on the pleadings and evidence; though I plainly perceive that the decision of the court on this branch of the case will prove practically unimportant, as from the views I have taken of other branches of the case the indebtedness of the estate of Leonard White will not be large, and the said estate will be abundantly sufficient to satisfy the same.

I pass on to the consideration of other

questions that have been raised. The defendant Lewis, the administrator of White, as respects the claim of Alwin Sydney Britton, has pleaded in bar a settlement in full. To this claim he has also pleaded the statute of Limitations. Both the pleas are sustained. Alwin S. Britton had removed from the State of South Carolina. Anthony White was his agent. On the 16th February 1848, a settlement was made between Leonard White and Anthony White as the agent of Alwin S. Britton, of all the claims of the latter in the estate of his father Henry Britton, including the sale of the Bradford Springs property to Julius J. DuBose. There was a balance in

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favor of Leonard White of five hundred \*and ten dollars and thirty-six and three-fourths cents, which was subsequently paid by Alwin S. Britton. The said Alwin S. Britton was of age on the 6th June, 1844. This is conclusive. If more were wanting, and supposing that the settlement was erroneous, or made upon erroneous principles, and supposing that it was at the time not obligatory upon Alwin S. Britton, the statute commenced to run from the date of the settlement (the 16th Feb'y, 1848.) The bill was filed the 7th April, 1854. The claim of the said Alwin S. Britton is barred. On both grounds the estate of Leonard White is not liable to account to the said Alwin S. Britton. It is so ordered and decreed.

To the claim of W. W. Brunson, and Sarah Ann, his wife, (formerly Sarah Ann Britton) the defendant Lewis, the administrator of White, pleads in bar a settlement in full. This settlement bears date the 12th January, 1852: Sarah Ann was of age on the 15th of June, 1851. She had also intermarried with an adult. Her husband executed the receipt for the balance on settlement three hundred and twenty-two dollars and sixty-four cents. The settlement embraced all the claim of the said Sarah Ann in the real and personal estate of her father the said Henry Britton. In this settlement Leonard White accounted for the land at the price obtained from Julius J. DuBose. There are no grounds upon which this settlement can be opened. And if there were, none are alleged in the bill, and without a specific allegation by the plaintiffs in their bill of the grounds upon which they claim to have the settlement opened, the court would not grant relief. Porter v. Cain, McMul. Eq. 81. These plaintiffs have alleged no settlement, but have prayed for an account as if no settlement had been made. In the opinion of the court, the settlement is a bar to the claim of W. W. Brunson and wife. It is so ordered and decreed.

The other plaintiff, Susan Jane Britton, is entitled to an account. She was born on the

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5th April, 1833. She was still \*an infant at the filing of the bill. It is not pretended that any settlement has been had with her. The



administrator of Leonard White must account to her on the principles of this decree, and to the extent of the liabilities of the said Leonard White as herein declared. It is so ordered and decreed. It is ordered and decreed, that the Commissioner examine and report upon the accounts. For whatever sum or balance that may thus be found due, it is ordered and decreed that the estate of the said Leonard White be primarily liable. If the estate of the said Leonard White should be found insufficient, the said Susan Jane Britton, as regards her claim upon the funds arising from the sale of the real estate, shall be entitled to have satisfaction out of so much of the Bradford Springs tract as remains in the possession of the Bradford Springs Female Institute Company, undisposed of by the said company; and also out of so much of the purchase-money agreed to be given by Gilbert Morgan to the said company as was unpaid at the filing of the bill. It is so ordered and decreed. And it is further ordered and decreed, that whatever amount the said Gilbert Morgan may pay, on account of his liability as herein declared, shall be applied as a credit on his bond given to the said company for the purchase-money of the said land.

And in respect to the said Alwin S. Britton, and W. W. Brunson, and Sarah Ann, his wife, it is ordered and decreed that the bill be dismissed.

The plaintiffs appealed, and now moved this Court to reverse so much of the Circuit decree as dismisses the bill in respect to the plaintiffs A. S. Britton and W. W. Brunson, and to modify the same in other respects, on the grounds:

1. The sale by the executor, Leonard White, of nine of the slaves of his testator, should have been set aside—it having been sufficiently proved that the purchase of said slaves

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was made by Mr. White himself, and not by his son-in-law, Dr. Dick; and his Honor, it is respectfully submitted, erred in relying upon the answer of Mr. Lewis as evidence upon this point.

2. The power conferred by the will was not legally exercised in the sale of the Bradford Springs tract of land to Dubose.

3. The purchase by Mr. White of the equity of redemption in said tract of land was (and could only be) made by him as trustee and for the benefit of his *cestui que trusts*; it is at their option whether to treat said purchase as made for their benefit or not.

4. The defendant, Mr. Morgan, cannot be protected as purchaser without notice and for valuable consideration. The very title deeds which he holds, show that he had notice, and he had not paid the purchase-money when the bill was filed.

5. The settlement made by Mr. White with the agent of the plaintiff A. S. Britton, then and ever since a resident of Louisiana, and

until a short time before the bill was filed, a stranger to the facts, is no bar to the claim of the said A. S. Britton.

6. The said A. S. Britton's right of action is not barred by the Statute of limitations. The settlement which is supposed to give currency to the Statute was made while the facts were concealed—it was made before Mr. White had acquired, by conveyance to himself, the equity of redemption of said tract of land—and the bill was filed within five years (the plaintiff being a non-resident of the State) after Mr. White took from his son, William M. White, a conveyance of said equity of redemption.

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\*7. It is not contended that the amount paid the plaintiff, W. W. Brunson, on the 12th January, 1852, should not be allowed as a payment *pro tanto*, but it is respectfully submitted that said payment is no bar to the claim set up in the bill:—the payment itself was a breach of trust:—the so called settlement was made with a person not authorized to make one; and was, therefore, properly not noticed in the bill.

Spain, Richardson, for appellants.  
Moses, DeSaussure, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. I think the Chancellor has properly dismissed the bill as respects the claim of the plaintiff, Alwin S. Britton, and also as to the claim of Brunson, now the sole representative in interest, of Mrs. Brunson, deceased.

I am also of opinion that as to the claim of the other plaintiff, Miss Britton, the decree properly disposes of the matter of the negroes.

And I do not see much reason to differ from the result of the Chancellor's decree as to the lands.

There is no doubt that the sale of the lands to Mr. Dubose, transferred the title to the latter, subject to the mortgage.

There is much reason to doubt whether the executor purchased the equity of redemption of Mr. Dubose, when sold by the Sheriff. I should rather conclude he did not; but that it was bought by his son, and afterwards conveyed to Mr. White.

But when,—in whatever way he became the owner of the title,—the utmost that can fairly be insisted on is, that being mortgagee of the mortgaged premises, the legal operation of the mortgage was extinguished; but still there was an equity in his *cestui que*

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trusts to have the mortgage set up and enforced for satisfying the debt in which they are interested. The case of *Black v. Hair*, (2 Hill Eq. 622 [30 Am. Dec. 389]) would seem to imply that he might have bought the premises, even if sold under the mortgage itself, if he paid a fair price.

Then, when he conveyed the premises to the Bradford Springs Company, which was done for a fair price—the title passed—subject, nevertheless, to the equitable lien of the cestui que trusts, under which he himself had held it. In this sale, computing interest on the debt of Mr. Dubose, still unpaid, with annual rests as provided for in the contract with Mr. Dubose,—it appears that he made a very trifling profit,—if any.

But taking it to be correct, that the equity of the cestui que trusts was only for this debt, then let us look to the effect of it.

I think the decree properly throws the primary responsibility on Mr. White's estate, to make good the mortgage debt to his cestui que trusts.

Then, the equity of the mortgage in the next place, attends the land in the hands of the Bradford Springs Company; they having notice when they bought.

But then, this company alienated portions of the land. I think the recitals of the deeds under which Mr. Morgan acquired title to a portion, were notice to him,—even if by payment of the purchase-money, he were entitled to rely on the plea of purchase without notice. The deed to Mr. Dubose is recited, which obliged Mr. Morgan to look into his title, and then the mortgage being on record, the registry affected him with notice of the incumbrance.

But the law is well settled that the portion purchased by Mr. Morgan is not equitably liable, until that portion retained by the company be first subjected.

It is true the company may have subsequently aliened other portions to persons not impleaded in this suit. But still, Mr. Morgan has a right to ask that before he is made liable, (or rather his land,) these other per-

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sons be brought in. The \*decree will then be (if all of them are equally affected with notice, and if the primary responsibility of Mr. White's estate prove unavailing) that the lands in the hands of the company, and its different alienees, be subjected—by taking hold of the retained land first; and proceeding step by step, until the first alienee be reached. The liability is in the inverse order of the alienations.

It is my judgment that the decree be affirmed, except as modified by the opinion I have expressed; and it is so ordered.

DUNKIN and DARGAN, CC., concurred.

WARDLAW, Ch. I concur in the decree, except that I think White substantially bought the land with the trust funds; and that the cestui que trusts should have the benefit of the profits made.

Decree modified.

8 Rich. Eq. \*286

\*J. S. SIMS, Committee, v. J. McLURE and Others.

(Columbia. May Term, 1856.)

[Contracts  $\Leftrightarrow$  92.]

Contracts of one of unsound mind, made before the appointment of a committee, held valid where no undue advantage was taken of him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 413; Dec. Dig.  $\Leftrightarrow$  92.]

[This case is also cited in Ashley v. Holman, 15 S. C. 105; Cathcart v. Sugenhimer, 18 S. C. 130, as to parties.]

Before Wardlaw, Ch., at Spartanburg, June, 1855.

Wardlaw, Ch. By an inquisition, executed under the order of this Court, on January 26, 1853, and confirmed April the 12th, 1853, by a Chancellor, it was found that Thaddeus C. Sims "is of unsound mind, and has been so from his infancy, and incapable of the government of himself and estate." The plaintiff was appointed committee of the said Thaddeus: and on July 23, 1853, he, as committee, filed this bill, to set aside sales of certain slaves made by said Thaddeus, and certain judgments confessed by him, before the inquisition.

The practice of instituting such a suit in the name of the committee only is sustained by high authority: Sto. Eq. Pl. Sec. 64; Ortegues v. Messere, 7 Jno. C. R. 139. But where, as in this State, the maxim of the common law, that one cannot stultify himself, is not recognised, it is certainly better to follow the general rule of pleading, to make all parties to the suit who are materially interested in the object of it, and not to litigate and adjudge concerning the estate of any person, even a lunatic, who is not before the Court. The pleading of the plaintiff is liable to other and more serious objections. He seeks redress in one bill against many defendants, for various representations, in which the defendants have no community of interest or action. Worse still, he states no specific case against any one of the defendants, and endeavors by vague averments to implicate all. A brief summary of the bill is, that Thaddeus was regarded by his family and friends as of unsound mind, without adequate knowledge

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of the value of \*property, and liable to be overreached; that he was entitled by succession to seventeen negroes and several thousand dollars; and that, on his coming of age in 1850, this property was put into his unrestricted possession by his guardian, J. J. Pratt, after a settlement with him; that of this estate nothing remains in his hands except a tract of land worth eight hundred or one thousand dollars, three negroes, and some other chattels of inconsiderable value, subject to the lien of judgments against him to about the sum of sixteen hundred dollars; that the other negroes have passed



into the hands of sundry persons for very inadequate consideration, paid in things of little value to him; and that of these negroes, Peyton Hunter has two—Margaret and Taylor; William T. Wilkins has two—Irene and Margaret; Wm. Robbs has three—Mose, Jim and Trezevant; McLure and Wilson have Eliza; and Wm. Savage has Frank; that of the debts in judgment, a list of which is exhibited, some were contracted while Thaddeus was a minor, and many others were without any adequate consideration of any kind, under mere pretences, by which his imbecility was overreached; although some of them may have been for necessities, and entitled to payment. And the prayer of the bill is that the defendants be required to make a full exhibit of their dealings with Thaddeus, with dates, items and proofs of fairness, and come to a full account with plaintiff, and in the meantime be enjoined; and that the unjust contracts be set aside, and the property acquired under them be delivered to plaintiff, and that he be allowed to sell so much of it as is necessary, and pay the creditors whatever is fairly due. The bill further alleges that plaintiff applied to some of the creditors for statements of their claims against his ward, (of which there is no proof, except as to Hunter,) and that in the only case in which his request was complied with (Hunter's) he is satisfied a portion of the claim is not allowable. All of these allegations are of a sweeping and indefinite character, and not pointed individually to persons or transac-

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tions. The grounds on which \*Courts of Equity interfere to set aside the sales, or other solemn acts of persons of unsound or weak minds, is, that fraud has been practised on them. *Sto. Eq.* § 227. A plaintiff seeking the aid of the Court in such case should state in his bill facts and circumstances impeaching each particular contract sought to be avoided.

It may be that all contracts of persons non compos mentis, made after the time at which the inquisition finds the unsoundness to begin, are prima facie void; that is voidable; but the inquisition is not conclusive evidence of the fact of unsoundness, and may be gainsayed by a party in interest without formal traverse. Indeed, a fair contract, made with a lunatic by a third person without notice of the lunacy, will not be disturbed. *Baxter v. Earl of Portsmouth*, 2 B. & Cr. 170; *Niel v. Morley*, 9 Ves. 478; *Beavan v. McDonnell*, 9 Exch. 309; *Ballard v. McKenna*, 4 Rich. Eq. 358; *Keys v. Norris*, 6 Rich. Eq. 388.

The bill in this case does not allege that the defendants, at the time of their several contracts, had any notice of the unsoundness of mind of Thaddeus Sims, and the defendants not only deny notice of this fact, but altogether dispute the unsoundness. I

shall not repeat in detail the evidence given as to unsoundness, but a brief summary of it is, that Thaddeus learned little or nothing at school; that he could not count well, and that he seemed to know little of the denominations of bank bills. On the other hand, that upon attaining full age, his guardian, a most prudent and respectable man, settled with him, and delivered to him his property in unrestricted possession; and that afterwards, until the inquisition, he managed his own affairs, having dealings, as one competent, with his relations and other persons; that he contracted marriage with the daughter of a respectable family—that he ploughed well—that he asked high prices for property he wished to sell—that he was thankful to a witness for keeping him out of a fight—that he sometimes

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gave sound opinions as \*to the value of property when his advice was sought—that he recognised his debts, and made arrangements for their payment—that he was able to make short calculations in his head—and that he named and knew by name eighteen game chickens raised for him by a neighbor, and that he played whist well, (although I believe cards were invented for the amusement of a crazy French king.) It seems impossible to conclude, on this evidence, that his unsoundness was of that manifest character, as necessarily to furnish notice of his incompetency to contract to those undertaking to deal with him. I am of opinion that he must be bound by his contracts, where no undue advantage was taken of him, before his friends chose to have a committee appointed for him by the Court. *Dodds v. Wilson*, 1 Tread. 448. His contracts impeached are the sales of certain negroes and certain debts which have passed into judgments; and they may be considered separately. Of the seventeen slaves alleged to belong to him on maturity, five were accidentally burned to death, three remain in his possession, and three were sold to his father-in-law Robbs, concerning which a satisfactory adjustment had been made. The title of Wm. Savage to another must be protected by the plea of purchase for valuable consideration without notice, and by the satisfactory proof of the fairness of the original sale of this slave to R. S. Sims. In like manner the purchase of one by McLure and Wilson, of two by Wilkins, and of two by Hunter, seem to have been made bona fide for full prices, and must stand. Some of the witnesses expressed the opinion that the price paid by Hunter was moderate, but the inadequacy was not such as of itself to furnish evidence of fraud, and there was no corroborative evidence.

So, too, of the debts contracted by Thaddeus; while there was evidence of extravagance and improvidence on the part of himself and wife, there is no proof of overreach-

ing on the part of the creditors. Some of the debts were contracted with the assent of his friends, and others are confessedly fair. In

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the \*state of the pleadings and proofs there is no satisfactory ground for the interference of the Court as to these debts.

The evidence, however, makes a pretty strong case as to the satisfaction of the judgment to Wilkins, and of the judgment and mortgage to Hunter; and it is proper that further inquiry be made on these points.

It is ordered and decreed, That it be referred to the Commissioner to inquire and report how much, if anything, remains due upon the judgment and mortgage of Hunter and the judgment of Wilkins against Thaddeus Sims; and that, in the meantime, Hunter and Wilkins be enjoined from enforcing the collection of these debts.

It is further ordered, that in all other particulars the bill be dismissed.

The complainant appealed on the ground:

1. Because Thaddeus Sims was an idiot, and none of his acts were binding upon him.

2. Because the debt to McLure and Wilson was contracted when Thaddeus was a minor and idiot, and not for necessities, or by the consent of his guardian; and a large portion of the judgment was for interest on an open account and illegal.

3. Because the decree was against law and evidence.

Bobo, for appellant.

Dawkins, contra.

PER CURIAM. This Court sees no sufficient reason for differing from the Chancellor. It is, therefore, ordered, that his decree be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and  
WARDLAW, CC., concurring.

Appeal dismissed.





# APPENDIX

## CASES IN EQUITY,

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

CHARLESTON—JANUARY TERM, 1847

### 8 Rich. Eq. \*291

\*G. A. WILKINS and Wife v. JOHN M. TAYLOR and Others.

(Charleston. Jan. Term, 1847.)

[*Wills* ⇨116.]

Testator directed his whole estate, real and personal, to be sold, and disposed of the proceeds. The will was adjudged void as to the personalty, because one of the subscribing witnesses was named as executor, and probate was refused:—*Held*, that the will was altogether one of personalty—that, consequently, the whole was void; and, that the real estate, as well as the personal, passed to his heirs as intestate property.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 298; Dec. Dig. ⇨116.]

[*Conversion* ⇨15.]

Where testator directs his real estate to be sold, out and out, so as to be converted at all events into personalty, it is not a devise, but a bequest of personal property.

[Ed. Note.—Cited in *Noble v. Burnett*, 10 Rich. 530; *Mathis v. Guffin*, 8 Rich. Eq. 81; *American Bible Society v. Noble*, 11 Rich. Eq. 202; *Brooks v. Brooks*, 12 S. C. 458; *Farr v. Gilbreath*, 23 S. C. 513.

For other cases, see *Conversion*, Cent. Dig. § 28; Dec. Dig. ⇨15.]

Before Johnston, Ch., at Charleston, June, 1846.

Johnston, Ch. The will of Henry Taylor was admitted to probate, upon proof in solemn form, by the Ordinary of Beaufort District. But upon an appeal from his judg-

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ment, the \*question came before the Court of Errors in May, 1845, when the judgment of the Ordinary was reversed, and it was decided that the will could not be admitted to probate. After this decision, the letters testamentary which had been granted to John M. Taylor were revoked, and administration was granted to Peyton L. Wade. The original bill was filed against John P. Williamson, then acting executor, and Henry Taylor, the infant devisee, by Mrs. Taylor the widow. After his death, it was revived against John M. Taylor, who had then proved the will.

After the revocation of his letters testamentary, and the marriage of the complainant with Mr. Wilkins, a supplemental bill was filed by Mr. and Mrs. Wilkins against John M. Taylor, Henry Taylor the infant, and Peyton L. Wade, administrator of Henry Taylor.

The bill claims an account of the real and personal estate, and a partition between the widow and infant, or in the alternative, one-third of the personal, and dower in the real estate. An order was made requiring the defendant John M. Taylor, to pay into Court, the amount admitted in his hands, and directing an account. The commissioner has made a report, to which exceptions are filed. The reference, however, was in anticipation of a hearing of the cause upon the merits.

The questions in issue are,

1st. As to intestacy.

2d. As to dower.

It was decided by the Court of Errors, that the executor is not a competent attesting witness to prove the will; but it is not decided that he may not be a good witness in a question between the heir and devisee, and the authorities show that in such a case he is a competent witness. I shall, therefore, hold

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\*that the will of Henry Taylor is a good devise as to the real estate.

Supposing the will to be well executed as a devise of lands, Mrs. Wilkins claims the benefit of an intestacy in the Laurel Hill plantation, because the will was executed on the 24th of January, 1840, and the land was conveyed to him on the 30th of the same month. But the testator who had sold Laurel Hill in January, 1837, to William Maner and Benjamin Chairs, on a credit, had found himself unable to procure payment from them, and after the death of Chairs, had agreed to take back the place on certain conditions. This contract was made before the 24th of January, 1840, viz: on the 18th day of the same



month; and the will, if duly executed to pass real estate, will operate as a good devise of the plantation. In case these questions are decided against her, the complainant, Mrs. Wilkins, claims her dower in the land. The will after giving the widow the interest of thirty thousand dollars during life and various legacies to other persons, directs all his estate to be sold, the purchase-money invested in stock in Savannah, and from the income allows maintenance for children during infancy, and gives the whole to the child or children on attaining twenty-one years; and it has been decided, that this will is not so executed as to pass the personal estate. It is rather a curious question whether the widow in such circumstances can take dower in the land. The authorities and precedents that are to be found respecting the defective execution of wills, are all cases where the will was valid as to the personal, but invalid as the real estate. But in this case, the will is good as to the real, and only void as to the personal. It is argued for the widow, that dower is an estate created by the law, and, that it cannot be barred by the act of the husband. That this is not a case of satisfaction or election, because the will operates only on land, none of which is given to the widow. To this, two answers are given: First, that this will has been established as a valid testament in Georgia, and, that the

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widow does take the legacy given to \*her out of the assets in Georgia: Secondly, that by the Act of 1791, the widow is barred of her dower if she takes by intestacy. It is then urged in behalf of the widow, that the provision made by the will in this case is not inconsistent with dower. Without undertaking to answer all the objections that may be raised on the point, I shall decree against the right of dower. This brings us to the matter of the exceptions. The account to be taken in this case, is that of John M. Taylor, for the management of the estate before his letters testamentary were revoked, and administration granted to Peyton L. Wade. The exceptions raised two points:

1st. Whether the income shall be apportioned between the real and personal estate, and a third part of the personal allotted to the widow—or whether the personal estate shall be assumed to have hired the land, and taken the burden of rent and all incidental expenses.

2d. Whether in this account the counsel fees and expenses laid out to establish the will, can be charged against the widow, who succeeded in establishing an intestacy. The Master has decided both points against the complainant, and for the sake of bringing up the whole case, I shall confirm the report on these points, and also on that covered by the first exception.

I take this decree as drawn, and pass it pro forma, that the case may not be delayed;

as it is intended to be carried to the Court of Appeals.

The complainant appealed on the grounds:  
1. That the will of 24th January, 1840, is not well executed to pass real estate; because John P. Williamson one of the three subscribing witnesses, took a benefit under the said will as executor, and never renounced nor released the same.

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\*2. That even if the said will be a valid devise of the testator's lands, the widow is entitled to dower in the real estate.

3. That the exceptions to the Commissioner's report should be sustained. And, that the Commissioner, after ascertaining the amount in the executor's hands, should ascertain how much of said amount should be considered the result of the real estate, and how much of the personal estate; and what charges should be borne by the real, or what by the personal estate; and what charges should be borne by the two estates in common. And, that the sums paid for sustaining the will should be charged to the infant, in an account between the widow and the infant.

The opinion of the Court was delivered by,

HARPER, Ch. We are of opinion that the will in question must, according to the decision of the Court of Law, be considered altogether a will of personal property, and according to the decision of the Court of Law, which we are bound to follow, void altogether. I have no doubt that an executor may be a competent witness, according to the same decision, to establish a will of real estate, and such I should think him in the present case, if there were a direct devise of the land to A or to B. But the rule of Equity as established by the English Courts, notoriously is, that it is in the power of a testator, at his option, to give to his property the character of real or personal estate. If money is directed generally to be laid out in land, it will be regarded as land, and go to the heir at law, or otherwise as directed by the will. So, if the testator has contracted to purchase land before the making of the will, or an intestate before his death, without having taken a conveyance, this will pass as real estate. These rules are so familiar, that it is hardly necessary to refer to authorities in support of them.

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\*If real estate be directed to be sold for a particular purpose, as to pay debts or raise an annuity, &c., if after accomplishing the purpose, there should be a surplus, this will still be regarded as land, and will go to the heir at law. But if, as the cases express it, the land be directed to be sold "out and out," so as to be converted at all events into personalty, this is regarded as a bequest of personal estate. This is explicitly ruled in the case of *Fletcher v. Ashburner*, 1 Br. Ch. Cas-

es, 499. The Master of the Rolls (Sir Thomas Sewell) observes, that "nothing was better settled than, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be regarded as that species of property into which they are directed to be converted, &c." "The owner of the fund, or the contracting parties, may make land money, or money land." The authorities are very fully collected by Lewin in his treatise on trusts, pp. 177, 178, and the note appended. It is not necessary to comment on these in detail, for I believe there is no question with regard to the general principle. And so in the same treatise, 684, referring to *Singen v. Lowray*, 1 Pr. Wms. 172, it is said, in reference to the choice given to a cestui que trust, to elect whether the fund shall remain land or money, "that a cestui que trust, had divested money of its real quality by causing the securities to be changed, and the trust to be declared to himself and his executors, for this was tantamount to saying the money should not go to the heir."

There would be insuperable difficulties in any other construction. The office of executor, in its proper signification, has relation only to personal estate. I suppose that if there were a will merely of real estate and executors appointed, it might be within the competency of the Court to construe the words executors as equivalent to trustees. Executors may have a power to sell land: but the decision of the Court of Law, which we are bound to follow, is, that there are no executors. If we should construe the executor in this State, who has been decided

to be no executor, to be a trustee; and, if he

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should sell the land, how must the proceeds be disposed of? A trustee having such power to sell, must have paid over the proceeds to the executors, to be distributed as personal estate. But, according to the decision of the Court of Law, there are no executors. I do not know on what principle we could regard the single nominated executor in this State as a trustee to sell. Nor, according to the decision at law, which goes on the supposition of the testator's being domiciled in this State, can we in any manner recognize the executors in England, or in Georgia?

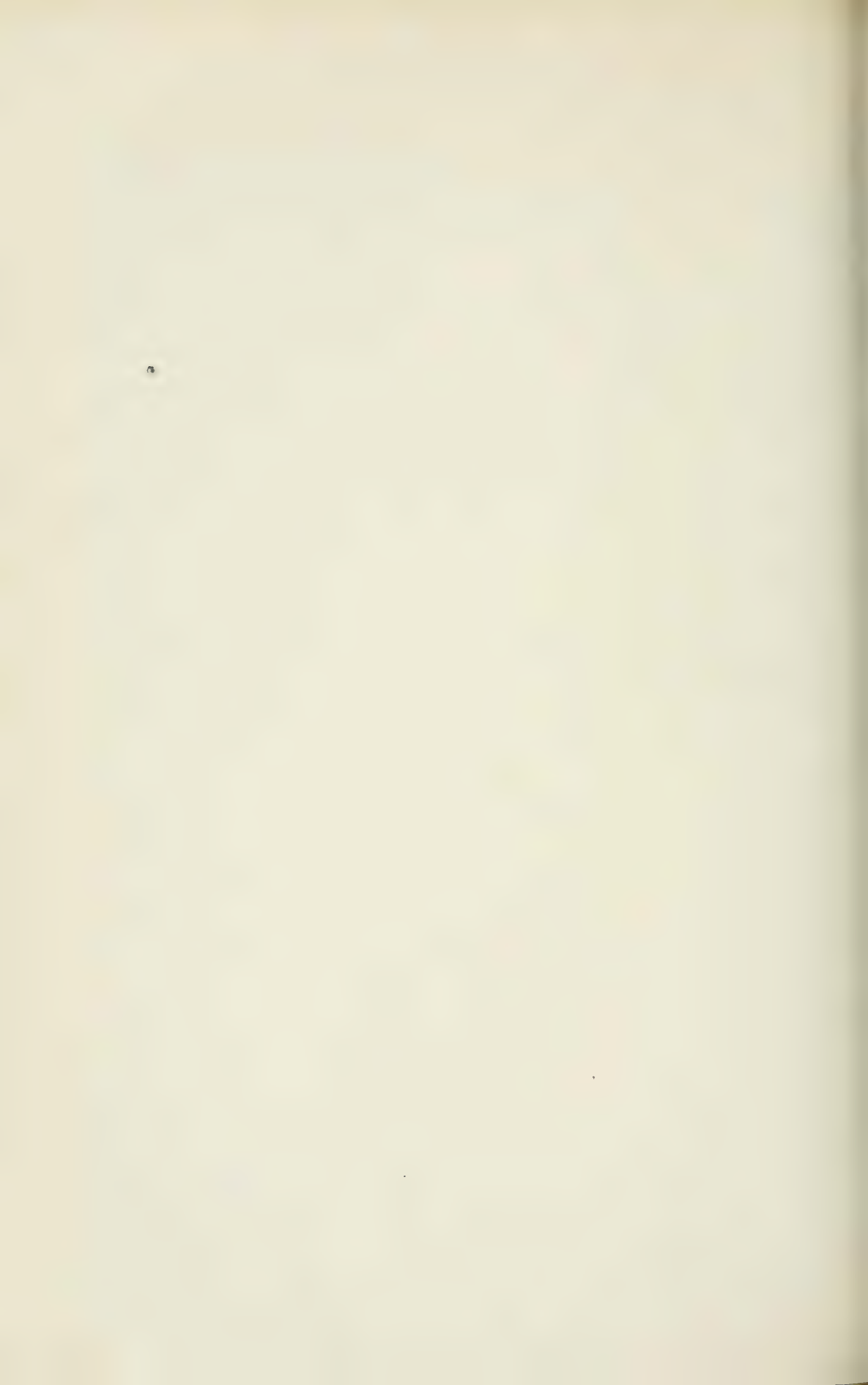
We do not at all contravene the decision of the Court of Law, that an executor may be a competent witness to a will devising real estate. But, what belongs exclusively to this Court, and which the Court of Law could not notice, is, that this was no devise of real estate. We do not doubt, but that if the land had been devised directly to A or B, the will might have been established on such testimony: but the entire purport of the will is to dispose of it as personal estate.

It follows, there being no valid will with regard to the property in question, that it must descend to the widow and child according to the statute of distributions; and it is ordered and decreed accordingly.

With respect to costs and expenses, the report of the commissioner, overruling the third exception is confirmed; costs to be paid out of the entire estate.

JOHNSTON and DUNKIN, CC., concurred.  
Decree modified.

















REPORTS

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS AND COURT OF ERRORS  
OF SOUTH CAROLINA

VOLUME IX

FROM NOV., 1856, TO DEC., 1857, BOTH INCLUSIVE

By J. S. G. RICHARDSON

STATE REPORTER

CHARLESTON, S. C.  
McCARTER & CO.  
1858

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# CHANCELLORS

DURING THE PERIOD COMPRISED IN THIS  
VOLUME

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HON. JOB JOHNSTON

“ BENJ. F. DUNKIN

“ GEORGE W. DARGAN

“ F. H. WARDLAW

## PREFACE

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THE Legislature, at its last Session, having directed the Reporter to publish the decisions, "upon the adjournment of the Courts of Appeal, respectively, and so arranged that they may be bound up in one volume, when, in the opinion of the Judges of the Courts of Appeal, there may be a sufficient number of pages for purpose," (12 Stat. 599,) the reports will hereafter be issued upon that plan. There will, however, be no pamphlet containing the Equity cases of the last Term at Columbia, for it will be seen that this volume contains those cases: and the decisions of the same Court at the last Term in Charleston are so few, that it is deemed advisable not to publish them in a separate pamphlet, but to include them with the cases of the next May Term.

The Reporter regrets that he has been unable, up to this time, to publish the Law cases of the last two Terms. He was much in hopes that a pamphlet containing the cases of at least one of those Terms would have been out before this; but up to this date the clerks of the Court of Appeals have been unable to furnish him with all the copies of the opinions of the Judges. As soon as possible after they are received the first pamphlet will be issued.

March 31st, 1858.

9 RICH. EQ.

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# CASES IN EQUITY.

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA—NOVEMBER AND DECEMBER TERM, 1856.

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CHANCELLORS PRESENT.

HON. JOB JOHNSTON,

“ BENJ. F. DUNKIN,

“ GEORGE W. DARGAN,

“ F. H. WARDLAW.

---

### 9 Rich. Eq. \*9

JAMES F. BURTON and Wife and Others v.  
J. H. YELDELL and J. A. TALBERT.  
(Columbia. Nov. and Dec. Term, 1856.)

[Wills  $\S$  732.]

Testator directed his estate to be sold on credit, and the proceeds he bequeathed to his daughter for life, to her sole and separate use, free from the control of her husband, with remainder to her lineal descendants; and he appointed his executors, trustees of his daughter. On bill filed by the daughter, her husband and their children, to prevent the sale and have the property itself, consisting of land and negroes, settled, according to the terms of the will, the Court refused to interfere with the scheme of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig.  $\S$  1732; Dec. Dig.  $\S$  732.]

Before Dunkin, Ch., at Edgefield, June Sittings, 1856.

James Yeldell, while in his last illness, being extremely low and feeble, executed his last will and testament, Aug. 15, 1854, the 2d and 3d clauses of which are as follows:

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\*“2d. I will and direct that my executors do sell the whole of my estate both real and personal upon such reasonable credit as they in their discretion may think best, and after paying all my just debts as above directed, I then give, bequeath and desire all the balance of the proceeds of the said sales, and all the rest, residue and remainder of my estate of whatever nature and kind it may consist unto my daughter Mary Burton, in such way and manner that she may and shall receive and enjoy the interest and income thereof, for and during the term of her natural life, for her sole and separate use, free and uncontrolled by the contracts, debts or

obligations of her present or any future husband—and to this end and for this purpose, I hereby nominate and constitute Jasper H. Yeldell and Joseph L. Talbert, Trustees of my said daughter, Mary Burton, with full power and authority to take charge of the legacy hereby bequeathed to and for the benefit of my said daughter, and to see to the execution of my will and desire as herein expressed.

“3d. That from and after the decease of my said daughter Mary Burton, I give and bequeath the whole of my said estate to her lineal descendants in such shares and portions as they would be entitled to take as her legal heirs or distributees—the child or children of a deceased child to represent and take the share or portion of a deceased parent free and discharged from any and all trusts—and I desire that the said Trustees of my daughter shall execute and perform the duty of making this division and distribution among the lineal descendants of my said daughter.”

Proceedings were had on behalf of these complainants, before the Court of Ordinary, and, on appeal, before the Court of Common Pleas for Edgefield district, to set aside the said will, but without success. The bill, in this case, was filed by the beneficiaries under the will, James F. Burton and his wife

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\*Mary, and their four infant children, against the executors, Jasper H. Yeldell and Joseph L. Talbert, asking the Court for a specific settlement of the property named in the will, upon the same trusts and limitations as expressed therein relative to the pro-



ceeds of the sale of the said property. It was urged by the complainants, that the slaves of the testator came to him from the family of his wife—are all of kin to each other, being chiefly the offspring of a single family—and are unusually valuable and likely, of excellent character and rapid increase, and would unquestionably yield a larger estate for transmission to the infant remainder-men, than would the fund arising from the proceeds of the sale of said estate though managed with the utmost prudence. It was further urged that the present disposition of the funds is a most unusual one, exceedingly indiscreet and unwise, and seriously hazardous by reason of the great length of time the funds are to remain in the hands of the executors with no other security than their individual liability: that the said executors, admitting that a specific settlement of the property, would be decidedly to the benefit of the infant remainder-men, promised their aid and co-operation in the Court of Equity to effect the said arrangement, provided they should be relieved from taking on themselves any future trusts relative to the estate, and should be paid the same commissions to which they would be entitled in the event of the sale of the entire property as directed by the will—but, without assigning any reasons therefor, the said executors withdrew from the proposition, and refused all assistance to carry out the compromise as agreed upon by the parties.

The executors in their answer, admit that, at the time of making and executing his last will and testament, the testator was quite ill, and had been sick for some weeks of a severe and malignant disease; but they deny

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that the testator was \*unable to give explicit directions as to the testamentary disposition of his property, and demand strict proof thereof. They deny further that the testator, at any time during his life, expressed himself desirous of making any disposition of his estate different from that stated in his will. They allege that the complainant, James F. Burton, is improvident and unthrifty in his management, and incapable, as they are informed and believe, of governing and managing negroes properly; and that the testator imposed the restrictions upon his property for the purpose of preventing the said James F. Burton from having any management or control of his estate, and especially of his negro slaves and of his lands. They express their belief that the will is drawn in exact conformity with the wishes of the testator, as made known by him on divers occasions, while in good health and long before his last illness, to some of his most intimate friends.

The defendants deny the statement in the bill as to the intention of the testator, to secure to his daughter, Mary Burton, his family residence and negro slaves for and dur-

ing the term of her natural life—and as to the fact that the said Mary J. Burton is deprived of a house and home by the provisions of the testator's will, as they are informed and believe that the said James F. Burton owns, in his own right, a tract of land with a dwelling house thereon. They admit it to be true, that the negro slaves of the testator are nearly all of kin to each other, and that the greater part of them are descendants of one family; that most of these slaves were born on the plantation, and were raised by the testator: that the said slaves are very likely, valuable, and of good character, but deny that the said negro slaves are of rapid increase, since, as they have been informed, the fifteen or sixteen negroes of which the testator died possessed, were the accumulation of some twenty-five or thirty years, and there are but few children now among them.

The defendants further express the belief

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that the fund \*arising from the sale of said slaves, would afford to the said Mary J. Burton and her children, more ample means of support than would the annual income of the crops upon the plantation; and they deny that it would be to the benefit of the cestui que trust under the will, that the said property should be settled specifically upon the said Mary J. and her children upon the terms indicated in the bill, while the duties and responsibilities thereby incurred would be much more burdensome than they contemplated at the time they qualified as executors of said will, at the same time that their compensation would be diminished. They further state, on information, that considerable sickness has, for several years, existed on the testator's plantation, during which several deaths occurred, the testator's wife, two or three of his children, and the testator himself. The defendants submit that as executors and trustees, they have rights which the Court ought not to disregard—that by reason of their office as executor, they are entitled to full commissions on the whole estate of the testator, both real and personal, and that the Court will not in equity and good conscience deprive them of the compensation to which they are justly entitled, and subject them to burdens and duties which are not required of them as executors of said will, and render their office of executor not only troublesome to them, but expensive. That had they supposed such an arrangement as that prayed for in the bill would have been effected, they would not have qualified—and in case the Court makes such a decree as will carry into effect the prayer of the bill, they pray to be relieved from their office of executor, and desire to have no connection with the estate, if the complainant, James H. Burton, is to have control of it, on account of his character and disposition—That the said James has already

committed a violent assault and battery on one of the defendants without any provocation, simply because he made a suggestion to him in reference to the management of the estate.

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\*After hearing the pleadings and evidence, and after argument thereon, his Honor ordered and decreed that the bill stand dismissed.

The complainants appealed, and moved this Court to reverse the circuit decree on the grounds:

1. Because a specific settlement of the property in question is not such a variance from the terms of the will, as to place the matter beyond the discretion of the Court of Chancery.

2. Because the peculiar terms of the trust created by the will, render it altogether necessary and proper, it is respectfully submitted, that the Court should interpose its authority to protect the funds of the testator, for the benefit of those who are the objects of his bounty, against the insecurity in which they have been placed by the inadvertence of the testator, occasioned by his extreme illness at the time of making and executing his last will and testament.

3. Because, from the case proved, it would conduce greatly to the interest of the beneficiaries under the will, and particularly to the infant remainder-men, that the property should be settled specifically on Mrs. Burton and her children.

Moragne, Spann, for appellants.  
Adams, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The general authority of the Court to change the character of the property of infants and femes covert is not doubted; although the too frequent exercise of this power upon applications, necessarily ex parte, has been sometimes a subject of animadversion and of regret. Even where a testator, has given specific directions in re-

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lation to the \*management of the property bequeathed by him, and subsequent events have rendered the scheme impracticable or manifestly prejudicial, either from change in the condition of the property itself, or of the beneficiaries, the Court has in some instances interfered, although with extreme caution; and generally upon the assumed principle that the Court only does what the testator would have himself done if the new condition of things had existed when his will was made. But these are exceptional cases. Few rights are regarded with so much jealousy as the right of testamentary disposition of one's own property; none more dearly cherished than the privilege of securing according to a man's own judgment, the comfort and well being of his offspring. Provid-

ed no rule of law be violated, Courts do not interfere with the exercise of this discretion, or, it may seem, caprice, on the part of testators. When juries have sometimes undertaken to set aside a will from their own views of its injustice or inexpediency, the attempt is uniformly controlled and the spirit rebuked by the sober judgment of the Court.

In this case the sole objects of the testator's bounty as well as solicitude were his daughter (his only remaining child) and her issue. She had been the wife of the plaintiff for nine or ten years. It appeared from the evidence that the testator "did not regard his son-in-law as a thrifty man," that he said "he had paid a good deal of money to get Burton out of debt but could not do it," that he, sometime before making his will, said, that "the portion of the property he intended to leave his daughter, Mrs. Burton, should be left so that James Burton could have no control over it,"—that "he wanted his property which was to go to his daughter put in somebody's keeping, so that Burton could not spend it." Testator told another witness that "he dreaded James Burton's father more than himself," he stated his apprehension that "they would break James up"—that "he would leave his property so that James Burton's father should have no

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control over it,"—and \*again that "he would leave the property which was to go to his daughter in Jasper Yeldell's hands."

On 15th August, 1854, the will of testator was executed, by which he directed the whole of his property, consisting principally of the place on which he resided, and fifteen or sixteen negroes, to be sold by his executors, upon such terms of credit as they deemed reasonable, and, after payment of his debts, directed, in substance, that his daughter "should receive and enjoy the interest and income" of the surplus for her sole and separate use during her life, and he appoints the defendants executors and trustees to take charge of the legacy for the benefit of his daughter, and see to the execution of his wishes in that behalf. Upon the death of his daughter, he directed the said trustees to make distribution among the lineal descendants of his daughter in the manner therein specified, free and discharged of all further trust.

This bill was an application to enjoin the executors from selling the property, because, in the language of the third ground of appeal, "it would conduce greatly to the interest of the beneficiaries under the will, and particularly to the infant remaindermen, that the property should be settled specifically on Mrs. Burton and her children." It was also urged as a reason, that the executors and trustees gave no security for the fund. The defendants resisted the application for the several reasons set forth in their answer, among other reasons that they regard the



arrangement, made by the testator, not only in accordance with his intentions, long and deliberately entertained, but such as, in the judgment of the defendants, is best calculated to promote the object he had in view, of affording and securing a support to his daughter and her children—they further say that they would never have qualified on the will, or accepted the trust, if they were obliged to hold the property as desired by the plaintiffs, instead of carrying out the scheme of the testator as declared by his will, and, if the prayer of the bill should be

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granted, they pray to \*be relieved from the trust which they have unadvisedly assumed.

At the hearing of the cause much evidence was offered for the purpose of showing that a larger income would be derived, and the capital increased, by granting the prayer of the bill. Several witnesses testified that twenty per cent. per annum might be calculated upon as the natural increase of slaves. It may be remarked, in passing, that nothing can be more fallacious or illusory than any such speculative opinions. It would be very unwise to deduce any general conclusion from an isolated instance of remarkable fecundity, or peculiar exemption from disease. The increase in the entire slave population of South Carolina from 1840 to 1850 was less than eighteen per cent. for the ten years, which would be an average of less than two per cent. per annum. It may be said, that increase was less in consequence of emigration. But, during the same period, the increase of the slave population in the whole United States was not quite twenty-nine per cent. for the decade, or about three per cent. per annum. The inquiry is not, however, whether a more expedient scheme might not have been adopted by the testator, but whether he had not all the lights before him, all the means for forming a correct judgment, which are now presented to the court. At the hearing of the cause no change whatever had taken place either in the situation of the property or of the beneficiaries, and the presiding Chancellor, not deeming himself warranted in revising the judgment of the testator where his intention was plain, dismissed the application.

Again—It was evidently a material part of the testator's plan to secure competent trustees to carry his purposes into effect. It is enough for the Court that they had his confidence. It is not suggested that they are in any respect less entitled to confidence than when the appointment was made. They assumed the execution of the trust in the assurance that it was to be discharged in the

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manner prescribed by the testator, \*and they pray to be relieved from the trust if the prayer of the bill be granted. It would be

difficult, under the circumstances, to decline this request, especially as the plaintiffs oppose no objection. All the precautions of the testator would thus be defeated, and the Court, having adopted a different mode of managing the testator's property, must seek for new trustees to carry out the scheme.

It may be a very embarrassing case to the plaintiffs, and the Court has not been insensible to the cogent reasons urged by the appellants' counsel against the general policy of the scheme prescribed by the testator. Perhaps no member of the Court would be disposed to follow his example. But, sitting here, we have no means, if we had the authority, to inquire into the various motives which may have influenced his determination.—It is the province of the Court to ascertain, and declare the intention of the testator, but neither to make nor unmake his will.

According to the facts disclosed by the pleadings and the evidence, this Court perceives no error in the exercise of the Chancellor's discretion by dismissing the bill. It is ordered that the decree be affirmed.

JOHNSTON, DARGAN and WARDLAW,  
CC., concurred.

Decree affirmed.

### 9 Rich. Eq. \*19

\*ELIAS S. ELLIS, MARY ANN L. SCURRY, et al., v. WM. H. WOODS, et al.

(Columbia. Nov. and Dec. Term, 1856.)

[*Husband and Wife* ⇨117, 135.]

Testatrix bequeathed to her daughter M. A., a negro girl, "to be hers and hers only, during her natural life, and at her death to be equally divided among the issue of her body, and not to be subject to the debts of her husband or any other person;"—*Held*, that M. A. took a separate estate in the negro girl; and, upon her afterwards marrying, that her husband became trustee for her.

[*Ed. Note*.—Cited in *Markley v. Singletary*, 11 Rich. Eq. 400; *Bouknight v. Epting*, 11 S. C. 76; *Gregory v. Rhoden*, 24 S. C. 93; *Trustees v. Bryson*, 34 S. C. 413, 13 S. E. 619.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 419, 502; Dec. Dig. ⇨117, 135.]

[*Husband and Wife* ⇨137.]

Her husband sold the negro girl, and upon bill filed, the purchaser was ordered to deliver her up to M. A. or account for the value.

[*Ed. Note*.—For other cases, see *Husband and Wife*, Cent. Dig. § 520; Dec. Dig. ⇨137.]

[*Wills* ⇨590.]

Technical or express words are not necessary to create a separate estate. Such an estate may be created by implication, and where the intent to create it is manifest, such intent will prevail, although there be no express words of that import.

[*Ed. Note*.—Cited in *Markley v. Singletary*, 11 Rich. Eq. 399.

For other cases, see *Wills*, Cent. Dig. § 1296; Dec. Dig. ⇨590.]

[*Husband and Wife* ⇨135.]

Where a separate estate is given and no trustee appointed, the husband becomes trustee for the wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 501-507; Dec. Dig. ⇨135.]

[*Equity* ⇨340, 341.]

Where a purchaser pleads purchase for valuable consideration without notice, he must prove that he paid the consideration before he had notice of the equity. His answer, if not responsive to any allegation of the bill, is not evidence for him on that point; and, even if evidence, it is not sufficient where it merely states, that he purchased for a certain sum, being the full value, without saying that the sum was paid.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 687, 700; Dec. Dig. ⇨340, 341.]

[*Sales* ⇨235.]

Where a will has been admitted to probate, and is on record in the Ordinary's office, the law implies notice of a trust relating to personal property contained in it.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 685; Dec. Dig. ⇨235.]

[*Sales* ⇨235.]

One cannot plead want of notice of the judgments and other records of the Courts. Notice is implied by law.

[Ed. Note.—Cited in *Kaminsky v. Trantham*, 45 S. C. 400, 23 S. E. 132; *Ex parte Graham*, *In re Plyler v. Robertson*, 54 S. C. 169, 32 S. E. 67; *Kilgore v. Kirkland*, 69 S. C. 86, 48 S. E. 44.

For other cases, see *Sales*, Cent. Dig. § 685; Dec. Dig. ⇨235.]

Before Wardlaw, Ch., at Sumter, June Sittings, 1856.

On the 3d May, 1853, the complainants, Elias S. Ellis, Mary Ann L., wife of E. Madison Scurry, and her infant child, Edward Scurry, filed their bill against William H. Woods and E. Madison Scurry, in which they stated, that the late Mary Ellis of Williams-

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burg district, made her will, \*on the 20th May, 1850, by which she bequeathed, inter alia, as follows: "Item. I will and bequeath to my daughter, Mary Ann L. Ellis, one negro girl named Annie, and her future increase, to be hers, and hers only, during her natural life, and at her death to be equally divided among the issue of her body, and not to be subject to the debts of her husband or any other person; also one cow and calf, two beds, bedsteads and furniture, and all the rest of my household and kitchen furniture not disposed of before or after in this."

That the complainant, Elias S. Ellis, was nominated as executor, and shortly after the death of testatrix proved the will and qualified as executor; that the complainant, Mary Ann L., intermarried with the defendant, E. Madison Scurry, in 1852; that Elias S. Ellis regarding himself as the trustee of the said Mary Ann L., for her sole and separate use, allowed the negro girl Annie to go into the possession of his *cestui que trust*; that William H. Woods afterwards purchas-

ed Annie from E. Madison Scurry,—they both well knowing the contents of said will: that he, Woods, wrongfully withholds the possession of said girl, and is about to convey or run her off, so as to place her beyond the jurisdiction of the Court: and the prayer was that Woods be compelled to deliver up said girl or account for her value.

In his answer, the defendant, Woods, stated that he purchased Annie, on the 4th April, 1853, from E. Madison Scurry, for six hundred and seventy-five dollars, that sum being her full value, and received from him a bill of sale, with warranty title; that Scurry and others told him the title was good; that he sold Annie shortly after his purchase in Camden; he denied all knowledge of the existence or contents of the will of Mary Ellis, and submitted that if complainants' construction of the will was right, he nevertheless should be protected, being an innocent purchaser, for valuable consideration, and without notice.

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\*On hearing the bill, answer, evidence, and argument, his Honor ordered and decreed that the bill be dismissed.

The complainants appealed and now moved this Court to reverse the decree on the grounds:

1. For that the limitation over of the slave Annie and her increase to the issue of the body of Mary Ann L. Scurry, with the words, "and at her death to be equally divided among the issue of her body" is not too remote, and therefore the infant complainant, Edward Scurry has a right to a decree for the forthcoming of the said slave and her increase at the death of the said Mary Ann L. Scurry; and his Honor ought so to have declared.

2. For that, whether the limitation over be too remote and void, or not, the plain and clear purport of the words, "to be hers and hers only, and not to be subject to the debts of her husband," created a separate estate in the said Mary Ann L. Scurry upon which the marital rights of E. Madison Scurry could not attach, and therefore the sale to William H. Woods is void, and Mary Ann L. Scurry has a right to the protection of this court in the enjoyment of her separate estate; and his Honor ought so to have declared.

3. For that, all the circumstances of the case fully establish, that William H. Woods not only had legal notice of the complainants' claim, but that he was sufficiently put on his guard as to said claim, without legal notice; so that he could not in any event occupy the position of an innocent and bona fide purchaser, without notice; and, therefore, even if he did part with the said slave and place it out of his power to produce her before this suit was commenced and before demand, the claim being an equitable one,



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this Court has full power \*to decree an account against him for the value of the slave; and his Honor ought so to have done.

Rich, Bellinger, for appellants.

W. F. De Saussure, Blanding, contra.

The opinion of the Court was delivered by

DARGAN, Ch. The third clause of the will of Mary Ellis, is in the following words: "I will and bequeath to my daughter Mary Ann L. Ellis, one negro girl named Annie, and her future increase, to be hers, and hers only, during her natural life, and at her death to be equally divided among the issue of her body, and not to be subject to the debts of her husband or any other person, also one cow and calf, &c."

The question principally discussed in this case, and the one which presented the greatest difficulty to the mind of the Court, is whether by the terms of this bequest, Mary Ann L. Ellis, the plaintiff, (now Mrs. Scurry,) took a separate estate in the negro girl Annie. For Annie had been sold by the legatee's husband, E. Madison Scurry, and bought by the other defendant William H. Woods. And this suit was instituted to recover the said negro Annie from the purchaser.

What language is necessary to create a separate estate, where express and technical words have not been employed for the purpose, has given rise to much discussion in the Courts of England and America, and the result in the decision of cases, has been various, and contradictory. At one time the current of the decisions has run strongly in favor of the husband; and as remarked by a learned commentator, 2 Story's Eq. Jur. 821, note, "the case of Brown v. Clark, 3 Ves. 166, shows how nicely language has sometimes been interpreted to sustain the marital rights

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of the husband." \*On the other hand there is a class of cases, which verge to the extreme in the opposite direction. Upon the question whether Mary Ann L. Ellis takes a separate estate by the will of her mother, a decision either way might be supported by a very formidable array of authorities. Nor are the decisions of the Courts of South Carolina entirely free from the imputation of vacillation. Amidst all the discordance of the decisions, one principle is recognized throughout, namely, that technical or express words are not necessary to create a separate estate. And from the decided cases, another principle is clearly deducible; and that is, a separate estate may be created by implication, where there is a manifest intent. In the application of the last mentioned principle, the difficulty has always been in determining by what degree of force, such implication should appear. I doubt not, that in some cases, language too slight for such a purpose has controlled the interpretation un-

favorably to the marital rights. Whilst in an equal number of cases, the marital rights have been sustained in violation of a manifest intent to create a separate estate. The only safe and rational rule that can be laid down as applicable to such cases is one, the enforcement of which must depend much upon the discreet judgment of the Court. If it appear to the satisfaction of the Court, upon a fair construction of the whole instrument, without wresting the meaning either to sustain the marital rights, or the separate rights of the wife, that there is a manifest intent to create a separate estate, such intent should be effectuated, though no express words of that import should be employed.

One of the grounds, upon which a separate estate has been implied in favor of the wife, is where, by the instrument creating the estate, she is clothed with a dominion over the property, which would be inconsistent with the marital rights. There is a numerous class of cases to this effect. Another class of cases, equally numerous, goes to establish the principle, that where the marital rights

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are restricted and curtailed \*such restrictive provisions can have no other reasonable interpretation, than that a separate estate was intended for the woman. Both of those presumptions are founded upon fair and logical inductions; and where technical and express words are not employed, there can be no stronger grounds for believing that a separate estate was intended to be created. I come now to apply these principles to the facts of this case. The testatrix gave the negro girl, Annie, to her daughter, "to be hers and hers only," &c. If it was to be a simple gift, upon which the marital rights could attach, why was it made in this form? What is the import of the words "to be hers and hers only,"—words not at all necessary, unless they imply an intention to create a separate estate? The testatrix obviously meant, that the estate should be her daughter's, and "hers only," in contradistinction to, and in exclusion of, the rights of some other person; and the person meant can be none other than the husband, for in reference to no other person would the language have any sense or meaning. Not satisfied with this manifestation of her intention, the testatrix proceeds to declare that the property bequeathed "should not be subject to the debts of the husband" of the legatee. One of the essential incidents of property is, that it is subject to the debts of the proprietor. And this restriction upon the marital rights is incompatible with any other interpretation, than that the testatrix intended to create a separate estate in her daughter, as to the property in question. It is the opinion of the Court, that Mary Ann L. Ellis (now Mrs. Scurry) took a separate estate in the negro girl, Annie. I do not think that Elias Ellis, the testatrix's executor, is a trustee of the es-

tate. There is no indication of an intention to appoint him a trustee, or to give him any other duties or powers, beyond those that were incident to his office of executor. But no trustee was necessary; or, rather, the want of one, by the appointment of the will, will not invalidate the provision creating the separate estate. Roper, in his treatise

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on Husband and Wife, \*2 vol., 156, says, "it is settled, that when the intention appears that the property bequeathed to, or settled on, the wife, shall be to her sole and separate use, whether it is so given immediately, without the intervention of trustees, or to the husband for her, a Court of Equity will effectuate the intention by converting the husband into a trustee for the wife."

E. Madison Scurry, the husband, is regarded by the Court as the trustee of the plaintiff, his wife. And the other defendant, William H. Woods, has confessedly purchased the trust property from the trustee.

It is equally well settled as a principle, in this Court, that a purchaser of the trust property from a husband, being a trustee as in this case, or from any other trustee, for a valuable consideration, without notice, will be protected in his title; for where the equities are equal, and the property is equitable, the Court will not disturb the title of a bona fide purchaser of property which he has acquired for a valuable consideration. To sustain himself in this ground of defence, it is necessary for the purchaser to show that he has paid the consideration, and if it appears that he has not completed the purchase, by paying the consideration before he has had notice of the plaintiff's equity, he will be held as a trustee, in the place of him from whom he purchased, and be accountable to the same extent.

In this case, as to the terms of the purchase and its consummation, there is no proof before the Court, save that which is contained in the defendant's answer. He says that he purchased the negro from his co-defendant, E. Madison Scurry, on the 6th day of April, 1853, for the sum of six hundred and seventy-five dollars, which he considers equivalent to her value, and that this was before he had notice of the plaintiff's claim. The defendant, Woods, does not say that the purchase money was paid, and the contract completed, before he had notice, nor does it appear that it has yet been paid. The payment of the price is not necessarily im-

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plied in \*what he says in his answer. A person may be properly said to purchase property when he has entered into a contract or agreement for that purpose, although the consideration may not be paid. To sustain a defence like this, the completion of the contract should be proved.

Besides this, the evidence of the fact, as far as the proof goes, rests solely upon the al-

legations of the defendant's answer. This is not sufficient, if the statement had been positive as to the payment of the purchase money before notice. His answer is not evidence on this point. It is not responsive. He was not interrogated as to these particulars. Setting up in his answer a matter of defence, he was bound to prove it by competent evidence.

For a purchaser from a trustee to be protected in his title, he must be a purchaser without notice, express or implied. The Court is of opinion, that the defendant, Woods, had implied notice. The will of Mary Ellis, which created this separate estate, had been admitted to probate. It was on file in the office of the Ordinary. It was of record there. This was implied notice. The proceedings of all our Courts are public. Their records, as those of every public office where records are kept, are open to the inspection of every citizen of the country, who has an interest or an inclination to inquire or investigate. The keepers of such records are bound to produce and exhibit them on demand. When one purchases land from a defendant in execution, he cannot protect himself in the purchase, or set aside the lien of the judgment, on the plea that he had no notice of the enrolment of the judgment; or, if he purchases a negro, or other chattel, he cannot avoid the prior claim of the plaintiff in the execution, on the ground that he was not aware that such execution was lodged in the office of the sheriff. In these instances, the purchaser has implied notice. I think that public policy requires that the doctrine should be broadly declared, that the records of all our Courts should be implied notice in

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all cases, except \*where legislative Acts have or shall modify or restrict the doctrine. The conclusion at which I have arrived is, that the defendant, Woods, has purchased the separate trust estate of the plaintiff, Mrs. Scurry, without proof of having paid the purchase money before notice of the plaintiff's equity, and, in fact, with implied notice of that equity. On the plainest principles applicable to the subject, he must make restitution. Upon the question, whether Mrs. Scurry takes, by the said will, only a life estate, and whether her issue, after her death, will be entitled to take by way of remainder, the Court has made no decision; a judgment upon that question not being necessary to the adjudication of this case.

It is ordered and decreed, that the circuit decree be reversed, and that the defendant, William H. Woods, deliver to the plaintiff, Mrs. Mary Ann L. Scurry, the said negro Annie, on or before the first day of February next, and that he do account before the Commissioner, to the said plaintiff, for the hire of the negro from the 4th day of April, 1853. And in default of the restitution of the said negro, as herein directed and required, it is



further ordered and decreed, that the said William H. Woods do account to the said plaintiff for the value of the said negro Annie, and the profits of her labor from the 4th day of April, 1853. It is further ordered and decreed, that the defendants pay the costs.

JOHNSTON and DUNKIN, CC., concurred.

WARDLAW, Ch., dissenting. If the will of Mary Ellis confer a separate estate in the slave Annie, on her daughter Mary Ann L., whether for life, or in fee, the question of the validity of the limitation over to the issue of the daughter, made by the first ground of appeal, involves merely the proper joinder of the plaintiffs in the suit, and becomes too unimportant for discussion. As to the third

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ground of appeal, it is sufficient to remark, that, while I agree that the probate and registry of the will afford constructive notice to all persons, I adhere to the opinion expressed in *Nix v. Harley*, 3 Rich. Eq. 383, that there is a difference between express and constructive notice as affecting the conscience of a defendant, and the remedy to be afforded by the Court. I agree, too, that under the facts of the case, the title to Annie must be determined by the interpretation of the third clause of testatrix's will, unaffected by what is said in the fourth clause concerning Sydney. I dissent, however, from the judgment of the Court as to the matter of the second ground of appeal, that the terms of this third clause of the will give to the daughter a sole and separate estate in the slave Annie.

By this clause Annie and her future issue were bequeathed to the daughter, then unmarried, "to be hers and hers only, during her natural life, and not to be subject to the debts of her husband or any other person."

The general doctrine on this topic is well expressed by Chan. Dunkin, as the organ of the Court of Errors, in *Wilson v. Bailer*, 3 Strob. Eq. 260 [51 Am. Dec. 678]. "A separate interest in a married woman, is in derogation of the husband's common-law right—the creature of the Court of Chancery—and unless the intention to exclude the husband is clearly expressed, or arises by necessary implication, the marital right is maintained. In this all the authorities concur." And the Chancellor further adopts the phraseology of one of our cases: "The expression of such intent should be plain, explicit and unequivocal," else there will be a continual effort from slight expressions to imply this separate estate in the wife, leading to unceasing litigation. In *Nix v. Bradley*, 6 Rich. Eq. 48, Chancellor Dargan arranges the modes of creating a separate estate in a wife into three classes: 1, where the technical words, sole and separate use, or others equivalent are used; 2, where the marital rights are ex-

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pressly excluded; and 3, \*where the wife is empowered to perform acts concerning the estate given to her, inconsistent with the legal disabilities of coverture. There the estate was given in trust for the use and benefit of the daughters of testator, (some of whom were married and some unmarried,) and "not subject to the debts, contracts or sale of their present or future husbands," and with the assent of the whole Court it was held to be a separate estate of the second class above mentioned. In the present case, if there be a separate estate it must be created likewise by the exclusion of the husband's rights, for there is no pretence that technical words are used, nor that any special power of a feme sole was conferred on the daughter to be exercised when she should become a wife. It is clear and uncontested that the words in the bequest, "to be hers only," do not by their single force exclude the husband's rights. It has been often adjudged that a bequest to a wife, "for her own use and benefit," quite equal in force, do not give a separate estate to a wife: (*Wills v. Sayer*, 4 Mad. 409; *Roberts v. Spicer*, 5 Mad. 491,) although such words might have this effect, if followed by others excluding the husband's control and enjoyment, such as "independent of the husband;" and in one case, (*Margetts v. Barringer*, 7 Sim. 482,) the phrase "independent of any other person" was treated as a euphemism for independent of the husband. In *Tyler v. Lake*, 2 Rus. & Myl. 183, a legacy in trust for two married women, with direction to the trustees "to pay the moneys into their own proper, and respective hands, to and for their own use and benefit," was held to be an absolute gift to the husbands through the wives; and a similar decision was made in our own case of *Foster v. Kerr*, 4 Rich. Eq. 390, on a bequest of slaves to a wife, "to her and the heirs of her body and to them alone." All words pointing towards the creation of a separate estate have diminished effect, (it has been matter of controversy whether they had any effect,) when the donee is unmarried at the time of gift; as a sepa-

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rate use \*however well conveyed, operates only during coverture, and in restriction of the husband's rights only, for a woman discover has as full power to dispose of her separate estate as of any other portion of her property. *Nix v. Bradley*, and the cases there cited.

The other words in this will supposed to indicate the purpose of testatrix to raise a separate estate in the daughter, "not subject to the debts of her husband or any other person,"—do not necessarily imply the intention to exclude the husband. If the clause be read, "not subject to the debts of her husband," without the addition of the latter words "or any other person," which greatly increased the doubtfulness of the intent, it would

still have been very equivocal that the testatrix intended more than to give property without its necessary incident of liability for debts, to him who should become by the fact of marriage the substitute or successor of the express donee. Such a condition in a gift to a man or to a woman while sole, is void as utterly inconsistent with the nature of the estate given. *Brandon v. Robinson*, 18 Ves. 429; *Heath v. Bishop*, 4 Rich. Eq. 46 [55 Am. Dec. 654]. In *Rivers v. Thayer*, 7 Rich. Eq. 136, we held that the equitable estate of a husband in property settled to the joint use of himself and wife, and so as not to be liable for his debts, was nevertheless liable to his creditors. In *Weatherford v. Tate*, 2 Strob. Eq. 27, the testatrix bequeathed certain slaves respectively to her two married daughters Charlotte and Harriet, and in another clause of her will, said: "all the property which I have given to my two daughters Charlotte Weatherford, and Harriet Tuttle, I give to them during their natural lives, and after their death to go to the lawful heirs of their bodies; no sale made by either of their husbands shall be valid, unless by the consent of one or both of my executors, and thus my executors have power to prevent such property being moved off the State." Chancellor Johnston in the circuit decree said: "there can be no question that Harriet Tuttle took an absolute estate in

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the slaves, and \*that her husband's marital rights attached, investing him with power to dispose of them as he pleased. The bequest is to Harriet Tuttle for life, and the limitation over is to the lawful heirs of her body: and, judging apart from the terms of the will, I have no doubt there was in the mind of the testatrix a desire to secure to her daughter a life interest free from the control of her husband, and that the property at her death should go over to the issue of her body living at her death; but in *Myers v. Pickett*, 1 Hill Eq. 37, it was held that a bequest of chattels to one for life, and then to the heirs of her body, vested an absolute estate in the first taker, on the ground that the limitation over was too remote; and that is this case. The provision that the slaves should not be removed out of the State, nor sold by the husband, is not a condition, because there is no forfeiture or penalty attached to it, and is utterly inconsistent with the general right of property, and can only operate as a command or order that the property should not be removed or sold, which the party, might obey or not at his pleasure." The Court of Appeals by Johnston, Ch., affirmed this decree and declared their satisfaction "with the view taken by the Chancellor." Now surely an inhibition of the husband's power to sell or remove a chattel given to his wife affords a much stronger implication of intention to exclude marital rights, than a mere general declaration that if the

donee should be taken in marriage a chattel given to her should not be liable for a husband's debts. I approve the decision of *Nix v. Bradley*, that terms clearly excluding the dominion and control of a future husband over chattels given to his wife while sole, equivocally for her sole use, confer on her a separate estate as to such of the chattels as remain at the marriage; but restriction of the right of a husband to charge or encumber such chattels is the most equivocal of all limitations of his rights and powers.

But the desire of the testatrix in the will in question is not simply that the chattel giv-

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en to her daughter shall not \*be liable for the debts of a future husband, but it is that the chattel shall not be liable for the debts of a husband "or any other person." The daughter was then unmarried, and the natural construction of the clause is that the property is to be exempt from liability for the debts of the daughter or any one else, and affords another instance of the many attempts to give property without its necessary incidents.

In *Massey v. Parker*, 2 Myl. and Ke. 174, a testatrix bequeathed the interest of certain moneys to two unmarried grand-daughters for life, and directed that this interest should be "for and under their sole control, and that their mother shall have no control over this property;" and it was adjudged that no separate estate was given to the grand-daughters in exclusion of husbands, and that the control of the mother only was intended to be prevented. If the direction had been simply that the property should be "under the sole control" of the grand-daughters, the decision must have been different; but the reference to the mother pointed and limited the meaning of sole control by the donees. This case has been impeached in some respects, but not as to this point. So here, if the property had been declared exempt from liability for the debts of a future husband alone, it might have been plausibly urged that one of his characteristic powers as owner had been excluded, involving a general exclusion of his marital rights; but when the property is declared exempt from the debts of all owners, it seems to be a bald attempt to give in fee, and still limit the inherent rights of the owners.

In my opinion the argument for a separate estate in this case acquires not much additional force by considering conjointly the particulars which separately are inadequate to create such estate by necessary implication. The slave is given to the daughter "to be hers only," that is, she is to be the single proprietor, and it is "not to be subject to the debts of her husband or any other person," that is, she or any one in her right may enjoy

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the property and yet not \*incur the responsibilities of an owner imposed by law; and, taken altogether, the clause means that the



donee shall have all the benefits without the risks of holding this property. I am unable to perceive that "the intention to exclude the husband is clearly expressed or arises by necessary implication;" and I apprehend that the present decision will be regarded by the profession as over-ruling *Weatherford v. Tate*, and as impinging on the doctrines pronounced by the Court of *dernier resort* in *Wilson v. Bailer*; with both of which judgments I am content.

Decree reversed.

### 9 Rich. Eq. \*34

\*JOSHUA McCREARY v. ROBERT McCREARY.

(Columbia. Nov. and Dec. Term, 1856.)

[Acknowledgment  $\S$  33.]

By the Act of 1795, a seal is necessary to the magistrate's certificate of the renunciation of her inheritance, by a married woman; and where such seal is wanting, the conveyance of the married woman is null and void.

[Ed. Note.—Cited in *McLaurin v. Wilson*, 16 S. C. 410; *Wingo v. Parker*, 19 S. C. 13; *Vinson v. Nicholas*, 28 S. C. 200, 5 S. E. 357; *Bratton v. Burris*, 51 S. C. 50, 28 S. E. 13.

For other cases, see Acknowledgment, Cent. Dig. § 170; Dec. Dig.  $\S$  33.]

Before Johnston, Ch., at Barnwell, March, 1856.

The only point involved in this case, will be understood from the opinion delivered in the Court of Appeals.

Owens, for appellant.

Bellinger, Hutson, contra.

The opinion of the Court was delivered by

DARGAN, Ch. The bill in this case was filed for the distribution of the real estate of Ann Fortune, whose distributees are the parties to the suit. The land sought to be divided had unquestionably been the inheritance or real estate of the said Ann Fortune. But she and her husband, William Fortune, had united in the execution of a deed of conveyance of the same land to Robert McCreary, who was the son of the said Ann by a former marriage. The conveyance was formal, and complete, according to the forms prescribed by law for the conveyance of the inheritance or real estate of married women, with the exception, that the seal of the magistrate was not affixed to his certificate of the renunciation of the inheritance. The certificate was, in every other respect, formal and sufficient. The Chancellor who heard the cause held, that the want of the seal to the magistrate's certificate of the renunciation, vitiated the conveyance, and rendered it void and inoperative. He accordingly considered

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the land in \*question as the real estate of Ann Fortune, as to which she died intestate, and ordered a writ of partition to issue, to

divide the same among the heirs at law of the said Ann. This is an appeal from that decree, on the ground that the want of a seal to the magistrate's certificate of renunciation does not vitiate the conveyance of Ann and William Fortune, and that the same was sufficient to convey, and did convey, the estate to the said Robert McCreary.

The defendant, in his answer, setting up title in himself to the land of which partition was sought, admitted that the certificate of renunciation, by the magistrate, had no seal. This admission the Court would not have held conclusive upon him, if it had appeared to the Court that there was, in fact, a seal. Admissions by defendants to suits in equity, shall not be held conclusive against them, where it clearly appears that such admissions were contrary to the truth, and were made in ignorance or misapprehension of the facts of the case. This would be contrary to equity, and that regard which should be had for the weakness and infirmity of the human mind. In such cases, however, the onus should lie upon the party, clearly to disprove the truth of his own admissions. But, upon an inspection of the proceedings in this case, it most obviously appears, that the admissions of the defendant are in accordance with the fact. Upon the certificate of the magistrate there is nothing that can be distorted into the semblance of a seal. Had there been any sign annexed to the magistrate's signature, which the Court could have considered as having been intended by him for a seal; had there been a wafer, or the word "seal," or the letters "L. S." (signifying, in the place of a seal), or any other sign or character which the magistrate intended to adopt as a seal, or to serve in its place, the Court would have regarded it as a seal, or a sufficient affixing of a seal. But, in the absence of a seal, or of anything which might be regarded as such, the question is presented to the Court, whether a conveyance by

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\*a married woman of her inheritance, unaccompanied by a sealed certificate of her renunciation by the judge or justice who took the same, is valid in law to pass the estate.

At common law, a married woman could not alienate her real estate. The Act of 1795, 5 Stat. 257, and prior Acts, enabled her to do so on certain conditions, and after certain forms, very specifically prescribed; a part of which is, that the certificate of her renunciation should be under the hand and seal of the magistrate by whom it is taken. Is it competent for the Court to hold, that any part of the form may be dispensed with? If the seal may be omitted, some other portion of the form might, with equal propriety, be omitted.

According to modern usages, there is very little difference between sealed and unsealed

ed instruments, as to solemnity and deliberation. It was not so in those past ages, when these distinctions originated. Then, every one likely to be engaged in transactions requiring such forms had his own private seal, with his device engraved upon it, and the affixing of it to an instrument imported solemnity, while the preparation of the wax, or other plastic material, made the act of sealing more formal and deliberate. But in our day, there is no more of solemnity and deliberation in the execution of a sealed than of an unsealed instrument. The addition of a few more words to the written part of the instrument, the letters "L. S." (understood to mean *locus sigilli*), a circumflex with the pen, or a scrawl in the place where the seal is usually placed (which are generally made by the scrivener), or any mark or sign, which the person executing the instrument meant as his seal, or to adopt as such, is sufficient to stamp upon the writing the character, and to impart to it all the qualities of a sealed instrument. Thus the Court has undertaken to decide what is a sufficient seal, but in no case to dispense with one where the law requires it. This would be the usurpation of a power which belongs to the legislative department of the government. The age that

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is past never fails to leave its impress \*upon the succeeding age. This is one of the laws of human progress. And among a wise people, those ancestral institutions that are found to be deficient in the quality of adaptation to the wants and circumstances of posterior generations, are thrown off gradually and cautiously, without violence or sudden revolution. The distinction between sealed and unsealed instruments is a principle which we have inherited from our fathers. Though this distinction in matter of form is now insignificant, and absurd in some of its applications, it is deeply and extensively ramified in our legal system, and touches many interests. I am persuaded that it would not be wise even for the Legislature to innovate too much upon the subject. The sudden abolition of all distinction between sealed and unsealed instruments would produce many perturbations, and unsettle many things that are now considered as settled. The gradual action of the Courts would, in the course of time, modify and remove those portions of the law upon this subject, which would be found to be most repugnant to reason, or more inconvenient in operation.

These are speculations, however, which, though not wanting in pertinency, go beyond the matter in hand. The question is, whether the want of the magistrate's seal, to his certificate of Mrs. Ann Fortune's renunciation of inheritance, rendered her deed, which she executed jointly with her husband, Wil-

liam Fortune, to Robert McCreary, null and void. The opinion of this Court is in the affirmative. The deed is void for the want of that part of the form prescribed by the Act. In regard to the land which the deed purported to convey, Ann Fortune died intestate, and the same is subject to distribution among her heirs at law. The Circuit decree, ordering a partition of the land, is right, and is hereby affirmed and the appeal dismissed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.

Appeal dismissed.

9 Rich. Eq. \*38

\*EDWIN J. SCOTT, et al., v. JOHN DAVIS, et al.

(Columbia. Nov. and Dec. Term, 1856.)

[*Equity* ⇐ 267, 418.]

Where a defendant allows the bill to be taken pro confesso, he is subject to the discretion of the Court as to the terms of his defence. The Court may give plaintiff leave to amend and require the defendant to answer the bill as amended during the term, and upon his failure to do so, make a decree against him.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 546, 953; Dec. Dig. ⇐ 267, 418.]

[This case is also cited in *Bryce v. Bowers*, 11 Rich. Eq. 50, without specific application.]

Before Johnston, Ch., at Chester, July Sittings, 1856.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Eaves and Thomson, for appellant.

Herndon and Patterson, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. The bill was originally exhibited against the defendant, John Davis, alone. A note had been given by the firm of Lipford & Davis, (consisting of John C. Lipford, and the said John Davis,) for seventeen hundred dollars, and payable the 1st of January, 1856; and to secure the payment of the money, Davis had mortgaged a small message which he owned in the suburbs of Chester. The object of the bill was to foreclose this mortgage, sell the premises, and apply the proceeds to the payment of this debt.

Davis having failed to put in a defence, an order pro confesso, had been taken against him.

Under these circumstances he, through his counsel, moved to set aside the order, under the 36th rule of Court; (1 Des. Rep. 62;) which, so far as it is necessary to quote it, is in the following words:

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\*"For the Country. The bill being taken pro confesso, the order therefor can be set aside only where the defendant shall apply



for the same on the first day of the meeting of the Court, and shall have previously filed, or, on making such application, shall produce a full and explicit answer, or plea, with a brief for the Court, and shall docket the cause for hearing at such Court; and submit to any further conditions the Court may impose."

On moving to set aside the order pro confesso, the defendant Davis produced and filed what was termed a demurrer, setting out that the firm of Lipford & Davis was primarily liable, and Davis only secondarily, as a surety, and insisting that Lipford should be made a party defendant to the bill. On argument, the Court set aside the order pro confesso, and gave the plaintiffs leave to amend their bill, by making Lipford a defendant, on payment of costs. It was stated that the amendment would be made, and Lipford's answer put in by next morning, (which was done, admitting the debt,) and that plaintiffs would insist on a hearing during the term; and the Court indicated that Davis must be ready.

When the case was called again, which was towards the close of the sittings, Mr. Thomson, Davis' counsel, insisted that his client was entitled to thirty days to put in his answer, and stated that he had so instructed him, and he had left the Court. The Court, thereupon, ordered the order pro confesso against Davis to be restored, and sent the case to the commissioner to ascertain and report the debt due the plaintiffs, and on the coming in of his report, decreed payment of the debt by the firm by a given day, and failing such payment, that the mortgaged premises be sold, and the proceeds applied as in cases of mortgage: and also directed an account between the partners, in which Davis should have credit for the amount thus raised from his property.

The appeal is by Davis from this decree: and by mere indulgence his counsel has been

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permitted to argue it without \*bringing up a copy of the decree—the foregoing having been agreed upon as the substance of what it contains.

It is surely unnecessary to repeat here, what has been so often announced:—that this defendant having allowed the bill to be taken as confessed, was subject to the discretion of the Court as to the terms of his defence. The 36th rule is explicit to this effect. It was held in *Meek v. Richardson*, 4 Rich. Eq. 91, that the rules of Court, while they are to be generally observed, where no special equity calls for a deflection, are, nevertheless, subject to the discretion of the Court, to be so moulded as to meet the exigencies of cases, and promote the ends of justice: and in *Wilson v. Waterman*, 6 Rich. Eq. 272, it was said, that "where a party defendant has permitted a bill to be taken

pro confesso, he has subjected himself to the discretionary power of the Court: and he should not be relieved from this condition, in which he has voluntarily placed himself, without coming up to what the merits of the case and convenient practice require."

There is enough in the thirty-sixth rule to shew that a party let in to defend himself after judgment against him by default, is not captiously to throw any impediment in the way of a hearing at the first term, but is bound, unless there be some just (not merely technical) objection, to come to trial.

If Davis had disclosed by affidavit, any defence which he could not make at the time, or any reason why he could not put in his answer to the amended bill; he might have been entitled to pass the term. But to insist that he had a right, in the face of his own prior default, and from which he was relievable only upon terms, to postpone a decree upon the merits, was simply preposterous. Under the circumstances, all that he could justly ask was that his plea stand for an answer; and this advantage he has had.

It is argued that by his mortgage he was

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a mere surety \*for the debt of his firm; and had a right to require the creditor to take his decree against the firm, and pursue it to insolvency, before asking satisfaction under the mortgage. There would seem to be more ground for such a pretension where the principal debtor is a stranger to the surety, than where, as in this case, the surety, is himself, also a principal. But in *Goodwyn v. State Bank*, 4 Des. 389, it was held that the creditor is not to be delayed in his remedy against his debtor, on the ground that some collateral security, intended for the creditor's benefit, is entangled, and in controversy among the debtors, themselves.

In the present case, this defendant has all the benefit of a decree against the partnership firm, and of an account between the partners, with a right to recoup for the amount which under his mortgage he may pay for them: and what more would he have?

It is ordered that the decree be affirmed and the appeal dismissed.

DUNKIN and WARDLAW, CC., concurred,

DARGAN, Ch., absent at the hearing.  
Appeal dismissed.

9 Rich. Eq. \*42

\*WILLIAM M. MARTIN and Wife v. WILLIAM BELL and Wife, and Others.

(Columbia. Nov. and Dec. Term, 1856.)

[*Husband and Wife* ⚭ 117.]

Testator declared as follows, "The property, real or personal, that my three daughters, M.

M., N. J., and M. S., may or do receive by this, my will, I hereby settle it on them and the lawful issue of their bodies forever, and I do declare that it shall in no wise be subject the debts of their husbands, in no case whatsoever."—*Held*, to create separate estates in the daughters.

[Ed. Note.—Cited in *Bouknight v. Epting*, 11 S. C. 76.

For other cases, see *Husband and Wife*, Cent. Dig. § 419; Dec. Dig. ¶117.]

Before Johnston, Ch., at Fairfield, July, 1856.

Johnston, Ch. One of the objects of this bill is to obtain a construction of the fifth clause of the will of Thomas Bell, which is in these words: "The property, real or personal, that my three daughters, Margaret M., Nancy J., and Martha S., may or do receive by this, my will, I hereby settle it on them and the lawful issue of their bodies forever, and I do declare that it shall in no wise be subject the debts of their husbands, in no case whatsoever." The questions submitted are, as to the quantity of the estate taken by the daughters, and whether the same are separate estates in Mrs. Bell and Mrs. Martin.

The opinion of the Court is, that as to the personalty, the wives take absolute estates, and as to the realty, fees conditional—and further, that these are "separate" estates.

The defendant, William Bell, elects, under these circumstances, that "McVea place" shall stand as a part of his wife's separate estate, and he must deliver up to be cancelled, the deed executed by the executor, Edward M. Bell, to him, conveying these premises, referred to in the bill.

The plaintiffs suggest that Mrs. Bell has received more than her share in partition, and she must therefore hold this, as well as the other property received in the partition of

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20th \*December, 1854, subject to Mrs. Martin's lien for any deficiency in partition, if it should result in this deficiency being established, about which there appears to be no doubt.

It is Ordered and Decreed, That this opinion stand for a decree; parties to be at liberty to apply at the foot, for such further orders as may be necessary. Costs to be paid out of the estate of the testator, Thomas Bell.

It is further Ordered, That it be referred to the commissioner to enquire and report as to the partition of the testator's estate on 24th December, 1850, and whether it is expedient that the same be confirmed.

It is further Ordered, That the commissioner do also enquire and report as to the partition made 20th December, 1854, of that portion of the testator's estate held by the widow for life, and what amounts are to be paid, and by which of the parties, to equalize the shares and finally adjust the same.

It is further Ordered, That the commissioner do take an account of the administra-

tion by Edward M. Bell, executor of the estate of the testator, Thomas Bell.

The plaintiffs appealed on the ground:

Because, it is respectfully submitted, his Honor erred in holding, that by the fifth clause of testator's will, a "separate estate" was created in the portions devised and bequeathed to the daughters of the testator.

Boylston, for appellants.

The opinion of the Court was delivered by

DUNKIN, Ch. In *Wilson v. Bailer*, 3 Strob. Eq. 260 [51 Am. Dec. 678], it is said that a separate estate in the wife is the creature of the Court of Chancery, and in derogation of the husband's common law right, and that, unless the intention to exclude the husband is clearly expressed, or arises by necessary im-

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plication, the marital right is maintained. It is also there said that, in order to ascertain whether it was intended to exclude the marital right, it is necessary to analyze the language used in every case. The instrument before us is testamentary. It was a provision of a father in favor of his daughters, two of whom were then unmarried women, and one (Mrs. Bell) married. The difficulty in reconciling the authorities arises from confounding the amplitude of the gift to the donee with an exclusion of the marital right. But if the intent to exclude may be fairly deduced from the language used, it is the duty of the Court to give effect to this as to every other lawful intention of the testator. The distinctions are sometimes nice. A gift to a married woman as her own in every respect, has been held not to exclude the husband. But in *Ex parte Ray*, 1 Madd. 199, Sir Thomas Plumer held that a gift to "her sole use" gave a separate estate; and chiefly because of the technical character of the expression, sole. The language of this will is, in some respects, technical. "The property, real or personal, that my three daughters may or do receive by this, my will, I hereby settle it on them and the lawful issue of their bodies forever." It may be that the word settle would only refer to the limitation of the estate. But he proceeds, "and I do declare that it shall in no wise be subject to the debts of their husbands, in no case whatsoever." Certainly it is not competent for a testator to give property to his son or daughter and take away the incidents of property. But it is not less clear that, according to well established principles of this Court, he may give property to his daughter, and, at the same time secure that property, from liability for her husband's debts. But this can only be effected by construing the gift to create a separate estate. The intent to exclude the marital right in this case is demonstrated by declaring the property exempt from the principal incident of such right. *Weatherford v. Tate*, 2 Strob. Eq. 27,



has been supposed to conflict with the deci-

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sion of the Circuit Chancellor. \*In that case slaves were bequeathed to the daughters in terms which vested an absolute estate; but to the bequest was added this provision: "No sale made by either of their husbands shall be valid, unless by the consent of both, or one of my executors, and thus my executors have power to prevent such property being moved off the State." This restriction upon alienation had no reference to the separate enjoyment of the wife, and was not intended to secure it. On the contrary, apparently recognizing the title of the husband, the testator sought only to restrain the exercise of it so far as to prevent the removal of the slaves beyond the limits of the State. To accomplish this, he declared that any sale by the husband, must have the sanction of the executors, or one of them, in order to secure its validity. The Court could infer no intention to exclude a right from a provision that it shall not be exercised in a particular way. If the testator had provided that no husband of his daughters should require more than nominal wages from the slaves, this restriction could hardly be construed into an intent to secure a separate estate to his daughters, although if effectual, the provision would seriously impair the value of the husband's enjoyment. Such the Court appear to have regarded the character of the restriction in *Weatherford v. Tate*. "This provision," say the Court, "was not a condition because there was no forfeiture, or penalty attached to it, and was utterly inconsistent with the general right of property, and could only operate as a command or order that the property should not be removed or sold, which the party might obey or not at his pleasure."

It is ordered and decreed that the appeal be dismissed.

JOHNSTON, Ch., concurred.

DARGAN, Ch., absent at hearing.  
Appeal dismissed.

9 Rich. Eq. \*46

\*WILLIAM TYGART and Wife, and Others,  
v. WILLIAM J. PEEPLES and Others.

(Columbia. Nov. and Dec. Term, 1856.)

[Process  $\hookrightarrow$  103.]

Where the heirs of A. B., who died abroad, should be made parties to an action or other legal proceeding in this State, if their names are unknown and their residence is out of the State, it is sufficient to describe them in the published notice to appear and plead, &c., as the heirs of A. B.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 131; Dec. Dig.  $\hookrightarrow$  103.]

[Wills  $\hookrightarrow$  427.]

Probate of a will in common or solemn form, and even after verdict in the Common Pleas finding it to be valid, does not affect the right

of the heir at law to the land. He may, notwithstanding the probate, assert his right to the land, and question the validity of the will as a devise.

[Ed. Note.—Cited in *Burkett v. Whittemore*, 36 S. C. 433, 15 S. E. 616.

For other cases, see Wills, Cent. Dig. § 916; Dec. Dig.  $\hookrightarrow$  427.]

[This case is also cited in *Rumph v. Hiott*, 35 S. C. 458, 15 S. E. 235, as to jurisdiction of ordinary in case of "mixed" will.]

Before Johnston, Ch., at Union, June, 1856.

This bill was filed by a number of the heirs at law and distributees of George L. Smith, deceased, against the executors of his will and John W. Sartar, who had purchased from the executors the plantation of their testator and devisor. The will had been admitted to probate in solemn form of law, after a verdict in the Court of Common Pleas establishing its validity, which verdict had been affirmed by the Law Court of Appeals. The bill stated that sundry of the heirs at law and distributees of George L. Smith, were not parties to the proceedings before the Ordinary and in the Common Pleas; that the will was procured by fraud and undue influence; that at the trial in the Court of Common Pleas proper evidence was excluded and improper admitted; and the bill prayed that the probate be set aside, if not entirely, at least so far as the heirs who were not parties are concerned; that a writ of partition issue to divide the real estate and that an account be taken of the rents and profits.

His Honor after hearing the bill and an-

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swers and argument \*of plaintiffs' solicitors, ordered and decreed that the bill be dismissed for want of equity.

The plaintiffs appealed.

Thomson, Arthur, for appellants.

Dawkins, Gadberry, Herndon, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The principal object of this bill seems to have been to obtain a revival of the judgment of the Law Court of Appeals in *Peebles v. Smith*, 8 Rich. 90. The bill was dismissed by the Chancellor for want of equity. The dissatisfaction of the appellants, as disclosed in their two first grounds, as well as in the argument before us, arises from the refusal of the Chancellor to interfere with the judgment of the Law Court, in a matter properly within their jurisdiction, and in which this Court concur entirely with the Chancellor.

It is objected in the sixth ground of appeal, that some of the plaintiffs who are among the heirs at law of the testator were not legally made parties in the proceedings before the Ordinary. They are said to be children of John Smith, deceased, and of George P. Smith, deceased who were children of the testator, both of whom died abroad. The names of the children were not known, and

the publication called upon them (so far as the Court can collect from the papers,) as heirs of George L. Smith, deceased, without setting forth their names. Many of the heirs appeared and successfully contested the probate of the will before the Ordinary, although his judgment was subsequently reversed. It did not appear in any way that any of the plaintiffs were ignorant of the litigation during its progress through the

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several tribunals. \*In cases of this character, the Court exacts a reasonable compliance with the provisions of the statute, and this is well illustrated by the language of the Court of Appeals in *Cruger v. Daniel*, *McMull. Eq.* 189. Chancellor Harper says, "It would be the duty of the Court, upon its own motion, in decreeing upon the rights of Ferrie, to inquire if he were properly made a party. As I understand, the publication was made in pursuance of the Act of Assembly, requiring John Ferrie, or if he should be dead, his heirs, to appear. It was objected that from his long absence without being heard of, he must be presumed to be dead, and that his heirs should be required to appear by name. If it is as alleged, he has been absent from the State for fifty years, and his heirs are unknown, this would be impossible. It seems to me to be a substantial and the only practicable mode of complying with the directions of the Act. I do not perceive that the heirs would receive any greater benefit if they were named in the advertisement requiring them to answer."

But the plaintiffs set forth in their bill, that part of the estate of their ancestor George L. Smith, deceased, consisted of a valuable plantation in Union district, now in possession of the defendant John W. Sartar, under an alleged conveyance from his co-defendants. It is also conceded in the pleadings, that the plaintiffs are among the heirs at law of George L. Smith, deceased. Among the various objects of the prayer of the bill the plaintiffs ask specially for a writ of partition. The fourth and fifth grounds submit that the proceedings on the appeal from the Ordinary, constitute no bar to the heirs at law in relation to the real estate, that the bill should have been retained for the purpose of partition of the real estate, and an issue devisavit vel non ordered by the Chancellor. Mr. Justice Williams says, that if an instrument be testamentary, and is to operate on personal estate, probate must be obtained in the Ecclesiastical Court. Where,

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how\*ever, a will clearly respects lands only, and no personal property, it ought not to be proved in the Spiritual Court. "But if a will is a mixed will, concerning both lands and goods, it must be proved entirely in the spiritual Court, yet the probate will not prejudice the heirs, inasmuch as it will not be evidence of the will as to the land; nor will

the examination of the witnesses in the Ecclesiastical Court be evidence in the Court of Common Law." 1 Williams' Ex'ors, 321. So Mr. Jarman states that, except as to the personalty, the probate by the Ecclesiastical Court is wholly inoperative and void, "that the validity of wills of real estate is solely cognizable by Courts of Law, in the ordinary forms of suit." 1 Jarman, 212.

The principle has been often recognized in our own Courts. Thus in *Crosland v. Murdock*, 4 McC. 217, Judge Nott says, "The Ordinary has no jurisdiction over the lands; and it follows as a consequence, that his judgment is not conclusive, so far as the real estate is concerned. If he allows the will, his probate is not evidence against the heir at law. The original must be produced and proved. If he rejects it, the devisee, for the same cause, will be permitted to set it up in opposition to the heir." Then it was urged that the judgment of the Ordinary had been affirmed, on appeal, by a jury. "But" continued that eminent judge, "it must be recollected that the powers of the Court of Common Pleas, in respect to this matter is entirely appellate, and is conferred solely with the view of controlling the Ordinary, and is only authoritative so far as to put him right when he has erred." He further remarks, that although by the practice of the Courts in this State the trial is gone into de novo as regards the object, the power is appellate, and the judgment is that of the Ordinary as corrected by the appellate tribunal.

It was contended that the effect of probate in the Court of Ordinary was altered by the Act of 1839, (11 Stat. 39.) It may have been in the power of the Legislature thus to have

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\*extended the jurisdiction of the Court of Ordinary, as has been done in some other of the States of this confederacy. But in such case a change of so grave a character, is not left to inference or doubtful interpretation. In several of the Eastern States it is expressly provided by statute that "the probate of a will devising real estate, shall be conclusive as to the due execution of the will in like manner as it is of a will of personal estate." But the Act of 1839, purports to confer no new jurisdiction in this respect, on the Court of Ordinary, but only regulates the practice as already existing. The effect of probate by the Ordinary is not changed; and the consequences of such implication are too grave to be lightly adopted. By the English law, the heir may pursue his claim to the real estate, as often as he has the inclination and \*he means. In this State he is restricted to two suits. But if the probate of the will by the Ordinary is deemed conclusive, his right is still more restricted, and, unless he appeal within a limited time, he may be effectually deprived of his freehold without the judgment of his peers, or a new provision be engrafted on the statute of limita-



tions. The probate in common form without citing any of the parties in interest is (by the 11th section) declared to be good unless, within four years next after such probate, some person shall give notice that he requires probate in solemn form. But in *Cannon v. Setzler*, 6 Rich. 471, (decided in 1853) which was the case of a mixed will, the Court of Errors clearly recognize the well settled principle, that the probate of the Ordinary had no effect in relation to the real estate.

Then it has been suggested that the Act of 1823, authorizing office copies of wills to be given in evidence in certain cases, may have made a difference. But that Act does not purport to alter the effect of the probate of the Ordinary. Previous to that Act in all actions of trespass to try title, whether in England or in this country, if a will constituted any part of the plaintiff's chain of title

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it was necessary to \*produce the original will, and for this purpose to require the attendance of the officer who had the custody of the will. As is said in 1 Bur. 429, every several devisee was required to make out his title in a distinct cause, and de novo against every new party—and so of one devisee against several trespassers—and so of several defendants claiming title under a devisee. In all these cases it was necessary to produce the original will. Sometimes the will was given up by the ordinary upon large security being given, and in England when he refused an order was sometimes made by the Court of Chancery to that effect—although Lord Eldon, who had made several such orders, once remarked, he did not see how he could proceed if the custodian refused to surrender the instrument. To remedy this inconvenience in cases where there was no controversy as to the validity of the will but it was offered collaterally in evidence, or as part of a chain of title of plaintiff or defendant, the Act of 1823 declares, that exemplification of wills under the hand of the Ordinary and seal of the Court in which such wills may have been admitted to probate, or under the hand and seal of any other officer who has legal possession of the same, shall be admissible in evidence in any of the Courts of law or equity in this State, whether the same may regard the title to real or personal property. At one time the office of the Secretary of State was the place of record of wills, and by this Act a certified copy from that office is placed on the same footing as a copy from the Ordinary's office. But it was manifestly intended to apply when the evidence was collateral, and not where the validity of the will was the issue presented, and so it has always been regarded.

*Crosland v. Murdock*, was decided in 1827, four years after the passage of that Act, in which the Court declare that the probate by the Ordinary is no evidence against the heir.

The same doctrine was announced in the recent case of *Cannon v. Setzler*, and in *Taylor*

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*v. Taylor*, decided in 1845, 1 Rich. \*533, it is repeatedly stated by the judges that devises are not established by probate of the Ordinary. To give to the Act of 1823 the operation suggested, would require a construction not before intimated, or which has been repudiated by all our subsequent adjudications.

It is ordered and decreed that the appellants' sixth ground of appeal be sustained; that the bill be retained for the purpose of partition of the real estate in case the plaintiffs should prove themselves entitled to such relief, and that the cause be remanded that the plaintiffs may proceed as they shall be advised. But as all the principal matters of contestation have been determined against the plaintiffs, and in this respect the Court is well satisfied with the judgment of the Chancellor, it is not proposed to interfere with the effect of his adjudication in relation to the costs. Up to the time of the Circuit decree the costs must be paid by the plaintiffs.

JOHNSTON, DARGAN, and WARDLAW, CC., concurred.

Decree modified.

9 Rich. Eq. \*53

\*CYRUS A. ALLEN and Wife *v.* THOMAS RICHARDSON and Others.

(Columbia. Nov. and Dec. Term, 1856.)

[*Mortgages* ⇨295.]

Under proceedings in partition, a lot of land was assigned to E. and she was required to pay T., a co-distributee, a certain sum of money, being the value of his share of the land. E. died, and under proceedings for partition of her estate, A. became the purchaser of the land. Afterwards under executions against A., the land was sold as his property by the sheriff and purchased by T.: *Held*, that T., by thus purchasing the equity of redemption, extinguished his debt against E., for the value of his share of the land.

[Ed. Note.—Cited in *Trumbo v. Cumming*, 20 S. C. 336.]

For other cases, see *Mortgages*, Cent. Dig. §§ 815, 817–831; Dec. Dig. ⇨295.]

[*Partition* ⇨84.]

A distributee, who acquires, under proceedings for partition, a statutory lien on land, by afterwards purchasing the land, otherwise than under proceedings to foreclose his lien, extinguishes his debt or claim as well as his lien on the land.

[Ed. Note.—Cited in *Griffin v. Addison*, 3 S. C. 109; *Edwards v. Sanders*, 6 S. C. 334, 336; *Trimmier v. Vise*, 17 S. C. 500, 43 Am. Rep. 624; *Devereux v. Taft*, 20 S. C. 558, 559; *Agnew v. Charlotte, C. & A. R. Co.*, 24 S. C. 22, 58 Am. Rep. 237; *Bleckley v. Branyan*, 26 S. C. 428, 2 S. E. 319.]

For other cases, see *Partition*, Cent. Dig. § 232; Dec. Dig. ⇨84.]

[*Motions* ⇨47.]

[Cited in *Jones & Parker v. Webb*, 8 S. C. 206; *American Publishing & Engraving Co. v. Gibbs & Co.*, 59 S. C. 218, 37 S. E. 753; In

*re Duncan*, 64 S. C. 484, 42 S. E. 433, to the point that a consent order is a mere agreement of the parties.]

[Ed. Note.—For other cases, see *Motions*, Cent. Dig. § 60; Dec. Dig. *¶* 47.]

Before Wardlaw, Ch., at Lancaster, June Sittings, 1855.

These causes (there were several bills in relation, pretty much to the same matters, and between nearly the same parties,) were heard, on exceptions to the commissioner's report.

In 1834, certain proceedings were had at law for partition of the estate of John Richardson, deceased. Under these proceedings a certain piece or lot of land was vested in Elizabeth, widow of John Richardson, and as the value thereof exceeded her share, she was adjudged to pay, for equality of partition, three hundred and seventy dollars, to Thomas Richardson, a co-distributee. Elizabeth departed this life, and, in 1837, under proceedings for partition of her estate, the lot was sold and purchased by one James Allen, who had married one of her daughters. Allen gave a mortgage to secure payment of the purchase money, after deducting his wife's distributive share. Under an execu-

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tion of one Milling \*against Allen, the lot was sold by the sheriff as his property, and purchased by Thomas Richardson for one hundred dollars. The sheriff's deed of conveyance bore date the 23rd January, 1841.

Among the several questions which arose in the causes, one was, whether the amount due Thomas Richardson from Elizabeth Richardson as his distributive share in the estate of John Richardson, and for which he had a statutory lien on the lot, was paid, or in any way satisfied or extinguished. The Commissioner reported, with hesitation, that it was unpaid; and exception was taken by the plaintiffs to his report. So much of the Circuit decree as relates to that question is as follows.

Wardlaw, Ch. The first and most important question is, whether or not the sum of money assessed as the distributive portion of Thomas Richardson in his father's estate with the lien securing the same under the Act of 1791, has been satisfied and extinguished. The plaintiffs insist that the debt and lien of Thomas Richardson was extinguished by his purchase in 1840, after the lien was created, of the lot pledged, and that the presumption of actual payment to him arises from other circumstances in evidence. The defendants contend that the decree of 1854, fixes the right of Thomas to the sum assessed, subject to deduction only on proof of actual payment in money: and the Commissioner, taking a middle course, confines his investigation to the question, whether or not Thomas, according to the evidence, express and presumptive, has been in fact paid; and comes to the conclusion, with much

hesitation, that the evidence of payment is insufficient; the Commissioner considering that the decree settled the right *prima facie* of Thomas to receive, and that it was the province of the Court to determine whether or not he had been paid by operation of law. Some part of the exceptions complains that

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in another particular the Commissioner usurped the functions of the Chancellor in deciding upon equities not referred; but, so far from deeming this a matter of just reproach, I should have been pleased to have the aid of this officer's opinion and reasoning upon every question of law and facts in the cause. When a question of law underlies the conclusions the Commissioner is required to report to the Court, it is his duty, and one excused in almost every case, to determine the question, subject of course to review by the Court. If the question be difficult and fundamental in the suit, he may be excused for asking the previous judgment of the Court; but the better course even then, as promoting the despatch of litigation, is for him to state his views of the question of law and the conclusions which will follow, and alternatively, the conclusions which will follow from a different determination of the law involved.

The omission of the Commissioner here to decide upon the effect of a purchase of the equity of redemption will result in a recommitment of the report, but not probably occasion delay. It is a narrow and untenable construction of the decree, that the Court in it decided or reserved for its primary decision, any question affecting the fact of payment, however made, to any of the distributees of John and Elizabeth Richardson. The Commissioner was directed to inquire and report how much each distributee has received of the assessments made for partition, in rents or otherwise, and from the proceeds of sales in his hands, after taking into the account for producing equality whatever portions of the shares had been paid, and after the payment of costs, to apply the balance towards payment of the respective assessments remaining unpaid; and if any surplus remained to distribute this equally among plaintiffs and defendants, the right of Jane Allen and John Richardson to call their guardian James M. Richardson to further account being reserved. I give my version and not the exact words of the decree. Nothing whatever was settled as to the rights of the

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parties (leaving \*out of view the surplus) except that plaintiffs and defendants were originally entitled to certain sums of money in lieu of their shares in the real estates of intestates with liens upon these estates which had been assigned to two of the distributees, and that they were respectively still entitled to payment, and to lien if they had not been paid: and all questions as to payment were



referred to the Commissioner. A consent decree is the mere agreement of the parties under the sanction of the Court, and is to be interpreted as an agreement: and release by a party of his legal rights is not to be rashly deduced from equivocal terms.

The question then is still open, whether or not the purchase by Thomas Richardson of the lot on which he had a statutory mortgage for securing the money assigned to him for his share of his intestate father's estate, is not a purchase of the equity of redemption merely and an extinguishment of the debt secured by reason of the merger in him of the legal and equitable estate in the mortgaged premises? This question is settled in the affirmative as to the case of an express and formal mortgage. *Ex parte City Sheriff*, 1 McC. 399; *Schnell v. Schroder*, Bail. Eq. 338; *McLure v. Wheeler*, 6 Rich. Eq. 345. And it seems to me that the reasons of the doctrine in case of express mortgage apply with increased force to a secret lien created by statute, of which no memorandum to give notice is required to be recorded, and where the possession of the mortgagee tends to mislead the unwary. Creditors and purchasers are so liable to be deceived where possession is not coincident with unincumbered title, that it seems politic to restrain and preclude encumbrances not notorious as far as the law will allow. I conclude that a statutory mortgagee who buys the estate under mortgage, not under process of foreclosure of his lien, extinguishes the debt or claim, with lien on the land.

The smallness of the sum paid by Thomas Richardson on his purchase tends to show

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that the conclusion of law is consonant with the facts, and that he considered himself as buying only the equity of redemption.

Besides, the great lapse of time, the receipts on Allen's mortgage, Allen's confession for the benefit of Jane Allen and John Richardson only, and the solvency of Elizabeth Richardson in her lifetime and of her estate afterward, go very far towards satisfying me that Thomas Richardson's shares have been in fact paid.

The exception was sustained; and the report recommitted to the Commissioner.

An appeal was taken in behalf of Thomas Richardson.

Williams, for appellant.  
Moore, contra.

PER CURIAM. This Court concurs in the Chancellor's decree; which is hereby affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, and WARDLAW, CC., concurring.  
Appeal dismissed.

9 Rich. Eq. \*58

\*GEORGE A. ADDISON, and Others, v. EMMA L. ADDISON, and Others.

(Columbia. Nov. and Dec. Term, 1856.)

[Wills. 603.]

Testator devised and bequeathed real and personal estate to trustees, "for the sole benefit of my son, J. A., during his natural life. But if my said son, J. A., should die without leaving any child or children, or representatives of child or children, in that case my will is, that the above property be equally divided between my son, G. A., and my daughter, E. S., or their children, or descendants of child or children." J. A. had a son born after the death of testator, which son survived J. A.:—*Held*, that J. A. took an estate in fee conditional in the realty, by implication, which descended to his son, and that he took an absolute estate in the personalty, which, he having died intestate, was liable, after payment of debts, to distribution between his widow and child.

[Ed. Note.—Cited in *Anderson v. Rhodus*, 12 Rich. Eq. 111; *Dunlap v. Garlington*, 17 S. C. 572; *Shaw v. Erwin*, 41 S. C. 214, 19 S. E. 499; *Robert v. Ellis*, 59 S. C. 161, 162, 37 S. E. 250; *Harkey v. Neville*, 70 S. C. 133, 134, 136, 49 S. E. 218.

For other cases, see Wills, Cent. Dig. § 1352; Dec. Dig. 603.]

[This case is also cited in *Robert v. Ellis*, 59 S. C. 138, 37 S. E. 250, and distinguished therefrom.]

Before Wardlaw, Ch., at Edgefield, June, 1855.

Every thing necessary to a full understanding of this case is contained in the circuit decree, which is as follows:

Wardlaw, Ch. Allen B. Addison made his will July 21, 1849, and thereby disposed of his estate according to the following scheme:

1. He directs that his "just debts, if any, be paid out of the moneys arising out of notes and accounts due" to him.

2. He gives to his wife, Patience, during her natural life, the house and lot where he resided and other lands; as much of his household and kitchen furniture as she should wish; a year's provision for house and farm; and certain slaves and other chattels.

3. He gives to his son George A., in absolute fee, certain real and personal estate.

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\*4. "I give in trust to Dr. Edward J. Mims and George A. Addison, for the sole benefit of my daughter Emeline S. Mims, the wife of Dr. Edward J. Mims, during her natural life, and after her death the child or children or representatives of child or children she may leave, the following property: my plantation on Horn's Creek, &c., my Bellview tract, &c., my storehouse, &c., and the following negro slaves, &c."

5. "I give in trust to George A. Addison and Dr. Edward J. Mims, for the sole benefit of my son Joseph A. Addison during his natural life, the following property, that is, my mill place on Shaw's Creek, &c.; the Allen lot, &c.; that part of the lot I pur-

chased from C. L. Goodwin, &c.; and the following negro slaves, &c.; and the note I hold on said Jos. A. Addison, &c.; and my secretary and book case. But if my said son Jos. A. Addison should die without leaving any child or children or representatives of child or children, in that case my will is, that the above property be equally divided between my son George A. Addison and my daughter Emeline S. Mims, or their children or descendants of child or children, agreeable to the conditions of the 3d and 4th clauses of this will."

6—14. He gives certain legacies to his grand-children and step-grand-children.

15. "It is my will and desire that after my debts are paid out of the moneys due me that balance and for sale of crop be equally divided between my wife and my three children before named, share and share alike, and after my wife takes what furniture she wants the balance of my [furniture?] not mentioned be divided equally between my three children before named by lot or sale as they may agree upon."

16. "It is my will and desire that after

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the death of my \*wife the property left her during her natural life be equally divided between my three children, agreeable to the conditions of the third, fourth and fifth clauses of this my will—that the negroes, land and lots be appraised and divided by lot, as I do not wish the negroes exposed to sale for division."

17. "I do hereby appoint my wife Patience Addison my executrix, and George A. Addison and Dr. Edward J. Mims my executors, to this my last will and testament."

The testator died May 24, 1850, and soon afterwards George A. Addison and Dr. Edward J. Mims proved the will and took upon themselves the execution thereof and of the trusts therein declared. The wife and three children named in the will survived the testator, and they would have been the distributees of his estate, if he had died intestate.

Joseph A. Addison died intestate November, 1854, leaving a widow Emma L. Addison and a son Allen B., born January 6, 1851, entitled to his estate under the statute of distributions: And George A. Addison has become administrator of his goods and credits.

The subject of controversy is the estate given by the will to Joseph A. Addison; and all the parties in interest are regularly before the Court. The estate itself mentioned in fifth clause, has been sold by the order of the Court under the proceedings in this case; and the litigation now is as to the proceeds of sale. Beyond the gift for life to said Jos. A., the testator has made no express disposition of the remnant of this estate, except on a contingency which has not happened of the son's dying without leaving a child or

representative of child. There is no gift to the descendants of this son, as in the case of the daughter; nor is there any general residuary clause, for the 15th and 16th clauses of the will include only the property particularly enumerated.

If Joseph A. had died "without leaving any child or children or representatives of child

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or children," and a litigation \*had arisen between the devisees over and those who might claim that the remainder was not disposed of by will, the validity of the gift over might have been reasonably affirmed. The terms describing the contingency on which the estate was to go over would probably be construed in such a controversy to import dying without issue living at the death of the first taker, and not dying without issue generally. The word leave would, of itself, have this restrictive operation on dying without issue as to personality, and although not so cogent singly as to realty, (*Forth v. Chapman*, 1 P. Wm. 665; *Mazyck v. Vanderhorst*, Bail. Eq. 48,) yet when used in connection with other words naturally meaning descendants of the first generation and other issue representing children by the statute of distributions, leave would retain its proper signification and be adequate as to any estate to restrict the failure of issue within the recognized limits of entailment. 2 Jarm. Wills, 113, 114; *Matthis v. Hammond*, 6 Rich. Eq. 399. But as Joseph left a child the event upon which the estate was to go over did not occur, and the contingent devisees over take no title. It was the manifest purpose of testator that they should not take so long as descendants representing Joseph were in existence. *Andree v. Ward*, 1 Russ. 260.

No estate, however, is limited to these descendants or any of them by the testator; and authority seems to forbid the raising of an estate by implication in *Allen B.*, the son of Joseph, as a purchaser. *Carr v. Porter*, 1 McC. Eq. 78; *McLure v. Young*, 3 Rich. Eq. 578; 1 Jarm. Wills, 500; 2 Fonb. 62. The case of *Green v. Ward*, 1 Russ. 262, is analogous to the present in several points. There a testator bequeathed certain stock to trustees on trust to pay the interest to his son for life, and if he married a woman with a fortune of one thousand pounds to settle the stock upon her and the issue of the marriage; but in case of the son's decease, leaving no issue of his body lawfully begotten, the testator gave the stock to other persons, and bequeathed the residue of his

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estate to \*W. The son married a woman who had not the fortune required by the will, and he died leaving issue of the marriage. Lord Gifford decided that the life estate of the son was not enlarged by implication into a quasi estate tail—that the issue of the marriage took nothing—that the gift over failed and that the residuary legatee was



entitled to the stock after the son's death. On the point immediately under our consideration, the M. R. says: "If a sum of money is bequeathed to A. B. for life, and if he dies leaving no issue, then to another, that does not raise any implication in favor of the issue of A. B.; though if he dies leaving issue, the gift over does not take effect." It seems to impute a preposterous intention to a testator to hold that he confines the interest of the first taker to a life estate and gives the estate to the devisee over if there be no child of the first taker, and yet if there be a child gives nothing to the child or its parent. To avoid this incongruity, Sir Thomas Plumer, in *Ex parte Rodgers*, 2 Mad. 449 (576) raised a gift to children upon a construction seemingly strained. There a testator, who had by his will bequeathed absolutely one thousand pounds to his niece, by a codicil recited his purpose to withdraw the legacy from the disposal of herself and husband, in consequence of her indiscreet marriage, and directed his executors to secure to her the annual interest of the one thousand pounds, independently of her husband, by placing that sum in the public funds in trust for her, she to enjoy the interest or dividends during her natural life; and at her decease without child or children, the principal and interest to be equally divided among such of her sisters as should be living at her death. The V. C. felt justified in saying the children of the niece were entitled to the legacy. It will be observed that the estate of the niece absolute by the will is no further restricted by the codicil than by changing it into a trust, and thus preventing herself or her husband from disposing of the capital, which is left to go to her children, if she had any, as her next of

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kin. This case \*states some of the doctrines of implication unguardedly; as, that a devise of an estate to B. upon the death of A, gives a life estate to A.; which is not true if A. be a stranger. If my confidence in this case were greater than it is, I could not venture upon its authority to overrule what seems to be the settled doctrine of this State. If the testator here, who died before his son Joseph had a child, had foreseen the state of things existing at the son's death, it is probable that he would have expressly provided for that state of things. But the Court has no authority to make a will for him, nor to conjecture his intention not expressed, and is limited to the expounding of his will according to the words he has used. Where he designed the issue of his children to take by his gift, as in the case of *Mrs. Mims'* children, he has endeavored to express his purpose, and has not left the matter to implication. I am unable to find the grounds upon which an estate must be necessarily implied in favor of the son of Joseph. In my judgment he takes nothing under the

will, and can claim only through his father.

If the gift over be after an indefinite failure of issue, the estate of the first taker might have been enlarged by implication into a fee conditional in the lands and into an absolute estate in the personalty, as the only mode by which the issue can possibly take benefit. This construction is made to consummate the testator's intention, that the legatees over shall not enjoy the estate until the whole line of issue of the first taker be extinct; and that those claiming by intestacy shall take nothing where the will can operate. "From the fact of making a will, in the absence of any declaration therein to the contrary, the intention of the testator is manifested to prefer his legatees who can take in any event to those whom the law appoints to the succession in the absence of a will." 6 Rich. Eq. 400. In some early cases (as in *Bampfild v. Popham*, 1 P. Wm. 54,) it was held, that implication was never to be made in contradiction of an express limita-

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tion, \*and consequently that an express estate for life could not be enlarged into an estate tail by implication, but this view has been overruled in numerous cases, and now an estate tail is implied in the first taker from words devising the estate over if he die without issue, although the devise to him be expressly for life. *Langley v. Baldwin*, 1 P. Wms. 759; *Stanley v. Leonard*, 1 Eden. 87; *Atty. Gen. v. Sutton*, 3 Br. P. C. 75; *Bean v. Halley*, 8 T. R. 5. In *Knight v. Ellis*, 2 Br. C. C. 578, (which is recognised on this point in *Carr v. Porter*, 1 McC. Eq. 75,) Lord Thurlow puts the case of a devise to A. for life and after the failure of his issue to B., and proceeds: "What is the Court to do? It is clear that a life interest only is given to A. It is clear that no benefit is given to B. while there is any issue of A. The consequence is, that as no interest springs to B. and no express estate is given after the death of A., the intermediate interest must be undisposed of, unless A. be considered as taking for the benefit of his issue as well as of himself; and as the words in this case are capable of such amplification, the Court naturally implies an intention in the testator that A. should so take, that the property might be transmissible through him to his issue, and he is therefore considered as taking an estate tail, which would descend on his issue. Now an estate in chattels is not transmissible to the issue in the same manner as real estate, nor capable of any kind of descent; and therefore an estate in chattels so given, from the necessity of the thing, gives the whole interest to the first taker; but if the testator gives the fund expressly to the issue," there is no room for implication and they take as purchasers. The same observations are repeated in substance in *Atty. Gen. v. Bayley*, 2 Br. C. C. 558. In *Simmons v. Sim-*

mons, 8 Sim. 22 (11 E. C. C. 303,) testator gave all his real and personal estate in trust for the separate use of his daughter for life; "at her decease she shall be at liberty to will the same to her issue, as she may think fit; but in case of her dying with-

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out issue, I wish \*the property to go to my dear brother and sister G. and A. for their natural lives share and share alike: In the event of my brother G's death, prior to the death of my daughter, then to the children of said G. share and share alike." V. C. Shadwell held that the daughter took an estate tail in the lands and an absolute interest in the personalty disposed of in same clause. In *Machell v. Weeding*, 8 Sim. 4, (11 E. C. C. 296,) the devise was to testator's son J. for life, "but if he shall die without issue, not leaving any children," then land to be sold and the proceeds divided among three other sons, and if any of them should die before J. their shares to be divided among their children. Sir L. Shadwell interpreted, "die without issue, not leaving any children," as descriptive merely of dying without issue, and held that J. took an estate tail. He said, "I consider it to be a settled point, that whether an estate be given in fee or for life or generally without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue, the devisee will take an estate tail."

In his treatise on Wills, 1 vol. 490, Mr. Jarman says, "where the devise over is to take effect on the event of the prior devisee dying without issue, living at his death, it has no effect in enlarging the prior estate for life into an estate tail, (*Lethuanllier v. Tracy*, 3 Atk. 793,) as the event described is not that by which an estate tail is necessarily extinguished, for such an estate determines on the failure of issue at any time. The only question in such case would be whether the words would raise an estate by implication in the issue living at the death." In the case of *Green v. Ward*, above cited, Lord Gifford says: "When a bequest is to A. B. for life, and on failure of his issue generally remainder over, it has been held that A. B. will take an estate tail; but that is altogether different from a case in which the property is given to A. B. for life with a limitation over, in case he should die without leaving issue at the time of his death:

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and I have \*been unable to find any instance in which a bequest like that which I have mentioned, has been held to give A. B. an estate tail. The gift over is valid, but there is no estate tail in the first taker."

It follows, that if in this litigation we must construe the words of the will describing the event on which the estate was to go over as equivalent to dying without issue living at the death of Joseph, his life estate

cannot be enlarged by implication. The consequence would be, in the event which has happened of the primary legatee's leaving issue, that the property is undisposed of, as it cannot go to himself, his issue, or the ulterior legatees; and that the testator has miscarried in the attempt to dispose of his whole estate. In the case of *Green v. Ward*, above mentioned, the clause in dispute disposed of personalty only; the will contained a general residuary clause, and the contest was between the issue of the first taker and the residuary legatee; in this case, the will disposes of real and personal estate together by the same terms in one clause, and it has no general residuary clause, and the contest is between a legatee and those who claim independently of the will. I have already expressed the opinion that the words of the gift over here might have been construed, if the event had been different, to pass the estate to the ulterior legatees; but no intimation has been given that this must be the inflexible construction of the words, where the effect would be to pass the estate from all the express objects of testator's bounty. We may look to the state of things at the making of the will to ascertain the intention of the testator, and, although with much caution (2 Jarm. 71,) to subsequent events as exhibiting what was probable and probably contemplated by the testator, at the time of devise; and we may give to the same words different interpretations under different circumstances in fulfilment of the same general intention of the testator. *Schoppert v. Gillam*, 6 Rich. Eq. 83. In *Stone v. Maule*,

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2 E. C. R. 513, \*Sir L. Shadwell, in discussing the effect of the words without having any child or children seems to admit that the construction of them is flexible. "Why am I to put a construction on these words which they do not strictly bear, for the purpose of defeating the intention of testator? The question is not what is the effect of words creating an estate tail, but of words making a gift over." In *Packham v. Gregory*, 4 Hare, 396, Sir J. Wigram remarks, "the consequence of disinheriting issue is one ground on which the Court seeks, if it can, to avoid a construction attended with it." Grand-children are permitted to take under a devise to children where there are no children, but not if there be children. *Drayton v. Drayton*, 1 Des. 331; *Deveaux v. Barnwell*, Ib. 499; *Smith's case*, 2 Des. 123 n; *Ruff v. Rutherford*, Bail. Eq. 9. The word children is ordinarily a word of purchase, but is not unfrequently a word of limitation. *Johnson v. Johnson*, McMul. Eq. 345, where land and slaves were given to M. and her children after her, by the same clause, is a strong instance. If land be devised to A. and his children, and he has no children at the time of the devise, he takes an estate tail. *Wild's case*, 6 Co. 17; *Reeder v. Spear-*



man, 6 Rich. Eq. 92. In *Wood v. Baron*, 1 East, 239, under a devise of testator's whole estate, real and personal, to his daughter A., "who shall hold and enjoy the same as a place of inheritance to her and her children or her issue forever, and if she should die leaving no child or children, or if her children should die without issue," then over; the Court of King's Bench held that A. took an estate tail, though she had issue at the time of the devise and of the testator's death. In *Doe v. Wabber*, 1 Barn. and Ald. 713, Lord Ellenborough discussing the effect of the words in the gift over "die and leave no child or children," disclaimed any stress on the word children as distinguished from issue, as where the intent required it, it had been held to include all descendants, mediate and immediate. In *Raggett v. Beatty*, 2 Moo.

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and *\*Pay*, 512, testator devised a messuage to G., and in case he should die and leave no child lawfully begotten of his body, then over, and it was held G. took an estate tail. The same construction of the words, "die without leaving any child or children," was adopted in *Blesard v. Simpson*, 42 E. C. L. R. 483, which was an express case of fee conditional. See also *Byfield's case* cited in *King v. Snelling*, 1 Vent. 231; *Sonday's case*, 9 Co. 127; *Robinson v. Robinson*, 1 Bur. 38; 3 Br. P. C. 180; *Dansey v. Griffiths*; 4 Man. & S. 62, *Mackell v. Weeding*; *Simmons v. Simmons*, *supra*. These cases seem to justify the Court in ruling that the words employed in the gift over here, have the effect of giving to Joseph the immediate donee an estate in fee conditional in the lands, which estate has been in England converted into an estate tail by the statute *de donis* not of force with us. The result of my opinion on this point is, that Allen B. son of Joseph takes the land by descent, according to the form of the gift, subject of course to any charges and incumbrances thereon created by his father. *Izard v. Izard*, Bail. Eq. 228.

Where personal estate is bequeathed in language which if applied to real estate would create an estate tail either expressly or by implication, it vests absolutely in the first taker. *Garth v. Baldwin*, 2 Ves. Sen. 646; *Henry v. Felder*, 2 McC. Eq. 323. This rule is subject to an exception in estates tail by implication, where the words expressing failure of issue, receive different construction, as is the case with the word *leave*, in reference to real and personal estate. Lord *Thurlow* in *Bigge v. Bensley*, 1 B. C. C. 187, Lord *Kenyon* in *Porter v. Bradley*, 3 D. & E. 146, and Attorney General *Bailey* in a note to *Mazyck v. Vanderhorst*, have questioned the soundness of the distinction as to the force of the term *leave*, when applied to real or personal estate, but it is firmly established. Here however the question is between giving some effect to the will and declaring an intestacy; and the personal estate is dis-

posed of in the same clause with the lands.

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\*Lord Eldon said in *Genery v. Fitzgerald*, Jac. 468, (2 E. C. R. 218,) "when personal estate is given to A. at twenty-one, that will carry the intermediate interest; if real estate be given at a future period that will not carry the intermediate profits; but when a testator mixes up real and personal estate in the same clause, the question must be whether he does not show an intention that the same rule shall operate on both" and he decreed that rents as well as interest passed. The same doctrine was even more authoritatively declared after much discussion and conflicting decisions, in *Ackers v. Phipps*, 9 Bligh N. S. 431. See also *Johnson v. Johnson*, McMul. Eq. 345; *Gibson v. Mountford*, 1 Ves. S. 490; *Glanville v. Glanville*, 2 Meri. 28; *Simmons v. Simmons*, 11 E. C. R. 303. The words leaving issue do not necessarily import issue living at the death, or they would have that meaning when applied to real estate; and I conclude, in prevention of intestacy, not to allow to them in this case the effect of impairing an implication of an absolute estate in the personalty in the first taker. My judgment is that the personal estate given primarily to Joseph A. Addison is distributable, after the payment of his debts, one-third to his widow and two-thirds to his son.

The estate real and personal given to Joseph A. Addison, after the death of his mother is governed by the same principles as the estate immediately given to him.

I am not quite firm in the conclusions announced in this opinion, and I desire that the parties take the judgment of the Court of Appeals.

Let this opinion stand for a decree, with leave to the parties to apply at the foot for further orders in execution thereof.

George A. Addison and others appealed and moved this Court to reverse the Circuit decree.

Because his Honor erred in ruling that

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Joseph A. Addison \*took a fee conditional in the realty, and an absolute estate in personalty, under the will of his father, Allen B. Addison. Whereas, it is respectfully submitted, that the said Joseph A. only took a life estate under the said will, and the remainder undisposed of, is distributable among the heirs of the said Allen B., as estate of which he died intestate.

Allen B. Addison also appealed on the grounds:

That the decree is contrary to the intention of the testator, whose purpose was, to make a gift to the child or children of his son Joseph A. Addison, of all the property devised and bequeathed to the latter, and to exclude altogether from any portion of the said estate, the defendant, Emma L. Addison.

The defendant, Emma L. Addison, appealed on the grounds:

That under the will of Allen B. Addison, deceased, his son Joseph A. Addison, took in the lands thereby devised to him an estate in fee simple absolute, and not an estate in fee simple conditional.

Spann, Magrath, for George A. Addison.  
Moragne, for Allen B. Addison.  
Carroll, for Emma L. Addison.

PER CURIAM. We concur in the decree of the Chancellor; and it is ordered that the same be affirmed, and the appeal dismissed.

DUNKIN, DARGAN, and WARDLAW, CC., concurring.

JOHNSTON, Ch., dubitante.  
Appeal dismissed.

9 Rich. Eq. \*71

\*WM. H. GRIFFIN, Ex'or. v. M. L. BONHAM, Adm'r.

(Columbia. Nov. and Dec. Term, 1856.)

[*Executors and Administrators* 495.]

Where an executor is indebted to the testator upon notes, such notes are considered as paid as soon as they fall due, and the executor is entitled to commissions upon them as for so much money received.

[Ed. Note.—Cited in *Clowney v. Cathcart*, 2 S. C. 402, 403; *Jacobs v. Woodside*, 6 S. C. 499; *Charles v. Jacobs*, 9 S. C. 298, 300; *Black v. White*, 13 S. C. 42; *Todd v. Davenport*, 22 S. C. 150; *Chick v. Farr*, 31 S. C. 470, 10 S. E. 176, 390.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2100; Dec. Dig. 495.]

[*Executors and Administrators* 495.]

Where there are mutually subsisting demands between the executor and testator due at the same time, it is only upon any balance due testator that commissions can be charged by the executor. Where, however, the debts fall due at different times during the period of administration the rule is, it seems, different.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2100; Dec. Dig. 495.]

[*Executors and Administrators* 495.]

An executor is entitled to commissions upon a debt due by himself to his testator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2089-2106, 2108; Dec. Dig. 495.]

[*Executors and Administrators* 499.]

Where at the death of an executor there is a balance due upon his accounts as executor, his administrator, on making a settlement with the surviving executor, cannot charge commissions, for the benefit of the estate of the deceased executor, upon that balance or upon interest which has accrued thereon.

[Ed. Note.—Cited in *Clowney v. Cathcart*, 2 S. C. 403.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2130; Dec. Dig. 499.]

[*Executors and Administrators* 494.]

Where an agent sells property, and afterwards qualifies as executor of the will of his

principal, he cannot charge commissions upon the sales.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2084; Dec. Dig. 494.]

[*Executors and Administrators* 104; *Interest* 49.]

Upon a balance due by an executor at his death, interest will not be charged until there is some one authorized to receive it.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 423; Dec. Dig. 104; *Interest*, Cent. Dig. § 117; Dec. Dig. 49.]

[This case is also cited in *Ashley v. Holman*, 15 S. C. 106, as to the nature of the proceeding.]

Before Dunkin, Ch., at Edgefield, June, 1856.

This case, before the Court, on exceptions to the commissioner's report, which is as follows:

Richard Griffin died the 20th Nov., 1850, leaving his will bearing date the 4th Nov., 1847, and a codicil thereto dated 18th Nov., 1849. N. L. Griffin and Wm. Henry Griffin, two of his sons, were nominated executors. He left surviving him his widow, Mrs. Rebecca Griffin and children, N. L. Griffin, J. F. Griffin, Wm. H. Griffin, Margaret Carwile, wife of Z. W. Carwile, and Eugenia Leland, wife of Dr. Leland.

On the 12th Nov. 1850, the testator in daily expectation of death, divided among his widow and children all his negroes, adjusted all advancements, as well as inequalities in

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\*said partition. At the same time he sold to his son N. L. Griffin, his Bullock place on which he resided, at ten thousand dollars, secured by two single bills of five thousand dollars each, dated 15th Nov. 1850, and payable to said Richard Griffin, on the 1st January, 1852 and 1853. The remainder of his estate (personalty altogether) except so much as was allotted to Mrs. Rebecca Griffin, and a portion thereof to the said N. L. Griffin in connection with the sale of the land, and sixteen bales of cotton which were afterwards ginned and sold by the said N. L. Griffin, was sold on the 12th Nov., 1850, on a credit of twelve months, purchase money secured by sealed notes of the purchasers, payable to said Richard Griffin, twelve months after date. The sale was conducted chiefly by the said N. L. Griffin, who received the notes and retained them. The testator was too feeble to give his personal attention.

The said N. L. Griffin held a single bill on the testator for three thousand four hundred and forty dollars and nineteen cents, dated on the        day of        184   , due 25th October, 1847, credited Nov. 2d, 1848, with one hundred and fifty-five dollars and nineteen cents; October 18th, 1849, with one hundred and ninety-nine dollars and fifty cents, and August 1st, 1850, with one hundred dollars. Also another single bill due 28th



January, 1850, for seventy dollars and ninety-seven cents, credited 28th October, 1850, with sixty-eight dollars and six cents. These single bills are still in the hands of M. L. Bonham.

The said N. L. Griffin, alone qualified as executor 28th January, 1851, and rendered to the Ordinary a schedule of the choses of his testator including the two notes against himself—on the 21st February, 1852, made a return of his transactions as executor, for the year 1851, and died intestate February 17th, 1853. The two notes against himself had upon them no marks, or entry, or memorandum; nor in said N. L. Griffin's returns for

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1851, was there any mention of them \*or either of them denoting that they had been paid or were regarded by him as paid. On the day of March, 1853, M. L. Bonham was appointed his administrator, and on the 18th March, 1853, W. H. Griffin qualified as executor under the will of said Richard Griffin. On the 19th of the same month, M. L. Bonham turned over to W. H. Griffin, all the sale notes uncollected by his intestate; the two single bills of five thousand dollars each he retained.

The parties disagreeing as to the settlement of their accounts, this suit was instituted, and on the 24th of May, 1856, the parties came before me on reference to adjust the accounts between them.

It was admitted that the said N. L. Griffin was about to make a settlement of his father's estate in which the unsettled notes in his hands were to be received by distributees as cash; but I ruled that he was not entitled as contended by defendant, to commissions on so much as was collected by plaintiff as executor. It is not deemed necessary to set forth the proofs of the items of the account on either side as in respect to them, there is no controversy whatever. The following statement of the accounts I submit as just. [This statement is omitted.]

To the commissioner's report the plaintiff filed the following exceptions:—

1. The two notes under seal against N. L. Griffin were among the specific securities and choses that came to his hands as executor, and no act or declaration having proceeded from him indicating that they were treated or regarded by him as to any extent paid, those notes were not distinguishable from other like securities against other persons in his hands as executor at the time of his death, and ought to have been delivered up to the plaintiff as surviving executor to be disposed of in a due course of administration, and it is submitted, that the commissioner has erred in not having framed his report upon the accounts accordingly.

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\*2. So much of the debt of N. L. Griffin to his testator Richard Griffin as was discharged by setting off against the same the

debt from the latter to the former, was never "received" by N. L. Griffin as executor within the meaning of the Act of 1789, and the commissioner has erred therefore in allowing to the defendant commissions upon that sum.

3. The interest that has accrued subsequently to the death of N. L. Griffin, upon the sum due by him at that date to his testator's estate, cannot be regarded as having been "received" by him "in the course of his administration" as executor, and the defendant, his administrator, is therefore entitled to no commissions in respect of such interest.

4. The moneys received by N. L. Griffin in 1852, six hundred and fifty-three dollars and twenty-five cents, should have been added to the sum set down as the annual balance on the first day of January of that year, and from the aggregate should have been deducted the sum paid by him in the course of the year, one thousand four hundred and sixty-nine dollars and fifteen cents, and upon the balance interest for that year should have been computed, and the report is erroneous in being framed otherwise.

The defendant also filed the following exceptions:

1. The commissioner does not allow the estate of N. L. Griffin, deceased, commissions on the whole amount of the sale bill or the sale notes, although said N. L. Griffin performed the duties of executor at the time of the sale, and till his death.

2. The commissioner should have allowed commissions on all moneys paid to Wm. H. Griffin, executor, by the legal representative of N. L. Griffin; and also on the bonds or sealed notes turned over, inasmuch as N. L. Griffin, deceased, omitted to collect said sale

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notes, for the reason alone that \*they were to be treated as cash by the distributees in the settlement of the estate, about to take place when N. L. Griffin died.

3. That the statement of the accounts should have been made as though there had been a continuous administration; and the payments of each year, by Bonham, administrator, to W. H. Griffin, executor, should have been deducted from the annual balance at the beginning of such year, before reckoning the interest for that year. And in no event should interest be counted for the month intervening between the death of N. L. Griffin and the qualifying of W. H. Griffin as executor, to wit: from 17th February, 1853, to 19th March, 1853.

After hearing the report and exceptions and arguments thereon, his Honor ordered and decreed that the several exceptions be overruled for the reasons stated in the commissioner's report, and that the same be confirmed and become the judgment of the Court.

The plaintiff appealed and moved to reverse the decretal order pronounced by the Chancellor, upon the ground—that the plaintiff's exceptions to the commissioner's report

each and all of them should have been sustained, and that the Chancellor has erred in overruling them.

The defendant also appealed, because that the defendant's exceptions to the commissioner's report ought to have been sustained, and that the decretal order of the Chancellor is erroneous for having overruled them.

Carroll, for plaintiff.

Bonham, contra.

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\*The opinion of the Court was delivered by

DARGAN, Ch. This is a bill for an account of the estate of Richard Griffin. The plaintiff is a surviving executor of the decedent; and the defendant is the administrator of Nathan L. Griffin, who was one of the co-executors of the said Richard Griffin.

The accounts were referred to the Commissioner in equity, who, at June Term, 1856, submitted his report. Each party took exceptions to the report, and the case came before the Chancellor to be heard on the report and exceptions. The Chancellor overruled all the exceptions, and confirmed the report. And this is an appeal from that decree, on the same grounds that had been made the grounds of exception to the Commissioner's report. The grounds are various, and I will take them up for consideration seriatim, and in the order in which they are presented in the notice of appeal. And first of the plaintiff's grounds; the first of which is in the following words:

1. "The two notes under seal against N. L. Griffin were among the specific securities, and choses, that came to his hands as executor, and no act or declaration having proceeded from him indicating that they were treated, or regarded by him as to any extent paid, those notes were not distinguishable from other like securities against other persons in his hands as executor at the time of his death, and ought to have been delivered to the plaintiff as surviving executor, to be disposed of in a due course of administration, and it is submitted, that the Commissioner has erred in not having framed his report upon the accounts accordingly."

This ground of appeal, and what I have to remark upon it, requires a preliminary statement to make it intelligible.

The defendant's intestate, N. L. Griffin, was a co-executor with the plaintiff, of the estate of Richard Griffin, and to the time of his decease, was the acting executor. Among the securities belonging to the estate of Rich-

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ard Griffin, which \*came into his hands, were two notes of the said N. L. Griffin to the said Richard Griffin, each for the sum of five thousand dollars, dated (both) 15th November, 1850, and payable one the 1st of January, 1852, and the other 1st January, 1853. The said N. L. Griffin died on the 17th February,

1853, after the maturity of both of the notes. These notes, or more properly speaking, the papers evidencing the amounts due on these notes, were found among the papers of the said N. L. Griffin, after his death, without any mark indicating that they were in the conception of the deceased payor satisfied or paid, and without being embraced in his returns to the Ordinary as cash on account. The ground of appeal which I am considering assumes that these notes should be turned over to the plaintiff as surviving executor of Richard Griffin, as unpaid or unsatisfied securities of his testator's estate, to be by him collected and administered. The fund due on said notes, into whose hands soever it may be considered as having fallen, belongs to the estate of Richard Griffin. The only contest here is as to commissions.

The principle applicable to this state of facts is plain, and well understood. It may be laid down as a rule of universal application, that wherever the character of payor and payee of any debt, or obligation, is blended in the same individual, by operation of law, the debt is paid, and the amount is cash in hand on the accounts of the payee, to the credit of the party entitled to the fund. *Eo instanti*, it is due by the payee, and will be so considered, in every transaction relative to the matter.

As a consequence of this principle, whenever an executor or administrator, is indebted to his testator, or intestate, the amount for which he is indebted, and then due, will be considered cash in hand at the moment when he assumes upon himself the administration. If the debt be not due at the commencement of the administration, it will be cash on account, to the credit of the estate,

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whenever it falls due in the course of \*the administration. Applying this principle to the facts of this case, it cannot fail to be perceived that the amount due on the notes of the deceased executor, N. L. Griffin, to his testator, Richard Griffin, must be considered as cash in his hands to the credit of his testator's estate, when those notes became severally due, which was in the life time of the said N. L. Griffin, and in the course of his administration. The surviving executor, therefore, had no right to require that these satisfied notes (*functi officio*, as securities) should be turned over to him. All unpaid securities and the balance of cash in the hands of the said N. L. Griffin were transferable to the surviving executor. This exception to the report of the Commissioner was properly overruled, and this ground of appeal is dismissed.

The second ground of appeal on the part of the plaintiff, is, that "so much of the debt of N. L. Griffin to his testator, Richard Griffin, as was discharged by setting off against the same the debt from the latter to the former was never "received" by N. L. Griffin



as executor, within the meaning of the Act of 1789, and the Commissioner has erred therefore in allowing to the defendant commissions upon that sum."

N. L. Griffin was indebted to his testator in the sum of ten thousand dollars in the manner already stated. He also was indebted to his testator in several smaller sums due at his death. He also held a single bill against his testator for three thousand four hundred and forty dollars and nineteen cents, due 25th October, 1849, with sundry small payments endorsed thereon. The plaintiff contends that it is only the balance due by the testator to the executor on a settlement of their mutual demands, that can be considered as having been received by the executor, and upon which he would be entitled to commissions as upon money received.

The principle assumed in this ground is correct. If there be mutually subsisting demands between the testator and his executor at the death of the former, or falling due at

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the same time, in the course of the administration, these mutual debts satisfy each other, in the way of discount and by operation of law in toto or pro tanto. It is only the balance due the testator on such supposed settlement that the executor can be considered as having received, and it is only on such balance that he would be entitled to charge commissions. For illustration: suppose that in this case the testator and his executor were mutually indebted to each other, at the death of the former, in the sum of ten thousand dollars. In this case nothing would be due on either side, and there would be nothing received by the executor upon which his right to commissions could attach; and where the account did not exactly balance, as in the present case, the rule would operate pro tanto as far as the mutual indebtedness existed. But there would be some difficulty in applying this rule where the indebtedness was not mutual as to time of payment. If, as in this case, the debt due by the testator to the executor was due presently, and that by the latter to the former was due at a future period, the rule will apply or not according to circumstances. In such case, the executor is not bound to wait until his own debt to the testator falls due, but he may retain for the satisfaction of his debt out of the first or any assets that he may realize. If in this way, the debt due the executor by the testator is satisfied before that due by the former to the latter falls due, then the debt to the testator, when due and payable, will be considered as money received by the executor in the course of administration. In this case we have not sufficient information upon the face of the brief to ascertain how, upon the question here made, and the principles above stated, the accounts should be balanced and adjusted. We are not informed whether the debt due by the

testator to the executor was paid by discounting the debt due by the latter to the former, or by funds received before said debt became due. This ground of appeal does not admit of any practical decision for the want

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of information which should have been furnished by the appellant. The appeal is in this respect overruled, and the decree affirmed.

Under this ground of appeal a question was made, whether an executor was entitled to commissions as for receiving a debt due by himself to his testator. I think by a fair construction of the Act of 1789 that he is so entitled. The Act in making a provision for two and a half per cent. commissions to the executor for receiving, in language which would seem to embrace every case of receiving, or being charged as having received, by way of exception, and specifically, inhibits the allowance of commissions to the executor for retaining assets in his hands for the payment of a debt due by the testator to himself; by which an executor cannot charge commissions for paying to himself. *Expressio unius, exclusio alterius*. A fair interpretation of the Act warrants the allowance of commissions to an executor on his own debt to his testator, whenever the same is considered cash in his hands on the presumptions of law.

But it is urged that this ground of appeal is not taken properly and with distinctness. On the part of the appellant it was contended that it was embraced in the second ground of appeal, which has been just disposed of. It would be a strained construction which would consider it to be so embraced. At all events, as that ground of appeal has been overruled for the want of proper and sufficient information, this as an appendage must go overboard with it.

The plaintiff's third ground of appeal is that "the interest that has accrued subsequently to the death of N. L. Griffin upon the sum due by him at that date to his testator's estate cannot be regarded as having been received by him in the course of his administration, or in his character as executor, and the defendant, his administrator, is therefore entitled to no commissions in respect to such interest."

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\*Between the surviving executor of Richard Griffin, and the administrator of the deceased executor, there was a settlement in regard to the assets that had come into the hands of the deceased executor. On the balance due by the said deceased executor, interest was charged, and such balance with the interest was paid by the defendant, his administrator, to the surviving executor of Richard Griffin. This exception is a negation of the right of the administrator of the deceased executor, to charge commissions against the estate of Richard Griffin for receiving such interest. The exception is well

taken. This interest was not money received by him in the course of his administration. It was interest which had accrued on a debt due by him. This ground of appeal is sustained.

The plaintiff's fourth ground of appeal is "that the moneys received by N. L. Griffin in 1852, (six hundred and fifty-three dollars and twenty-five cents,) should have been added to the sum set down as the annual balance on the first day of January of that year, and from the aggregate should have been deducted the sum paid by him in the course of that year, which was one thousand four hundred and sixty-nine dollars and ninety-five cents, and upon the balance, interest for that year should have been computed; and the report is erroneous in being framed otherwise." The proposition involved in this ground of appeal, presented in a form more abstract and intelligible, may be stated thus: that in stating the accounts of an executor, the payments of a given year should be presumed to have been made from the receipts of the same year; leaving where the receipts and disbursements are equal, the whole balance against the executor, of the preceding year, to draw interest for the succeeding year; and that when the receipts and disbursements of the year are not equal, that the rule should operate *pro tanto*. Some of the language of the Court in *Baker v. Lafitte*, 4 Rich. Eq. 397, seems to give counte-

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nance to this proposition. But a fair interpretation of what was said in this case, leads to the contrary conclusion. The Court did not mean to overthrow the established rules upon this subject, then considered as settled, and so well understood; but merely to say, that those rules would not be sternly and inflexibly applied to every case, and standing as general rules, they would be made to yield to meet the equity of the case. A statement and account by these rules is merely an approximation to exactitude. Their operation is sometimes more, and sometimes less, favorable to the executor or to the estate. Whenever their operation is against the manifest equity of the case, the rules give way, and the accounts are adjusted on the peculiar equities of the case. This was what was meant to be decided in *Baker v. Lafitte*.

This is not one of those exceptional cases, which is to be withdrawn from the operation of the general rule. There is no equity forbidding its application. This ground of appeal is dismissed, and the circuit decree is affirmed in this respect.

I come now to the consideration of the defendant's grounds of appeal, the first of which is because "the commissioner did not allow the estate of N. L. Griffin commissions on the whole amount of the sale bill, or sale notes, although said N. L. Griffin performed the duties of an executor at the sale and till his death." To a proper understanding of

this, it is necessary to premise, that the testator, Richard Griffin, in view of his approaching death, which he was conscious was near at hand, had a sale of his whole estate or nearly the whole in his lifetime; at which sale, his son N. L. Griffin, afterwards his executor, was the agent. He conducted the sale, delivered the property and took the obligations of the purchasers, all of which were made payable to Richard Griffin, then alive. It is upon the aggregate of this sale, made in the life of the testator, by his son, and agent, afterwards his executor, that the de-

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fendant, in this ground of appeal, demands commissions. The claim is extravagant and unprecedented. This ground of appeal is dismissed.

The defendant's second ground of appeal is as follows: "the commissioner should have allowed commissions on all moneys paid to Wm. H. Griffin, executor, by the legal representative of N. L. Griffin; and also on the bonds and sealed notes turned over, inasmuch as N. L. Griffin, deceased, omitted to collect said notes, for the reason alone, that they were to be treated as cash by the distributees in the settlement of the estate, about to take place when N. L. Griffin died." The money paid over to Wm. H. Griffin, the surviving executor, by the legal representative of N. L. Griffin, the deceased executor, was not paid out in the course of his administration. It was paid as a debt due by his intestate; upon which he is entitled to charge commissions against the estate of his intestate, but not against the estate of Richard Griffin, his intestate's testator. See *ex parte Witherspoon*, 3 Rich. Eq. 13. *Floyd v. Floyd*, May term, 1856, (not yet reported.) This ground of appeal is unfounded and is hereby dismissed.

The defendant's third ground of appeal is in these words: "That the statement of the accounts should have been made as though there had been a continuous administration; and the payments of each year by Bonham, administrator, to W. H. Griffin, executor, should have been deducted from the annual balance at the beginning of such year before reckoning the interest for that year. And in no event should interest be computed for the month intervening between the death of N. L. Griffin, and the qualifying of W. H. Griffin as executor, to wit: from the 17th February, 1853 to 19th of March, 1853." The first part of this ground of appeal I do not comprehend, and I see no reason why the accounts should be stated as if there had been a continuous administration. But when the appellant says, that the estate of N. L. Griffin should not be charged with interest

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on the balance in his hands from his death on the 17th February, 1853, until his successor in the administration qualified, which was on the 19th March of the same year, he



asserts, a correct principle. For it has been decided, that interest does not accrue upon a debt when there is no person legally qualified to receive it.

This part of the exception is sustained.

It is ordered and decreed that the circuit decree be modified so as to conform with this decree; and that the appeals except as herein sustained be dismissed, and that in all other respects the circuit decree be affirmed.

It is further ordered and decreed, that the commissioner do correct his report as to interest and commissions according to the principles of this decree. In all other respects, the accounts are to stand as reported.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.

Decree modified.

### 9 Rich. Eq. \*85

\*L. G. PARKS and Wife, and Others, v. W. P. NOBLE, and Others.

(Columbia, Nov. and Dec. Term, 1856.)

[*Husband and Wife* ⇐120.]

In pursuance of an ante-nuptial agreement, husband and wife conveyed certain personalty to a trustee for the separate use of wife; and, on certain contingencies, at her death for her issue, and agreed that a certain tract of land should be settled upon the same trusts, and in the meantime that they should have power to sell the same, and lay out the proceeds on the same trusts as were therein declared concerning the personalty. Husband afterwards sold the land and received the purchase money, though the title was made by the trustee:—*Held*, that husband was an express trustee to re-invest, or at any rate bailee of the proceeds and agent to re-invest, and in neither capacity was entitled to the protection of the statute of limitations against the claim of the issue.

[Ed. Note. —For other cases, see *Husband and Wife*, Cent. Dig. § 432; Dec. Dig. ⇐120.]

Before Dunkin, Ch., at Abbeville, June, 1856.

Dunkin, Ch. This cause was heard upon the commissioner's report, and exceptions thereto. The general statement is so well and fully presented by the report that it is deemed necessary to do no more than consider the questions which arise upon the exceptions. The defendants' first exception is overruled, for the reasons stated by the commissioner. Bentley's deed would inure to different uses from those declared in the marriage settlement, and that of the commissioner's in bankruptcy, for the Fort Hannah tract was to Alexander Houston absolutely. The second exception presents the question, whether the husband is accountable for interest from 1837, when the land was sold, or from 26th November, 1843, when his wife died. He is no more responsible for interest from 1837, than he is for the rents and profits from 1826. (Clancey, 169, 170)—*Dulbias v. Dulbias*, 16 Ves. 116. It is to be presumed they

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were applied to \*the separate use of the wife during the coverture. But, if they were not, the plaintiffs would have no right to demand an account. This would belong to the legal representatives of the wife, and not to her issue. In this respect, the account should be reformed. The plaintiffs prefer their claim under the deed of November, 1826, and by the provisions of that instrument, their right did not accrue until 26th November, 1843.

The third exception of the defendants is more embarrassing. Six of the plaintiffs and one of the defendants (who is an executor,) are children of Jane Houston, deceased. The bill was filed 7th January, 1856. The plea of the statute of limitations was interposed. It appeared that none of the children had attained majority four years before filing the bill, except Augusta G. Parks and C. B. Houston, the former of whom was of age 7th May, 1848, and the latter on 22d January, 1850. It is insisted that the right of these plaintiffs is not affected because of the fiduciary relation of the parties, and so the commissioner has ruled, as well in relation to the hire, &c., of the slaves, as of the proceeds of Social Hall. The argument seems to be that, on the death of Pelot, the trustee under the marriage settlement, Alexander Houston, must be regarded to have held the negroes as trustee. And in a certain sense, the proposition is true. But he is a trustee by implication of law, and not an express trustee. As between trustee and cestui que trust, an express trust, constituted by the acts of the parties themselves, will not be barred by length of time; for in such cases, there is no adverse possession, the possession of the trustee being the possession of the cestui que trust. (Hill on Trustees, 264.) In a note it is said to have been uniformly ruled in the United States, that, in the case of an express continuing trust, the statute of limitations does not begin to run, as against the cestui que trust, and in favor of the trustee, until there has been some open, express denial of the right of the former, or what amounts to an adverse possession on

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the part \*of the latter; and for the same reason, that the possession of the trustee does not usually bar the cestui que trust, the possession of the cestui que trust will not, in general, displace the legal title of the trustee. But where the trust is not express, but is created merely by implication or construction of law, the exception is inapplicable. The doctrine is recognised and the authorities collected in *Joyce v. Gunnels*, 2 Rich. Eq. 260, in which case it was held that a tenant for life, although a trustee, was entitled to the protection of the statute from the time when the right of the remainderman accrued. Upon the death of Mrs. Houston, in November, 1843, the rights of her chil-

dren accrued. Alexander Houston had neither a legal or equitable title to the slaves. He had been entitled in a qualified sense, to the possession during his wife's lifetime; after that time, the law implies that he held in trust for his infant children. While they were under disability, their right was unaffected by time. But on 11th December, 1848, the plaintiff, Lewis L. Parks, the husband of Augusta G., received from Alexander Houston two slaves, valued at one thousand and fifty dollars, and executed to him the following receipt, viz.:

"Received of A. Houston, guardian of his children, viz.: Cornelius, Alexander, Armstrong, Jane, Cornelia, and Alice Houston, the following negroes, Charlotte at seven hundred dollars, Louisa at three hundred and fifty dollars—one thousand and fifty dollars, which is two hundred and seventy-one dollars and forty-five cents over and above my full part of the negroes of the estate of Jane Houston, deceased, this 11th December, 1848, (signed) Lewis L. Parks, in presence of C. B. Houston."

If A. Houston had been an express trustee, this might well be regarded, *prima facie*, as an act discharging his trust in reference to the slaves, and that the statute would run, as to the claim of this plaintiff, Parks, from that time. But in the judgment of the Court,

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it was an implied trust, and the testator, A. Houston, was entitled to the protection of the statute in four years after the removal of the disability of infancy.

C. B. Houston, the witness to the foregoing receipt, became of age in January, 1850, and in December, 1852, received from his father three negroes, valued at nine hundred and fifty dollars, for which he executed a receipt as of his lot. His right to an account for hire was barred two years before the filing of the bill.

Then as to the proceeds of Social Hall. The Court has not been put in possession of a copy of the deed from the trustee, J. F. Pelot, to the purchaser, James Edward Calhoun. In his testimony, Mr. Calhoun stated that it was recorded in the clerk's office, that the purchase money was chiefly paid to the plaintiff, Cornelius B. Houston, who called frequently for it, and who acted as agent for his father—that, except a few hundred dollars, the payments were completed before the end of 1844. So far as the Court can form a judgment from the evidence, John F. Pelot was the express trustee, and was bound to see that the proper re-investments were made. Alexander Houston was also affected with the trust, as he received the money. But none of the reasons seem to apply which should except this obligation from the operation of the statute after the rights of the parties accrued, and their disability was removed. It is not so clear as in the case of the hire of the negroes, and the difficulty

arises, in some measure, from the deficiency or uncertainty of the evidence. But assuming the statute to run against the claims of Parks and wife, and of C. B. Houston for the proceeds of Social Hall, the bar of the statute will not prevail, for reasons hereafter to be stated. The plaintiffs' first exception is overruled for the reasons stated by the commissioner.

Regarding the relation of Alexander Houston as only constructively fiduciary, the Court is of opinion that he is responsible for hire only as a third person would be. The second exception is therefore overruled.

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\*It is stated in the bill, that sometime before the death of Alexander Houston, he caused an informal partition of the slaves, to be made among his seven children, who were entitled to the same; but it is alleged that some of the children were minors at the time. This statement in relation to the partition, is verified by the Exhibit (R.) filed with the answer of the executors. The plaintiff, Lewis G. Parks, had received his share, as appears by the receipt already recited. In 1852, the remaining slaves were divided into six lots, marked and numbered, for the other six children respectively. C. B. Houston took his lot and gave his receipt as before stated. At the same time, A. R. Houston took his lot and gave his receipt. The lot of Armstrong P. Houston was also received, and he subsequently sold one of the slaves at an enhanced price, as appears specially in the report. Lot No. 4 was received by John C. Scott, in right of his wife, and his receipt given a few days after the other receipts. The other two lots, No. 5 for Cornelia, and No. 6 for Alice, who were, and still are, under age, remained in the possession of their father. C. B. Houston who had been in possession of his negroes since 1852, became greatly embarrassed, and his father's estate will suffer in consequence of the testator's suretyship for his son. His negroes are also under levy at the suit of creditors, who insist on their rights, and furthermore suggest that C. B. Houston, though nominally a complainant in the bill, had left the State the year before the bill was filed.

Although this partition was not strictly formal, it is binding upon those who participated in it and have taken the benefit of it, as well as confirmed it by their subsequent conduct. (*Oswald v. Givens*, Rich. Eq. Cases, 326).

The testator by his will, describes these negroes, "as the property and their increase of Jane Houston, deceased," and bequeaths the negroes to the several children according to the partition already made. He also

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makes some special bequests to Cornelia and Alice, not probably of very considerable value. It is not suggested that the negroes



retained for the minors, Cornelia and Alice, are not equal to their proportion, or that their rights have been, in any manner, prejudiced, or that the prayer for a repartition is for their benefit.—There are considerations which might render it disadvantageous to the interests of the minors; and the other parties who are united with them as plaintiffs, have no right to complain. If they have received more than their share, their interests are antagonistic to those of the minors, with whom they are associated as plaintiffs. It will be referred to the proper officer to inquire and report whether it is for the benefit of the minors, Cornelia Houston and Alice Houston, that the partition made, in their behalf, by their father, Alexander Houston, deceased, in his lifetime, and recognised by his will, should be affirmed or set aside by the Court, with leave to report any special matter growing out of the inquiry. The testator, A. Houston, devised the Fort Hannah tract of land, to be equally divided between the seven children (by name) of his last marriage. On the part of the plaintiffs, it is insisted that they are entitled to the benefit of this devise, in addition to their claims against the estate of testator, arising out of the marriage settlement. On the other hand it is maintained that the devise of Fort Hannah must be regarded as a satisfaction pro tanto of the testator's obligation, or a performance pro tanto of his agreement or covenant. The doctrine upon this subject is fully discussed by Mr. Justice Story, in his Equity Jurisprudence, § 1099, et seq. It is deemed necessary here only to repeat the language of Mr. Roper:

"In the discussion of questions of this nature, two descriptions of cases have occurred; the one consists of cases called cases of performance; the other of cases of satisfaction.—The cases considered in this section are cases of the former class, in which there has been a covenant by a husband, to

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leave \*or pay to his wife a sum of money at his death, and he dies intestate, and his wife's distributive share of his personalty, under the statute, is equal to or more than the sum stipulated under the covenant. In that case, he is held to have performed, through the operation of the law, what he had covenanted to do. The other case is where the wife takes a benefit to an equal or greater extent, under her husband's will, to which the same reasoning is not applicable. But although the bequest is not a performance, still it may be inferred that the testator intended it as a satisfaction of the covenant, so as to raise a case of election. Satisfaction, as Sir Thomas Plumer observes, supposes intention: it is something different from the subject of the contract, and substituted for it. And the question always arises, was the thing intended as a substi-

tute for the thing covenanted?—a question entirely of intent. But with respect to performance, the question is, has that identical act, which the party covenanted to do, been done?"

Satisfaction being a question of intent, the Court may look for the evidence of that intent in the conduct of the party as well as to the instrument itself, and even to extrinsic circumstances. In cases of portions secured by marriage settlement, Sir John Leach says: "The rule of the Court is, as in reason, I think, it ought to be, that, if a father makes a provision for a child by a settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *prima facie* to be presumed that he does not mean a double provision. But this presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions, or by extrinsic evidence: where the two provisions are of the same nature, or there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature, the two instruments afford intrinsic evidence of a double provision. But in either case, extrin-

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sic evidence \*is admissible of the real intention of the testator." (Weall v. Rice, 2 Russ. and M., 267; Story Eq., § 1109.) The inquiry is, not whether the provision made by the will of the testator, was a satisfaction of the plaintiffs' claims under the settlement, but whether it was or was not the intention of the testator that the provision made by the will should be so taken; and if so intended by him, does it not, as Mr. Roper puts it, "raise a case of election?" All the circumstances are properly to be taken into consideration in solving this inquiry.

In April, 1837, Social Hall was sold. Between that time and 1844, (inclusive,) the testator received the proceeds which, by his covenant, were to be invested to the same uses. On 10th February, 1838, he purchased the Bentley tract for five hundred dollars, and took a conveyance to the trustee of the settlement. For the reasons heretofore stated, this was not a fulfilment of his covenant even pro tanto, although it cannot be doubted that he so intended, and that he regarded that property as correctly settled. In 1844, he made a further purchase of Fort Hannah for six hundred dollars, from the Commissioners in bankruptcy, but took the title in his own name.

This tract contained six hundred and thirty acres, and it is in evidence that the testator held it, at one time, at three dollars per acre. In August, 1855, the testator's will was executed. To his eight children, by a former marriage, he devises and bequeaths "all his real estate, except the tract of land known as the Fort Hannah tract, then in the possession of Alexander R.

Houston," and several negroes, (by name,) "in addition to what they had already received," and refers to a book kept by him to show that "those children would be all equal." He then proceeds to give and bequeath to his "last set of children," the following negroes, &c., describing those which were under the marriage settlement, and which he distributed among the children ac-

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cording to the previous \*partition. The Fort Hannah tract is then devised to be equally divided between the same children. Various other articles are then bequeathed to the six younger children of the second marriage, and the will concludes, "and what moneys and notes may be on hand, after paying all my debts, to be equally divided between my last named six children, that is to say," &c.

So far as the Court can collect from the instrument itself, as well as from the pleadings and evidence, the testator had thus made a formal disposition of all the tangible property in his possession, except the Bentley tract; the title of which was in the name of the trustee. His moneys, choses in action, &c., were bequeathed to the six children of the second marriage, as above recited. The inquiry then is presented, was it the intention of the testator that the devise of the Fort Hannah tract should be regarded as a satisfaction of what remained due on the sales of Social Hall? Although the deed did not require, in terms, that the re-investment should be in real estate, the testator seems to have regarded that as necessary or proper. He accordingly makes an immediate re-investment (as he supposed,) in the Bentley place for five hundred dollars, and took the deed in the name of the trustee. When he purchased the Fort Hannah place, he took the title in his own name, and not in the name of the trustee. It could, in no view, be therefore properly regarded as an investment for the trust estate. He asked three dollars per acre for this tract of six hundred and thirty acres. Among the witnesses, there is a difference of opinion as to the intrinsic value. But the testator, having failed to re-invest nineteen hundred dollars of his children's money as received from the purchaser of Social Hall, by his will devises to them a tract of land which he valued at nineteen hundred dollars. Although the settlement of November, 1826, was not strictly a marriage portion for the children, much of the reason-

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ing applies as stated by Sir John Leach \*in *Weall v. Rice*, 1 Eng. C. R. 19. The presumption in such case should be against the intention of a double provision. In that case, it was said to afford intrinsic evidence against a double portion, that the provisions in the two instruments were of the same nature. Under the settlement of 1826, the provision was of real estate, and the provision

by the will is of the same character. But, as in that case, a reference to the extrinsic evidence strongly corroborates the inference that the testator, at the making of the will, did not intend a double provision. Having made a deliberate and careful disposition of the whole of his estate, and having manifestly in his contemplation the rights of the plaintiffs under the settlement, he would have left nothing to satisfy them, unless the provision of his will was so intended. In the judgment of the Court, the devise of the Fort Hannah tract was intended as a satisfaction pro tanto of the obligation of the testator in reference to the proceeds of Social Hall, so as to make a case of election. The parties having, by their bill, expressed their choice to abide by their claim under the settlement of 1826, can derive no advantage from the devise, except as an acknowledgment by the testator of a subsisting indebtedness for the proceeds of Social Hall. This saves the claim of all the parties from the operation of the statute of limitations in regard to that fund.

It is ordered and decreed that the Commissioner amend his report according to the principles herein declared, and that he also inquire and report as to the interest of the infant plaintiffs in abiding by the partition already made.

It is further ordered and decreed, that parties have leave to amend the pleadings, if so advised, and apply for such further orders as may be necessary in reference to the Bentley tract and the Fort Hannah tract of land, as well as to pray an account of the estate of Alexander Houston, deceased in the lands of his executors, if such account be desired.

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\*The complainants appealed on the grounds,

1. Because his Honor, the Chancellor, applied the bar of the statute to the negro hire of two of the complainants, viz: Lewis G. Parks and wife and C. B. Houston. None of the claim of the complainants, or either of them, being subject to the statute of limitations.

2. Because the complainants are entitled to interest on the purchase money of "Social Hall," not only from the death of Mrs. Houston, but from the time the money was wrongfully received and appropriated by Alexander Houston, deceased.

3. Because the complainants are entitled to receive the provisions made for them by their mother under the marriage settlement; and also to the Fort Hannah place, given to them by their father in his will.

The defendant, W. P. Noble, also appealed.

Because his Honor erred in holding the bar of the statute of limitations not to apply to the proceeds of the sale of Social Hall. It is respectfully submitted it is applicable to two shares of it, viz: The shares of Lewis G. Parks and wife and C. B. Houston.



Alexander P. Conner and William McCelvey also appealed—because his Honor did not dissolve the injunction granted by the Commissioner in this case, nor otherwise afford them relief.

McGowen, for plaintiffs.

Noble, for the executor.

Thomson, for Conner and McCelvey.

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\*The opinion of the Court was delivered by

WARDLAW, Ch. The plaintiffs have not pressed their appeal upon us, indeed have avowed their willingness that the circuit decree shall stand; the creditors Conner & McCelvey, so far as we can judge from the imperfect brief before us, have no just ground to complain of the decree, and it remains to consider the appeal of the executor of Alexander Houston, that the shares of Parks and wife and C. B. Houston in the proceeds of the sale of Social Hall are barred by the statute of limitations. Jane Postell before and when she became the wife of Alexander Houston, was seized in fee of the plantation called Social Hall, and of certain slaves and other property; and in the treaty of marriage between these parties, it was agreed that all the estate of the intended wife should be settled to her separate use. In pursuance of this agreement and after their intermarriage, the parties, on November 18, 1826, did convey the negroes and other chattels to John F. Pelot, in trust for the separate use of the wife, with power of appointment, and in lack of appointment, and in case of her predeceasing her husband, at her death for her issue; and in the same instrument, the parties, without actually settling Social Hall, agreed that it should be settled upon the same trusts as the personalty, and that in the meantime they, Houston and wife, should "have power to sell and dispose of the same, and lay out the proceeds on the same trusts as were therein declared concerning the personalty." In April, 1837, Houston sold this land to J. E. Calhoun for twenty-four hundred dollars, and afterwards received the purchase money; Pelot as trustee making the conveyance. On February 10, 1838, Houston purchased the Bentley tract for five hundred dollars, and took a conveyance to this trustee, but not precisely on the trusts of the settlement, and in 1844, he purchased the Fort Hannah tract, which he seems to have valued at nineteen hundred dollars, and took the conveyance to himself. Houston

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died in 1855, \*and by his will dated August 11, 1855, he devised Fort Hannah to his seven children who were the issue of his wife Jane. These children filed this bill, January 7, 1856, among other objects, for the proceeds of Social Hall, not contesting the title of the purchaser; and the executor pleads the statute of limitations. Two of the plaintiffs attained

maturity more than four years before the bill was filed, namely, Mrs. Parks on May 7, 1848, and C. B. Houston January 22, 1850; and as to these two only, the others being infants, is the statute relied upon.

The Chancellor held that the statute was no bar, because the devise to the plaintiffs of Fort Hannah was satisfaction pro tanto of the plaintiffs' claim, and served as a recognition of this claim at the death of the testator, creating a new point of time for the beginning of the barring term of the statute. Without discussing the sufficiency of these particular grounds, we think the Chancellor's conclusion may be vindicated for more palpable reasons.

We regard Alexander Houston as express trustee to reinvest the proceeds of Social Hall in other estate, and that his executor as representative stands in the position of the testator. Social Hall was not conveyed to Pelot as trustee by the post-nuptial deed, but was reserved under the express covenant of Houston and wife, equivalent to his single covenant, that they would reinvest the proceeds of sale, which they were authorized to make, in other estate to be held for prescribed uses. He sold, but did not reinvest the proceeds, at least for the whole sum. This express trust continued until full reinvestment. Lord Nottingham, who has been sometimes called the father of equity, in *Cook v. Fountain*, 3 Swans. 585, defines implied trusts, to be such as are raised by construction of law, from the circumstances of the case, as from the relation of the parties, and defines express trusts to be those created by the act of the parties declared by word or writing, and manifested by express proof or

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violent pre\*sumption. In the present case Alexander Houston expressly covenants to reinvest the proceeds of Social Hall for the use of his wife and her children; and although he did not fully reinvest, it does not appear that he ever repudiated or denied his obligation to this duty. Justice and policy require that a mere trustee should not be protected by lapse of time, in any attempt to appropriate to himself the property of his beneficiaries. So long as the trust continues, and while the trustee acknowledges his relation to the beneficiaries, equity will grant to the beneficiaries an account or any other proper relief. If the trustee does some act distinctly importing an end of the trust, as if he makes a settlement of his accounts apparently in full, or denies in the presence of the beneficiaries any or further liability, this breaks the fiduciary relation between the parties, and is an origin for the running of the statute against the beneficiaries, who are not under incapacity. *Long v. Cason*, 4 Rich. Eq. 63, and the cases there cited. Instance of such an act as disturbs the fiduciary relation and creates a point from which the statute runs, is afforded in

this case by the receipt taken by Alexander Houston from Parks and C. B. Houston, as to the negroes held in trust, more than four years, before the filing of the bill, and we concur with the Chancellor in holding that these plaintiffs are barred by the statute from any account for the hire of these negroes. But as to the proceeds of the sale of Social Hall, it does not appear, that Alexander Houston in any form disputed the rights of his children by the latter marriage. The bill relates to the proceeds only, and we are not required to consider the title of the purchaser, Mr. Calhoun. If there be reasons, which do not appear to us, to doubt that Alexander Houston was a technical trustee to reinvest the proceeds of Social Hall, surely it cannot be contested that he was bailee of the proceeds, and agent for his wife and children to reinvest; and in such case the statute does not begin to run until there be

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usurpation and refusal \*of the rights of the claimants. As Chancellor Harper remarks in *Lever v. Lever*, 1 Hill Eq. 67, "the possession of an agent or bailee, (and a bailment is a trust) is the possession of the principal or bailor, and is not adverse until demand and refusal." In this case we are not advised of any demand or refusal before bill filed.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Appeal dismissed.

#### 9 Rich. Eq. \*100

\*DAVID S. HENRY, and Others. v. CORNELIUS GRAHAM, and Others.

(Columbia. Nov. and Dec. Term, 1856.)

[Wills  $\hookrightarrow$  756.]

Testator ordered and directed his whole estate, after payment of his just debts, to be equally divided among and between\* several persons, naming them. He owned at the date of the will only personal property, but afterwards acquired some real estate:—*Held*, that the legacies were general and not specific, and therefore that the personalty was liable for payment of debts before the realty.

[Ed. Note.—Cited in *Lloyd v. Lloyd*, 10 Rich. Eq. 474; *Farmer v. Spell*, 11 Rich. Eq. 550; *Verdier v. Verdier*, 12 Rich. Eq. 144; *Richardson v. Inglesby*, 13 Rich. Eq. 99; *Laurens v. Read*, 14 Rich. Eq. 267; *McFadden v. Hefley*, 28 S. C. 323, 5 S. E. 812, 13 Am. St. Rep. 675.

For other cases, see Wills, Cent. Dig. § 1953; Dec. Dig.  $\hookrightarrow$  756.]

Before Johnston, Ch., at Marion, February, 1855.

Johnston, Ch. The question submitted to me in this case, arises out of the following circumstances: Richard J. Scarborough, having executed his will, the day of , 1853, died the 9th September, 1854,

leaving a widow, and a sister, the wife of James J. Harlee, as his only next of kin. His will is in the following terms:

"1. I direct all my just debts to be paid.

"2. If I shall leave a child, or children, or the issue of a child or children, surviving me, I order and direct the following disposition of my whole estate, to wit: The sum of five hundred dollars to be paid annually to my wife Susannah J. Scarborough, during her natural life, provided she shall remain a widow. The rest and residue of my estate to descend to, and vest absolutely in any child, or children, &c., &c.

"3. If at the time of my decease, I shall leave no child, or children, or their issue surviving me, (as provided in the second clause of this my will,) then I order and direct my whole estate, after the payment of my just debts, to be equally divided among and between the following persons, to wit: my

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\*wife, Susannah J. Scarborough, David S. Henry, John H. Walsh, Addison Walsh and Sarah Walsh," &c.

After the execution of his will, the testator purchased real estate, described in the pleadings, but having never republished the will, he died intestate as to this property. All the other property left by him was personal, and is covered by this will, and as he left no issue, it passes to the legatees named in the third clause.

The testator left debts behind him, and among others, a mortgage for the price of the after-acquired real estate; and the question is presented, whether these debts are chargeable upon this real estate, to the loss of the next of kin, on whom it descends, or upon the personal estate covered by the will, to the loss of the legatees who take under the will. This is the only question now submitted for judgment.

When a testator disposes of a mixed estate in general terms, subject to, or charged with debts, the doctrine may be admitted that all portions are equally liable to the burden, whether real or personal,—a modification may arise from the context of the will, and the relative rank of the legatees and devisees.

This doctrine applies obviously only so far as the estate is covered by the will, and not to cases where part of the property is intestate. In such cases, the liability for debts is determined generally against the intestate to the exoneration of the testamentary property.

Perhaps this doctrine may be deflected by a very strong context, manifesting explicitly a purpose to exonerate the intestate estate, and confine the debts to the testate. But if we examine this will, there is not enough in it for this purpose.

The testator's first direction is, that his debts be paid. He then directs the division of



his estate. This is no more than the injunction of the law, and does not modify it, and is surplusage.

In the second clause there is no expression

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postponing the \*legacies to the debts, which shows that the testator had no settled purpose on the subject.

This observation should be carried in the mind in perusing the third clause, which is the one that has taken effect. In that clause, he directs the division of his whole estate, "after the payment of his debts." But in addition to the previous remark (arising from the second clause), that the testator seems to have had no settled purpose in using these words, I have only to repeat, they do not modify the general law on the subject, and are mere surplusage. Certainly they express no intention to exonerate the real estate, and therefore do not repeal the legal rule which generally applies.

Can any implication of an intention to exonerate specific property arise from this will or in this case? The real estate for which the exemption is claimed is intestate, only because it did not belong to the testator when he dictated his will, and was acquired afterwards. How can we imply the existence of any intention to exonerate, or indeed, any other intention in the mind of a testator, respecting property not existing in him at the time.

If this testator had, by his will, confined its operation to the property owned by him on the specific day he executed it, giving that property, after payment of his debts, to A. or B., and had afterwards acquired personalty, as to which he died intestate, would this personalty be exempted from debts to the disparagement of the legatees? I presume this will not be contended for, and yet the principle involved must be the same, when the after-acquisition is realty, as if it had been personalty. Intestate property cannot be exonerated from its comparative liability, except by an intention expressed, not only to charge the testate property with the debts, but to charge it thus with an intention to exonerate the intestate, and such an intention is equally requisite, whether the latter be real or personal.

In what I have said hitherto, I have not

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deemed it necessary \*to remark upon the relative liability between intestate real and intestate personal property. As between these two classes, the primary liability is on the personal.

Nor have I remarked upon the exemption, which real estate, although intestate, may be entitled to, in cases where the legacies are of a certain rank, as, for instance, residuary.

On this subject I understand the counsel desire to carry up the case, with a view of examining *Warley v. Warley*, (*Bailey Eq.*

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That case subjects descended real estate, in exoneration of specific legacies. I take the third clause of the will to be specific. If the whole estate had been given to a single legatee, according to *Warley v. Warley* it would have been specific. Or if one half had been given to one, and the rest (not designating it as the other half) to another, I presume each of the two would have taken legacies of the same rank, both specific.

Residuary legacies are not such on account of the term "residuary," or "rest" and "residue;" but from the nature of the thing conveyed. A specific legacy is not liable to be increased or diminished, by the operation of any other legacy, except one of the same character. An abatement may arise from such a source. But the nature of a residuary legacy is, that its amount is floating and contingent, and it can only be determined by first taking out legacies of a superior degree.

In this case, the whole estate is given to the legatees; and the division of it among them does not degrade the legacy below the rank it would have held, if it had been given to one of them.

It is adjudged and declared, that the after-acquired real estate, referred to in the pleadings, and to which I have hitherto had reference, is primarily liable for the debts of the testator.

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\*When the debts are ascertained (the creditors may be called in) an inquiry may be made, with the view of setting apart a fund to pay them, and upon a report being made, an order can be applied for.

The defendant, *Susannah J. Scarborough* and *James J. Harlee* and wife *Mary F.*, appealed, and moved to reverse the decree on the ground:

That his Honor has, in his said decree, adjudged that the descended real estate, referred to in the pleadings, is primarily liable for the debts of the testator. Whereas, it is respectfully submitted, the property bequeathed in the will, being, by the terms thereof, charged with the payment of all the testator's debts, is the primary fund for this purpose, and the descended real estate should have been adjudged to be exempted, until this primary fund shall have been exhausted.

*Inglis*, for appellants.

The testator's whole personal estate passes under the dispositions of his will—the real estate, all of which was acquired after the execution of the will, descends. The inquiry is, what is the primary fund for the payment of the testator's debts, including the debt contracted in the purchase of the real estate and secured by a mortgage of the same? The language of the will is, "I order and direct

my whole estate, after the payment of my just debts, to be equally divided among and between the following persons," &c.

1. Although, under our law, all the property of a deceased person is equally liable for the payment of all his debts, as between his creditors and those entitled to the succession, yet as among those entitled to the succession themselves, this is not so: on the contrary, as a general rule, the personal estate is still the primary fund for the payment of debts. *Hull v. Hull*, 3 Rich. Eq. 65; *North v. Valk*, Dud. Eq. 212.

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\*2. A testator may exempt the whole or any part of his personalty, from this primary liability, the intention to do so being clearly manifested, either impliedly, as by specifically bequeathing it and leaving other property not so specifically disposed of, or expressly, by "charging," his debts upon some other portion of his estate. 1 Story's Eq. Jur., sec. 571-3.

3. In the case now before the Court, the personal estate is not specifically bequeathed, and therefore, the operation of the general rule is not, in this way set aside.

The distinction is between general and specific, not residuary and specific. A residuary bequest may be specific. *Williams on Executors*, 993; *Ib.* 1006; 1 Roper on Legacies 192, note\*; *Ib.* 242.

"A legacy is specific when it is a bequest of a specified part of the testator's personal estate, which is so distinguished." 2 Will. Ex'ors, 993.

"The bequest of a particular thing or money specified and distinguished from all others of the same kind, as of a horse, a piece of plate, stock in the public funds, a security for money, which would immediately vest with the assent of the executor." 1 Rep. Leg. 192.

"The principle of decision is, the severance of this particular property from the great body of the estate, and the specific gift of it to the legatee." "It is capable of being delivered in specie." 1 Rep. Leg. 242-3.

"The bequest of all a man's personal estate generally is not a specific, the very terms of such a disposition demonstrate its generality." 2 Wms. Ex'ors, 1006. "Since then a bequest of personal estate requires, as before mentioned, to be limited or controlled to some particular place, or to be referred to as in some person's hands, in order to make it specific, it follows, that if there be no such restrictive expressions, a legacy of personal estate, generally, will be general and not specific. 1 Rep. Leg. 243; *Howe v. Lord*

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*Dartmouth*, \*7 Ves. 147; *Warley v. Warley*, Bail. Eq. 409; *Morton v. Thompson*, 6 Rich. Eq. 370.

The criterion of a specific legacy is, that it is liable to ademption. *Coleman v. Coleman*, 2 Ves. 639, Summer's edit. Editor's

note 1, at the end of the case. But see 2 Wms. Ex'ors, 995 and 1001, how far this is qualified by subsequent cases. It seems to be still true as the general rule, subject only to the exception, that the testator may, by express terms or the form of the gift, protect it from ademption, as a bequest of "all of a certain stock which testator shall have at his death."

"Courts lean against construing legacies specific, and the intention with reference to the thing bequeathed must be clear." 1 Rep. Leg. 193; 2 Will. Ex'ors, 995; *Chaworth v. Beech*, 4 Ves. 563; *Junes v. Johnson*, *Ib.* 573.

"No legacy is to be held specific, unless demonstrably so intended." *Kirby v. Potter*, 4 Ves. 750; *Burton v. Cooke*, 5 Ves. 463; *Webster v. Hale*, 8 Ves. 410; *Cogdell v. Cogdell*, 3 Dess. 372.

4. But further, there is not here any charge of the debts on any other part of the estate; on the contrary, they are charged directly upon the bequeathed personalty.

To "charge" the real estate in England, or to direct it to be sold for payment of debts, is only to bring it to the aid of the personalty. Why? The personalty is the primary fund, the realty is not liable for the debts generally, the debtor can make it so, his doing so is necessary in order to provide for the payment of debts. This is an occasion for his interference and it does not therefore, of itself, import more than that the debts shall not go unpaid, and that if the fund, primarily subjected by the law, fail, the realty shall make up the deficiency. To substitute it for the primary fund requires more, requires evidence of testator's inten-

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tion to discharge the personalty, the primary fund. This results from the favor their law has to the heir.

But this rule has no application here, even for the protection of the real estate, because the reasons have no place here. There is no heir to favor, real and personal estate are distributed alike, there is no landed aristocracy to build up; real estate is already liable to satisfy creditors; to charge it, is either unmeaning, or else it imports the making it a primary fund.

How much less can any such exclusion of the liability of realty be required in order to constitute the debts a charge upon the personalty. Any words which direct property to be applied to payment of debts, or, in any manner charge debts upon it, must be held to constitute such property the primary fund. *Pinckney v. Pinckney*, 2 Rich. Eq. 234, 243; *Warley v. Warley*, Bail. Eq. 397.

The words, "after the payment of my debts," constitute a charge, even on real estate. Thus, 1 Jarm. Wills, 743, "A devise, after payment of debts, is considered as creating a charge, not as importing postponement." *Hall v. Hall*, 2 McC. Eq. 303; *War-*



ley v. Warley, Bail. Eq. 409; Ford v. Gaithur, 2 Rich. Eq. 270; Laurens v. Lucas, 6 Rich. Eq. 223.

The case of *Brown v. James*, 3 Strob. Eq. 24, commented on. In the bequest to McBride, the particulars intended to be embraced in the general terms, "all my personal property," are specifically named and enumerated, &c.

Miller, Spain, contra.

Dargan, in reply.

The opinion of the Court was delivered by

JOHNSTON, Ch. On the point, whether

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the will charges the \*debts of the testator on the estate owned by him at the date of his will, (which was entirely personal property,) in such manner as to reduce the gift of it to his legatees to a gift of the balance only, after deducting debts, I prefer to retain my opinion. It is not necessary to decide it here; both because I am now satisfied the legacy was general, and not specific; and because the third clause might be considered as a mere alternative to the second, and the words, "after the payment of my debts," as a mere reference to the general direction to pay the debts which precedes the second. Besides, I would not, without necessity, enter into an examination of the seeming conflict, upon this point, between the case of *Warley v. Warley*, 1 Bail. Eq. 397, and the subsequent case of *Brown v. James*, 3 Strob. Eq. 24. (a)

If the gift of the whole personal estate to a single legatee, were a specific legacy, manifestly the gift of it to several, to be equally divided among them, must constitute them specific legatees as to their different shares. But the real question in the case is, whether the gift of the whole estate, in general terms, is a specific legacy. It is so said in *Warley v. Warley*, and in *Brown v. James*; and certainly the position is not totally devoid of support.

But it does not strike me as entirely correct, as an abstract proposition. Unless there be something in the will to confine the general expressions of the gift to property of a particular description, or in a particular condition, the legacy is general and not specific. The distinction between these two sorts of legacies, says Mr. Williams, (b) "is of the greatest importance." "If there be a deficiency of assets, a specific legacy will not be liable to abate with the general legacies; while, on the other hand, if the specific legacy fail by the ademption or inadequacy of its subject, the legatee will not be

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entitled to recompense or \*satisfaction out

of the general personal estate." A legacy is general, he says, "when it is so given as not to amount to a bequest of a particular thing, or money of the testator, distinguished from all others of the same kind. A legacy is specific when it is a bequest of a specified part of a testator's personal estate, which is so distinguished." (c)

It is not doubted that the bequest, in general terms, of a testator's whole personal property at a particular place, may be regarded as a specific legacy, because the description of its position serves to discriminate it from all other property of like character situated elsewhere; or that where a testator disposes of real and personal property, describing it as his estate in another country, he having other estates differently described, this is specific, as in *Nesbit v. Murray*, 5 Ves. 149, cited by Chancellor DeSaussure in *Warley v. Warley*. But where there is in the words of the legacy and in the context a total absence of description, it is difficult to attribute to the legacy any specific object.

It is not essential to a specific legacy, that the property bequeathed should actually exist in the testator at the making of the will, as Sir Thomas Plumer intimated, in *Parrot v. Worsfield*, 1 Jack. & Walk. 601. A contrary opinion has been frequently held, as for example, in *Stephenson v. Dawson*, 3 Beavan Rep. 349.

Nor is it an invariable test of a specific legacy, that it be liable to ademption; as is held in the case last mentioned.

But after all that can be said, there is not, and cannot, in the nature of things, be a specific intention, in a general and indefinite bequest of a whole estate, subject to continual changes, to an entire conversion, and including not only chattels, but choses of every description.

And so Mr. Williams, concurring with Mr. Roper, sums up the doctrine: "The bequest,"

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says he, "of all a man's per\*sonal estate generally is not specific;—the very terms of such a disposition demonstrate its generality; (d) and the circumstance of the bequest of the general personal estate, being in the same sentence with that of the real, the devise of which is naturally specific, will not be sufficient to make it a specific legacy." (e)

It is ordered, that the circuit decree, so far as it adjudges the after acquired real estate, referred to in the pleadings, primarily liable for the debts of the testator, be reversed and set aside; and it is adjudged and declared, that the personal estate upon which the will operates, is the primary fund for payment of

(a) Et vide *Pinckney v. Pinckney*, 2 Rich. Eq. 219 and *Ford v. Gaithur*, Id. 270.

(b) 2 Wms. on Ex'ors, book 3, chap. 2, § 3, p. 994.

(c) 2 Wms. on Ex'ors, book 3, chap. 2, § 3, p. 993.

(d) 1 Rop. Leg. 215, 3d edition.

(e) 7 Ves. 138.

said debts. And it is ordered, that the case be remanded to the Circuit Court.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Decree reversed.

### 9 Rich. Eq. \*111

\*CHARLES BABB, and Wife, v. CUTHBERT HARRISON, et al.

(Columbia. Nov. and Dec. Term, 1856.)

[Wills  $\S$  88, 115.]

An instrument, in form a deed, by which a mother made, gave and bequeathed, two slaves, to her son, to go into his possession at her death: *Held*, upon construction of the whole instrument, to be testamentary, and not a deed; and, there being but two subscribing witnesses, that it was void.

[Ed. Note.—For other cases, see Wills, Cent. Dig.  $\S$  209, 280; Dec. Dig.  $\S$  88, 115.]

Before Johnston, Ch., at Fairfield, July, 1856.

The decree of his Honor, the circuit Chancellor, is as follows:

Johnston, Ch. This case comes up for hearing upon bill and answer.

The subject of litigation is a family of slaves; and it is admitted in the answer, that the plaintiffs are entitled to a distributive share of this family, unless the paper filed as an exhibit vests the title to them in the defendant, Cuthbert Harrison.

The plaintiffs admit the execution of the paper exhibited, and, (if a deed,) that it was properly delivered.

The case turns upon the question, whether the paper exhibited by the defendants is a deed or a will. If a deed, the defendant Harrison is entitled, by its operation, to the slaves in question; if a will, it is void, being attested by only two subscribing witnesses, and, in consequence, the plaintiffs are entitled to a distributive share in the slaves, as set forth in their bill.

I am of the opinion that the paper, under which the defendant Harrison claims the property, is testamentary. Though it creates an estate to be enjoyed in futuro, this is consistent with its being a deed, as is laid down in *Dawson v. Dawson* [2 Strob. Eq. 34], and in *Jaggers v. Estes*:—and therefore I do not

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base my \*opinion upon this feature of the paper. I would characterize a deed, as an instrument which creates an interest to be enjoyed in presenti or in futuro, and which operates in presenti. A will always operates in futuro. This distinction I took in my circuit decree, in the case of *Wheeler v. Durant*, 3 Rich. Eq. 454, argued before me at Marion. In the paper before me, the words employed are "give, make and bequeath," and taken together, import an intention that it shall operate in futuro. All these words can be

reconciled with this intention, while the last one "bequeath," is inconsistent with an intention that the paper shall operate in presenti. The words "to go into the possession of the said Cuthbert Harrison at the time of my death" are confirmatory of the paper being designed to operate in futuro. The attestation of the paper, "made and executed in the presence of," omitting the word delivered, likewise confirms the construction which I give the paper as being testamentary, rather than a deed.

Upon the whole, from the face of the paper, it is to be inferred that the intention of the maker was, that it should have a future operation, after the death of the maker; and, although it may have the introductory words of a deed, "know all men by these presents,"—has a consideration expressed, (one dollar,) has a seal affixed, and was delivered to the beneficiary, (which delivery could not have the effect of making that a deed, which was not intended as a deed,) I must hold it testamentary. Mr. Justice Buller says, "That the cases have established that an instrument in any form, whether a deed poll, or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. In one of the cases there were express words of immediate grant, and a consideration to support it as a grant; but as upon the whole the intention was that it (the instrument) should have a future operation after his death, it was considered as a will." (a) These observations

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\*are very appropriate to the case before me, and are in consonance with the distinction which I have drawn between a deed and a will.

I decree that the paper, by which the defendant Harrison resists the claim of the plaintiffs, be delivered up to the Court for cancellation; and that, upon administration being taken out upon the estate of Mrs. Sarah Harrison, the defendant, Harrison, deliver the slaves mentioned in the pleadings to such administrator as may be appointed. Costs to come out of the estate of Sarah Harrison.

Copy.

South Carolina, }  
Fairfield District. }

Know all Men by these Presents,

That I, Sarah Harrison, of the District and State aforesaid, for and in consideration of the love and affection that I bear towards my son, Cuthbert Harrison, and one dollar to me in hand paid at and before the signing of this instrument, do give, make and bequeath, and by these presents do give, make and bequeath, unto my said son, Cuthbert Harrison, a certain negro woman Harriet, and her daughter Ellen, together with

(a) *Habergham v. Vincent*, 2 Ves. Jr. 231.



their future issue and increase: to have and to hold the said negroes, Harriet and Ellen, and to be at his disposal when and wherever he may think fit or appoint; now the said negroes, Harriet and Ellen, are to go into the possession of the said Cuthbert Harrison at the time of my death, and upon the receipt of said negroes, he is hereby required to pay to my grandson, William Ashford, one hundred dollars in current money; to my great grandson, Tyler Johnson, son of my granddaughter, Sarah T. Johnson, one hundred dollars in current money; and to my great granddaughter, Sarah C. Harrison, daughter of my grandson, John T. Harrison, one hundred dollars in current money; to

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my great grandson, \*Charles Littlejohn Ashford, son of John Ashford, one hundred dollars in current money. Witness my hand and seal, this second day of March, in the year of our Lord, one thousand eight hundred and fifty-three, and of the sovereignty and independence of the United States of America, the

her

Sarah X Harrison. [L. S.]

mark

(The interlining and erasing done before signing.) Made and executed in the presence of us, this 2 March, 1853.

Jon'n. Davis,  
James Aiken.

South Carolina. }  
Fairfield District. }

I, Sarah Harrison, of the District and State aforesaid, do other and further make and require my said son, Cuthbert Harrison, in view of the fact that should be, the said Cuthbert Harrison, depart this life, and leaving no lawful issue, I request him, the said Cuthbert Harrison, to make and settle the said negroes, Harriet and Ellen, with their future issue and increase, to my granddaughter, Mary Morgan, wife of James Morgan, and to the heirs of her body forever.

Witness my hand and seal, this second day of March, in the year of our Lord, one thousand eight hundred and fifty-three, and of American Independence the seventy.

her

Sarah X Harrison. [L. S.]

mark

Made and executed in presence of

Jon'n. Davis,  
James Aiken.

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\*The defendant appealed, on the ground: Because, it is respectfully submitted, the instrument executed by Sarah Harrison, is a valid deed, and not testamentary, as held by his Honor.

Boylston, for appellant.

Rion, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. The tribunal of dernier resort in this State, (*Jaggers v. Estes*, 2

*Strob.* 343 [49 Am. Dec. 674],) has determined conclusively that a donor by a deed, without naming trustees, may convey an interest in remainder in a chattel after reserving a life estate to himself, if it be apparent from the construction of the whole instrument of gift, that a present title was intended to pass irrevocably to the donee, and that the enjoyment only was postponed. Nevertheless it follows from the definition of a will, a lawful disposal of one's estate to take effect after his death, (*Carthew*, 38; 1 *Swinb.* 25; *Co. Litt.* 111.) that the postponement of enjoyment by the donee, until the death of the donor, still leads to the conclusion, in any controversy whether an instrument of gift be an irrevocable deed or testamentary, that the instrument is testamentary, unless it may be fairly demonstrated from the text and context, that a future interest was presently and irrevocably given. The prominent distinction between a will and a deed is, that a will has no operation until the death of the testator, and that a deed must take effect on its execution, and immediately pass the estate or interest given, although it is not essential that this interest shall immediately pass into the possession of the donee. If the interest created do not arise until the death of the donor or some other future time, the instrument cannot be a deed, al-

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though it may be so denominated by the maker, may have express words of immediate grant, may have sufficient consideration to support a grant, and may be formally delivered. *Hixon v. Withand*, 1 Ch. Ca. 248; *Pronde v. Green*, 1 Mod. 117; *Shargold v. Shargold*, 2 Ves. 440; *Habergham v. Vincent*, 2 Ves. Jr. 231; *Allison v. Allison*, 4 Hawks, 141. On the other hand, if the provisions of the instrument be testamentary in their character,—if the intention of the maker to dispose of his estate after death be sufficiently manifested, and this intention be lawful in itself, and the writing have the statutory formalities, the instrument will operate as a will, whatever may be its form. *Lawson v. Lawson*, 1 P. Wms. 440; *Hall v. Hewer*, *Ambler*, 203, and the cases cited *supra*. The instrument, the character of which we are considering, does not call itself a deed, as the instrument in *Wheeler v. Durant*, 3 Rich. Eq., 453, did; which was the principal foundation of the doubts expressed in that case concerning the testamentary character of the writing there in controversy. It does not profess to have been delivered, and the omission of the internal evidence of this fact of delivery, which fact is essential in the execution of a deed, is a principal ground in *Ragsdale v. Booker*, 2 *Strob.* Eq. 348, note, for holding the writing there in question to be testamentary. It contains no unequivocal words of immediate grant; for the word "give" is quite as appropriate and as commonly used in a will

as a deed; the word "make," utterly unintelligible in some of the instances of its employment here, is in all the instances as applicable to a will as a deed; and the word "bequeath" is characteristic of a will, and controls the other equivocal words of gift.

This paper has the salutatory words commonly employed in a deed, "know all men by these presents," but these words are in no respect contradictory of a will; and similar, even stronger words, were used in instruments adjudged to be testamentary in the cases of *Habergham v. Vincent*, and *Allison v. Allison*, and see *Alexander v. Burnet*, 5

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*Rich.* 189. It omits moreover in the attestation the characteristic words of a deed, "signed, sealed and delivered," so well known and used as to be familiar to the most ignorant scriveners, and employs instead the words "made and executed" confessedly equivocal, but rather pertinent to a will than a deed. It also has a seal, but this concludes nothing, for seals, however unnecessary, are generally appended to wills. It was delivered to the donee or deposited with him, but the property was not delivered, and the instrument is not a symbolic delivery of the property, unless present title was intended to be conveyed. It has in addition to the good consideration of maternal affection, the nominally valuable consideration of one dollar, yet this circumstance, although certainly unusual in formal wills, occurred in some of the cases which have been cited and was treated as inconsequential and insignificant. It has an informal habendum and tenendum clause, and such clause is usual in deeds conveying real estate, not common in bills of sale and more unusual in wills, yet not inconsistent with testamentary dispositions; and the words "to have and to hold the said negroes Harriet and Ellen," immediately follow the phrase "with their future issue and increase," at least unnecessary when a present title even with deferred possession is intended to pass, and they are immediately followed by the phrase "to be at his (the donee's) disposal, when and wherever he may think fit or appoint." This latter phrase might possibly in an instrument otherwise definite in character as a deed, receive the interpretation, that the donee whenever it was matter of convenience to him, might dispose of the chattels by absolute or conditional sales before he came into possession, but to my perception the phrase contains a strong implication, that some act future to the execution of the instrument, was to be done by the donee before his title vested. The slaves were to be his property and "at his disposal" whenever in time to come he should think fit or determine to take them on the conditions and charges imposed. He was to 'ap-

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point' \*this time. Also the nature of these

charges, that the donee, when he came into possession of the slaves, at donor's death, should pay certain sums of money to other descendants of the donor, without the creation of any lien on the property given, affords some indication that the writing was intended to be testamentary. Then the double execution of the instrument, although certainly on the same day, and before the same witnesses and probably in immediate sequence, manifests to some extent that the appendix was a codicil, and that the whole instrument was intended to be revocable, and this manifestation receives some additional force from the nature of the requirement in the appendix, that the donee should settle the slaves upon another in case of his death without leaving issue.

It is argued that the judgment of the Court of Law in *Alexander v. Burnet*, 5 *Rich.* 189, is opposed to the conclusion to which this reasoning tends. But in that case words of immediate grant inappropriate to a will, "grant, bargain and sell," were used, there was an express warranty, the instrument was intrinsically denominated a deed, and the property was actually delivered, and all the forms of a deed were observed. It did contain words "this deed of gift to be of no effect whatever, until my (donor's) death," which might well divide opinions, and upon which the judges did differ, but without contesting the judgment of the majority that these words referred to enjoyment and not to title, the case is palpably distinguishable from the one in hand.

Upon the construction of the whole instrument now in question, we are of opinion that it is testamentary, and that as it lacks the number of witnesses required by our statutes for testaments, it does not obstruct the relief sought by plaintiffs. It is ordered and decreed, that the circuit decree be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Appeal dismissed.

9 *Rich. Eq.* \*119

\*PETER H. LAREY, and Wife, v. W. B. BEAZLEY, et al.

(Columbia. Nov. and Dec. Term, 1856.)

[*Husband and Wife* ⇐ 10.]

Where a wife has an expectant interest in chattels, no act of the husband, or of any third person, in vesting the husband, or the wife, or both, with the present, or particular estate, will operate to vest the future or expectant interest of the wife in the husband; and it makes no difference whether such future or expectant interest is vested or contingent, legal or equitable. The husband can only acquire the ex-



pectant interest of the wife by application to the Court.

[Ed. Note.—Cited in *Duke v. Palmer*, 10 Rich. Eq. 386; *Shuler v. Bull*, 15 S. C. 431.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 23, 34, 35, 38-46, 396, 398; Dec. Dig. ☞10.]

[*Deeds* ☞120.]

D. C., executed a deed, by which, in consideration of natural love and affection, he conveyed to his daughter, M. L., a minor, certain negroes, with a proviso that he be permitted to use and enjoy, during life, the labor, profits and emoluments of said negroes. M. L., shortly afterwards married, and then after giving birth to a child died—her father D. C., surviving her. Before M. L.'s, death the negroes went into her husband's possession by consent of D. C., and remained in his possession until D. C., died, when the child filed a bill against the husband claiming partition.—*Held*, that, under the deed, M. L.'s interest was in remainder after a life estate in D. C.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 453; Dec. Dig. ☞120.]

[*Husband and Wife* ☞8.]

That notwithstanding any surrender of his life estate by D. C., during the coverture, the marital right of her husband did not attach on M. L.'s expectant interest, and consequently that the negroes were liable to partition as the estate of M. L.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 25; Dec. Dig. ☞8.]

Before Johnston, Ch., at Barnwell, Spring Sittings, 1856.

Johnston, Ch. The defendant, W. B. Beazley, married Mary L. Calhoun, the daughter of Downes Calhoun, and the plaintiff, Mrs. Larey, is the sole issue of that marriage. The main part of this suit arises from a deed executed by Downes Calhoun, the 3rd of April, 1833, in the following terms:

"I, Downes Calhoun," \* \* \* "in consideration of the natural love and affection which I have and bear to my daughter, Mary L. Calhoun, a minor, now residing and being

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\*with me, and for and towards the better support and maintenance of her, after my decease, and for divers causes and considerations, have given, granted, bargained, sold and confirmed, and by these presents do give, grant, bargain, sell and confirm unto the said Mary L. Calhoun, the following negroes, viz: Sylvia, a negro woman about twenty years of age; Benjamin, a boy about five or six years of age; Lewis, a boy about three years of age; and John, a male child, about eight months old—to have and to hold, the said negroes, Sylvia, Benjamin, Lewis, and John, and also the future issue and increase of the said negro woman, Sylvia, unto my said daughter, Mary L. Calhoun, her executors, administrators, and assigns, as her, and their own proper and legitimate property, goods and chattels, and effects from henceforth forever. Provided, always, and upon this special trust and confidence, nevertheless, and upon this express condition: That the said Mary L. Calhoun, her executors, administrators and assigns, shall and do per-

mit and suffer me the said Downes Calhoun, to use, keep, and enjoy all the labor, profits, and emoluments arising from the work, labor, use, and hiring of the said negroes, Sylvia, Benjamin, Lewis, and John, and also the future issue and increase of the said negro woman, Sylvia, during my natural life, without paying or yielding anything therefor, or in any respect thereof:—and not otherwise. And that from and after my decease, she, the said Mary L. Calhoun, her executors, administrators, or assigns, shall, or lawfully may have, hold, and enjoy, the said negroes, Sylvia, Benjamin, Lewis, and John, and also the future issue and increase of the said negro woman, Sylvia, as her and their own specific, absolute and unconditional goods and chattels, or property, and to dispose thereof, and convert the same to her and their own proper use and behoof, as she or they shall think fit or proper."

In 1835, about two years after the execution of this deed, the defendant Beazley, in-

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termarried with the donee, Mary L. Calhoun, who, after giving birth to her only child, now Mrs. Larey, died intestate, still in her minority, in October, 1838. At this time Mrs. Larey was but a few weeks old.

It appears that during the life of Mrs. Beazley the defendant, her husband, obtained possession of the slaves, covered by the deed. Proof is made of the declarations of Downes Calhoun, that he had given them to his daughter and her husband.

Beazley sold three of the negroes, Ben, Lewis and John in 1847. As guardian of his daughter, he received several sums of money which he admits in his answer. This latter part of the case has been disposed of by a separate order.

The bill claims that the deed of Downes Calhoun, reserved a title in the slaves to himself for life, and subject to that reservation, conveyed a vested remainder to his infant and then unmarried daughter; that the marital right of Beazley did not attach upon this expectancy; and that upon the death of Mrs. Beazley, intestate, her interest, became distributable between the husband and her infant child (now Mrs. Larey) under the statute of 1791. Mr. Calhoun, the life tenant, being now dead and the expectant interest having accrued for enjoyment, the bill prays that the defendant account to Mrs. Larey, for two-thirds of the value of the slaves sold by him, and that partition be made of those remaining.

The defence is, that by the terms of the deed the entire title of the slaves passed immediately to the donee, Mrs. Beazley, (then Miss Calhoun,) without any reservation of title to the donor, but only subject to a trust or condition constituting a bailment in his behalf for the time limited. Upon this exclusive title of the wife, it is contended, the

marital right of Beazley attached, and the property became his by the marriage, which was a reduction of the property; and the subsequent delivery of Mr. Calhoun, was a full surrender of his bailment, which it was competent for him to make, and for the husband to receive. If the Court should be of

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opinion, \*however, that the deed, reserved a title for life in Calhoun, and only conveyed the remainder to his daughter, (a case like *Dawson v. Dawson* [2 Strob. Eq. 34].) then the defendant contends that the subsequent delivery of Calhoun was a gift and surrender by him of his life tenancy, which instantly coalescing with the remainder of his daughter, gave her an absolute title in presenti, (with a right of present enjoyment) upon which her husband's marital right attached.

I am of opinion, that if the deed reserved a life tenure (a title) to Mr. Calhoun, and conveyed only the remainder to his daughter, no conveyance to her husband, nor to herself and her husband, nor to herself alone, while under coverture, can be allowed the effect in this Court, to enable the husband (in derogation of his wife's interest or those of her privies) to claim the expectant estate of his wife by marital right. The wife in this case was under a double disability; infancy and coverture—and unable to make, enter into, or assent to any contract or transaction for the destruction or modification of her rights. Coverture alone, according to our decisions, produces a complete disability, except where the wife is expressly enabled by statute as in the case of lands, and then the forms of the statute must be followed.

I do not regard it of any consequence, what the quality of the wife's right may be, whether it be of a legal, or of an equitable nature, or whether the interest be vested or contingent, if it be expectant, no act of the husband, (and I incline to think no act of a third party, whether influenced by the husband or not,) will be allowed injuriously to affect the interest of the wife in her expectant estate. If a husband wish to get in his wife's expectancy, he must come into this Court, the guardian of femmes covert, where terms suitable to the equity of the wife will be imposed.

If the deed of Mr. Calhoun created a life estate and a remainder, there were two distinct titles, and when Mr. Calhoun surrendered or gave his life estate, to Beazley, the hus-

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band of his daughter, or to his daughter, with the husband's assent, this only vested the husband with the life estate. It remained as distinct from the wife's remainder (in the eye of this Court,) as if it had been aliened to a stranger, or still remained in the hands of Mr. Calhoun. Mr. Calhoun could convey his own title, no more. He had no right to disturb or affect the title of his daughter. That was a thing entirely dis-

tinct from his property and one over which he had no control.

But I have expressed myself fully on this subject in *Reese v. Holmes* [5 Rich. Eq. 531] and content myself here, with a reference to that case, and the authorities there commented on.

Before leaving this subject, however, it may not be improper to observe that what has been said may not necessarily apply to cases where the contest is between the husband and strangers. It may be that as to such persons, and in a litigation with them, the husband may be at liberty to show a perfect title in himself in the way spoken of. But, this Court, will not allow to such transactions, an effect injurious to the wife or her interest, or those of her privies when she or her privies are contesting the matter with the husband.

Some authorities have been quoted to show that the deed of Mr. Calhoun did convey the entire legal title to his daughter. If it did, her husband's marital right may possibly have reduced and drawn it to himself upon the marriage.

In *Hooper v. Hooper*, (3 or 4 Dev. & Bat. 150) reported in *Devereaux and Battle*, Law Reports, (our library edition is so defective that it is difficult to ascertain whether the case is contained in the 3rd or 4th volume,) two slaves were conveyed by a mother to her son in absolute terms; but the son made the following endorsement on the deed: "The within named negroes, Clarissa and Milly, I hereby certify, may be at the disposal of my mother, Susannah Hooper, for and during her natural life."

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\*The action which took place after the mother's death, was intended to ascertain the effect of this endorsement. The mother's representative insisted that the legal effect of her deed, and the son's endorsement, taken together, was to convey the slaves to the son with a reservation of a life estate to the mother, and that this reservation of a life estate, by the law of North Carolina applicable to deeds (anterior to their statute of 1823) (a) gave the mother the entire interest. For the son it was argued on the contrary, that to construe the endorsement as a reconveyance, as suggested, would operate to entirely defeat the deed, which could not have been intended; it should, therefore, be regarded as a mere covenant, or declaration of an use or power of disposition, without passing any legal title in the slaves. This latter view was sustained by Justice Pearson, and on appeal, his judgment was affirmed. Mr. Justice Gaston delivering the opinion of the Appeal Court, says "This endorsement speaks the language of the donee," (the son) "and is a declaration or stipulation on his part in relation to the precedent subject mat-

(a) *Yillman v. Sinclair*, 4 Ired. 183, and 3. Dev. & Bat. 43.



ter. The legal limitation of the gift is the language of the donor, who had the sole right to prescribe the extent and modifications of her donations. This limitation is immediate and absolute, and therefore passes directly the entire property from the donor to the donee. The subsequent declaration or stipulation on the part of the donee is an engagement, that during the life of the donor, she shall have the disposal, that is, the enjoyment of the thing which has been transferred to him. At Law, it can be regarded but as an executory covenant, for the breach of which he would be answerable in damages. In Equity, the donor would probably be regarded as taking an interest for life—but however this might be, it could not affect the legal operation of the instrument."

It must be admitted that this case is en-

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titled to consideration. But I am not quite prepared to be governed by it. It will be perceived that the Common Law of North Carolina did not formerly as ours does, admit of the divisions of legal interests in personal property, by deed, into estates for life and in remainder. In this very case it seems to have been assumed that if the endorsement operated to convey back a life estate in the slaves to the mother, that life estate must necessarily carry with it the entire and absolute estate, thus extending what was intended for a temporary into a perpetual title, and extinguishing, contrary to the plain intent, the enjoyment by the son, of any interest, even in remainder.

Of the extent to which the judges were driven by the doctrine of indivisibility of titles in personal property, by deed, we have another instance, in *Hart v. Davis*, 3 Dev. & Bat. 42. In that case, a mother had made a deed for a slave, to her daughter, after her (the mother's) death. The mother, subsequently sold and conveyed her life estate in the slave to a stranger, who afterwards, during the mother's life, sold and conveyed it to the daughter; the daughter then alienated the slave to one Davis. After the death of the mother, Hart her administrator, brought detinue against Davis for the slave. Justice Saunders, before whom the case was heard, decided that the mother's deed to the daughter being to take effect (as he held) after her death, was invalid, but that her second deed, by which she conveyed a life estate, in the slave, carried the entire and absolute title, which title enured to the daughter as assignee of the purchaser, and on her conveyance passed to Davis. The plaintiff was, therefore, non-suited: On appeal, Gaston, Justice, speaking for the Court, said—"According to the settled law of the land before the Act of 1823," a conveyance of a slave by deed, after a life estate, or with a reservation of a life estate therein, was void. (b) These decisions

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were founded avowedly on the \*principle that there could not be any remainder in a slave after a life estate, granted by deed. The opinion of the judge upon the operation of the first deed is in conformity with these decisions, and the principle which sustains them necessarily leads also to the opinion given by him upon the operation of the second deed. If a remainder, after a life interest in a chattel be null, because the life interest is the whole estate, then a conveyance of that chattel, for life, must pass the whole estate. The learned judge then goes on to express the opinion that the same result must follow, even if the conveyance were regarded as a lease for life. There are other cases in that State to the same effect.

But our own cases are directly to the contrary, and in my opinion, while breaking away from mere technicalities, they are more conformable to principle.

These decisions of our own have now ripened into rules of property, and it would be unsafe to disturb them by adopting the adjudications of foreign tribunals, even if these were in themselves apparently somewhat more desirable.

In *Hooper v. Hooper*, the first of the North Carolina cases referred to, the learned Judges discriminate between the endorsement made on the deed by the grantee and terms introduced into the deed itself, by the grantor, from which it might at first view appear that if the grantor while conveying away the property, had expressly reserved a life estate to herself, such reservation might have been effectual to give her a life estate. But when we look into the reasoning of the Court, in that and other cases, we find it would have been impossible; for the principle on which the reasoning proceeded was that there could be no such thing as a life estate in slaves, whether attempted to be created by direct conveyance or by reservation. The life estate, and the remainder

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were indissoluble. \*He who conveyed slaves for life, conveyed them absolutely, and he who reserved a life estate, either retained the property out and out, or his reservation was void, and the whole property passed.

It was entirely consistent with this reasoning, and was a necessary consequence of it, when the Court declared that if any effect could have been given to the endorsement in *Hooper v. Hooper*, it could only be by way of personal covenant. But we are not driven by our own cases to the necessity of regarding the use reserved to Downes Calhoun, as less than a title for life, because our law, unlike that of North Carolina, admits of a life estate in slaves, and I think we are bound, looking at the substance and real purpose of his deed, to give it the latter effect. Our law Courts, it seems to me, would regard the deed in that light, and if so, there is no necessity to

(b) *Graham v. Graham*, 2 Hawks; 3 Hawks, 538; *Sutton v. Hallowell*, 3 Dev. 186.

invoke the principle adverted to by Mr. Justice Gaston, to wit: That even if the instrument must be construed at law as a mere covenant, in equity it would be allowed the effect of a legal reservation of a life estate to Mr. Calhoun.

I conclude this judgment by observing, that even if we were obliged to construe the deed as giving the entire legal title to Mr. Calhoun's daughter coupled with a personal condition that she should permit him to enjoy the use and possession of the property during his life, this would have encumbered her title with a trust, and it might be worthy of consideration how far the marital right of her husband would attach on her trust property.

It is decreed that such of the slaves as have not been alienated are subject to partition, as the estate of Mrs. Beazley, between her husband and child, in the proportion of one-third to the former, and two-thirds to the latter, and that the defendant account to the plaintiff, Mrs. Larey, for two-thirds of the value of the slaves aliened (either at the price he sold them at or at their real value since the interest of Mrs. Larey accrued, as the plain-

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tiff may require) with interest, \*and that the defendant also account for proper, and reasonable hire of which the share of Mrs. Larey will be allowed, and let a writ of partition issue, and the account be referred accordingly.

The costs to follow the decree and be paid by the defendant.

The defendants appealed, Because

1. The Chancellor erred in deciding that the deceased wife of defendant, Beazley, did not acquire a perfect legal title to the slaves in controversy, under the deed of Downes Calhoun, her father.

2. The Chancellor erred in deciding that the marital rights of defendant, Beazley, did not attach upon the said slaves.

3. The Chancellor erred in deciding that the legal title of the deceased wife of defendant, Beazley, (if before imperfect,) was not perfected even by the subsequent parol gift and delivery of the said slaves by Downes Calhoun to her.

4. The decree of the Chancellor is in other respects contrary to the law and equity of the case.

Graham, Bellinger, for appellants.

Owens, contra.

PER CURIAM. This Court concurs in the decree, and it is ordered that the same be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN, and WARDLAW, CC., concurring.

Appeal dismissed.

9 Rich. Eq. \*129

\*C. A. WATSON, by Next Friend, v. J. W. CHILD and T. THOMSON, Executors, and Others.

(Columbia. Nov. and Dec. Term, 1856.)

[Wills  $\hookrightarrow$  436.]

Testator, after the date of his will, acquired lands in Florida. In the absence of all proof as to the law of Florida, *held*, that such lands passed to the heir and not to the devisee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 950; Dec. Dig.  $\hookrightarrow$  436.]

[Executors and Administrators  $\hookrightarrow$  152.]

Testator after the date of his will contracted to purchase lands in Florida, and after his death his executors paid a balance due of the purchase money and took titles in their own names: *Held*, that they were trustees for the heir and not for the legatees and devisees.

[Ed. Note.—Cited in Roberts v. Smith, 21 S. C. 461, 462.

For other cases, see Executors and Administrators, Cent. Dig. § 621; Dec. Dig.  $\hookrightarrow$  152.]

[Executors and Administrators  $\hookrightarrow$  272.]

Lands contracted to be purchased after the date of the will go to the heir; and the purchase money like any other debt must be paid by the executor from the personal estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052-1057, 1059, 1065, 1068; Dec. Dig.  $\hookrightarrow$  272; Wills, Cent. Dig. § 1008.]

[This case is also cited in Rapley v. Klugh, 40 S. C. 144, 18 S. E. 680, without specific application.]

Before Dunkin, Ch., at Abbeville, June, 1856.

Dunkin, Ch. The plaintiff is stated in the pleadings to be an infant about the age of nine years. She is the grandchild and only lineal descendant of the testator, John McLennan, being the child of his deceased daughter, Ann Watson. The plaintiff's father is also dead. It appears that the testator was born in Scotland, and emigrated to South Carolina about 1820. He resided in Abbeville District until the early part of 1852, when he removed to Florida, and there became domiciled. He died in the following year (1853) while on a visit to his friends in South Carolina. The will of the testator bears date 3d January, 1852, was executed in Abbeville District, South Carolina, and the testator describes himself of that District and State. By the first clause of the will, his estate, real and personal, is directed to be sold. A legacy of five hundred dollars is then given to the plaintiff, described as his "Grand-daughter, Catharine Ann Watson;" and after bequeathing a like sum to his father or mother,

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in Scotland, \*and one hundred dollars to his aunt, the rest and residue of his estate is bequeathed to his brothers and sisters in Scotland. At the time of his decease, the testator left some seventy slaves, valuable lands in the State of Florida, and choses in action to a considerable amount. The will has been proved in solemn form in this State, but has never been subjected to any judicial inquiry



in the State of Florida. On 17th January, 1854, these proceedings were instituted in behalf of the plaintiff. In June, 1855, Chancellor Johnston pronounced a decree in favor of the defendants as to the personalty. But he directed the bill to "be retained so far as the land in Florida is concerned," and it was thereupon ordered that "it be referred to the Commissioner of this Court to inquire and report whether the real estate, situate in Florida as aforesaid, was acquired before or after the execution of the will aforesaid of John McLennan; that he also take evidence of the Florida law, for the distribution of intestate real estate, and upon the subject of aliens taking by descent or devise, and that he have leave to report any special matter."

The Commissioner stated that, some months since, he had given notice to the Solicitors of both parties to furnish such evidence as would enable him to report under this decretal order; but that no reference had been held. It appeared also, that, on 9th January, 1856, an amended bill was filed on behalf of the plaintiff, alleging the belief of the plaintiff, that the Florida lands were acquired after the execution of the will, and praying that the defendants might be required to adduce the title deeds &c. The answer of the defendants was filed on the next day. The plaintiff desired to continue the cause for the purpose of adducing evidence of the Florida law, but this was successfully resisted by the defendants, who urged that the facts were sufficiently disclosed, and that, if the Florida law would afford aid to the plaintiff, it should have been produced.

It is not disputed that, at the date of tes-

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tator's will, 3d \*January, 1852, he was seized of no real estate, except fifteen acres, part of the academy lot in Cambridge, for which he had paid twenty dollars. He had sold out his lands in Abbeville to Gen. Gillam, in 1849.

During the following years, 1850 and 1851, he rented lands. Something is said in the answer of the executors, of the transactions of an agent of the testator in Florida, in the fall of the latter year. But it may be sufficient to observe that no evidence whatever was adduced, either of an agency, or of any thing done by such agent. Of course, if any evidence, important to the issue, or inquiry directed by the Chancellor, as to such transaction, existed, it was the duty of the defendants to have adduced the evidence. It was not a matter affecting their conscience, or in which the statements of the answer, unsupported, by proof, have any weight. At the period of the testator's death, he was in possession of two tracts of land, or rather of one tract embracing two half sections, in Florida. One half section was held under a conveyance from Mordecai Myers to the testator, bearing date, 12th June, 1852, of which a copy is exhibited with the defendants' answer. As to the other half section, the de-

fendants say, "they found among the papers of the testator a bond for titles from one Matthew B. Hawkins." It would have been more satisfactory, if the defendants had exhibited a copy of this bond, or if they were unable to do so, (which is not stated,) the date of the bond could have been set forth, and to whom it was payable; although, it may, perhaps, be very well inferred that it was payable to the testator, and as he did not go to Florida, until after the date of his will, that the bond from Hawkins was taken subsequent to that period.

From some difficulty about the title, no conveyance was made by Hawkins, until after the death of the testator; when in December, 1853, the balance of the purchase money was paid by the executors, and they received a conveyance from Hawkins to themselves as

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executors. According to this evidence, the testator, at the date of his will, 3d January, 1852, had no title, legal or equitable, to any part of his Florida lands. It is true there is an intimation in the answer of the defendants that, by the Florida law, real estate acquired after the date of the will would pass under a general devise. But of this, the Court can only remark, as of the statement as to some pre-existing contract for the purchase, that no evidence was offered by the defendants of the existence of any such law in the Florida Code. The provision, that real estate, acquired after the date of a will, shall not pass thereby, unless the will be republished, does not derive its origin from the Act of 1791. Such was the law of South Carolina before that enactment. See *Cogdell v. Cogdell*, 3 Dess. 346. Such, says Chancellor Kent, is the settled rule of the English Law, 4 Kent, 497. It is the law of every State in the Union, unless otherwise specially provided by Statute. The clause in the Act of 1791, applied to personal, as well as real estate, after acquired. When this was modified by the Act of 1808, the law stood as it had always been. But the position, upon which the defendants seemed chiefly to rely, and which was elaborately discussed at the hearing, is the ground last assumed in the answer. To wit: That "as the will directs a sale of all the testator's estate, the lands must be regarded as personalty and must pass to the legatees, whether acquired before or after the execution of the testator's will." Certainly in many cases, land articulated or devised to be sold, is, in this Court, reputed as money. Story, Sec. 790. But when the reason of the primary rule is examined, it will be perceived that this principle of equitable conversion is inapplicable. Subsequently acquired lands do not pass under a will, because the devise is a species of conveyance. "That," says Mr. Justice Blackstone, "is the reason that the devise operates only upon such real estate, as was owned and seized of at the time of the making of the will."

2 Blk. Com. 378. In *Brydges v. Chandos*, 2

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*Ves. Jr.* 417. Lord Roslyn con\*siders "what the law of England permits to be a disposition by will of land." "It is not," says he, "an indefinite disposition of all a man may be possessed of at his death, as in the case of personal property. A disposition of land by will is no more than an appointment of the person, who shall take the specific land, at the death of the person making it. It is so far testamentary, that it is fluctuating, ambulatory, and does not take effect till after the death; but it is in nature of a conveyance, being an appointment of the specific estate," &c. The will does not operate upon any real estate of which the testator was not, at the time, entitled to dispose. A direction to sell would no more affect after acquired lands than an absolute devise of all his real estate would vest in the devisee, a plantation which he subsequently purchased. In *Sugden on Vendors*, 179, the general doctrine upon another point is succinctly stated. "Estates, contracted for after the will, will not pass by it; nor will lands pass by the will, although conveyed to the purchaser subsequent to his will in pursuance of a contract prior to the will, unless it was a valid binding contract." (In the authorities cited, it is described as such a contract as would be enforced in a Court of Equity between the parties. *Rose v. Conyngham*, 11 *Ves.* 550; 2 *P. Wms.* 629.) "But in these cases," continues Mr. Sugden, "the heir at law will be entitled to the estate for his own benefit, and, if not paid for, the purchase money must be paid out of the personal estate of his ancestor." Again, "If the executor complete the purchase, and take the conveyance in his own name, he will be a trustee for the heir or devisee."

The Court has already remarked that there is no evidence in the case of any contract, anterior to the date of the will, 3d January, 1852, much less of any such obligatory contract as a Court of Equity would at that time have enforced by decree for specific performance between the parties. The bond for titles, which the testator, subsequently took

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from Hawkins, \*constituted a binding contract of which the heir, and not the devisee is entitled to the benefit, and she is also entitled to have any balance of the purchase money paid out of the personal estate, like any other debt of the testator. When the defendants, after testator's death, completed the purchase and took a conveyance in their own names, they must be taken to hold as trustees, for the heir at law.

If the result of the investigation had been different, if it had appeared that the Florida lands passed by the devise, then it might have been important for the plaintiff, to prosecute the other branch of the inquiry, indicated by the decree of June, 1855. But, in the

view now taken by the Court, the right of the plaintiff could only be resisted or modified by proof, on the part of the defendants, that the common law had been so far altered by the laws of Florida, as to permit aliens to take lands by descent, and to prefer collaterals to lineal descendants. In the absence of any such proof, the plaintiff, admitted to be the lineal descendant of the testator, must be regarded as the only person entitled to the inheritance. The Court is of opinion that the plaintiff is entitled to the possession of the title from Mordecai Myers to the testator, bearing date 12th June, 1852, and defendants are declared to be trustees for the plaintiff, under the conveyance from Matthew B. Hawkins to themselves, dated 12th December, 1853, and it is ordered that the Commissioner take an account of the rents and profits of the premises, with leave to report any special matter.

It may be important to direct a sale of the premises, either by the defendants (in whom the legal title to a majority is vested) or in some other way. Leave is given to the parties to prepare and present such further order, as may be deemed expedient and proper, to carry this decree into effect.

The defendants appealed and moved this Court to reverse the Circuit decree, and dismiss the complainant's bill.

1. Because, it is respectfully submitted, the

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Chancellor \*erred in disregarding the statements of the answer responsive to the amended bill, asking a discovery in respect to the purchase of lands in Florida, by the testator, John McLennan, through his agent, Child.

2. Because the complainant cannot take so much of the discovery sought, as benefits her, and disregard other portions of the same statement—which it was supposed was in evidence at the instance of the complainant herself and which, if it had been thought necessary, could have been proved by other testimony.

3. Because the lands in Florida were in fact purchased, and acquired, by the testator, through his agent, before he left the State of South Carolina, and before he wrote his will, which had reference to, and was doubtless intended to cover these identical Florida lands.

4. Because the will of John McLennan directed his lands to be sold, and disposed of the proceeds as personal legacies. This Court will, therefore, consider the same as personal estate, and apply to it the rules applicable to such property.

5. Because, by the laws of Florida, a will takes effect at the death of the testator, and conveys all the real estate owned at that time, whether acquired before or after making the will. There being in this respect no distinction in that State between real and personal estate.

6. Because, by the laws of Florida, aliens



may take and hold either by descent or devise, and when they take by devise it is immaterial whether the land is acquired before or after making the will.

Failing in their motion to reverse the decree, then they moved for a new trial.

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\*Because, from the view the Chancellor took of the amended answer of the defendants, there was not sufficient evidence before the Court to decide the case satisfactorily and according to the truth; the exact condition of the land purchased in Florida at the time of the testator's death, being susceptible of full proof, which relying upon the answer, was not offered upon the trial.

McGowan, for appellants.

Wilson, contra.

PER CURIAM. This Court is of opinion that the decree should be affirmed, and the appeal dismissed; and it is so ordered.

JOHNSTON, DUNKIN, DARGAN, and WARLAW, CC., concurring.

Appeal dismissed.

### 9 Rich. Eq. \*137

\*THOMAS C. MATHIS and Wife, et al., v. CHARLES HAMMOND, Ex'or., et al.

(Columbia. Nov. and Dec. Term, 1856.)

[Assignments  $\hookrightarrow$ 55.]

An assignment, for good consideration, (natural love and affection,) by unsealed instrument, of the assignor's distributive share of an intestate's estate, held valid—the assignor having acquired possession under the assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 113; Dec. Dig.  $\hookrightarrow$ 55.]

[Wills  $\hookrightarrow$ 552.]

Testator made his will by which he devised and bequeathed one-fifth part of his estate to his son G. absolutely. After similar devises and bequests to his other children, he declared "if any of my children die before the age of twenty-one and without issue, then his legacy shall revert," &c., "and be equally divided among my remaining children and their heirs." G. arrived at age, married, and then died, in the life time of the testator, leaving issue, a son, who survived the testator. Held, that the son of G. was entitled to the legacy to his father under the Act of 1789, § 9, (5 Stat. 107,) and that he took absolutely and without condition or limitation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1197; Dec. Dig.  $\hookrightarrow$ 552.]

[Wills  $\hookrightarrow$ 639.]

The question reserved, whether conditions annexed to a legacy to a child, remain annexed when the issue of such child become entitled, by substitution, under the Act: where the condition is personal, it would seem that it does not remain, in other cases it may.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1522-1524; Dec. Dig.  $\hookrightarrow$ 639.]

Before Dunkin, Ch., at Edgefield, June Sittings, 1856.

Dunkin, Ch. From the decree made in this

cause, June 1855, an appeal was taken by both parties. The appeal on the part of the plaintiffs was dismissed. The defendants' three grounds of appeal were—First, That Robert H. Anderson took an absolute estate—Second, If he took subject to the limitation of the will, still the plaintiffs under the will of Allen Anderson, Senior, cannot take under the terms "children and their heirs."—Third, The deed from Mrs. Mary Anderson to Allen Anderson, Junior, is operative, certainly as to the personality, and in equity as

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to the realty. The Court of Ap\*peals, in commenting upon these grounds, remark—"The first ground of appeal presents a novel question which was not argued on the Circuit nor before us; and the second presents a question upon which there is a difference of opinion at present amongst us. The third ground probably may be found conclusive of the controversy of the parties concerning the estate of Robert H. Anderson, if Allen Anderson, under the unsealed transfer of his mother, obtained actual possession of Robert's estate from her or from his guardian: but the facts are too obscure," &c. "As there is difference of opinion among us on the case now presented, and as the Chancellor reserved several points upon the exceptions for future judgment and recommitted the report, we have concluded to remand the case to the Circuit on the second point decided by the Chancellor and involved in the defendants' grounds of appeal for further inquiry before the Commissioner, concerning the facts, and decision by the Chancellor who may next hear the case; and it is ordered and decreed accordingly."

The will of Allen Anderson, Senior, was executed in 1828, but the testator survived until 1842. At the date of his will the testator's family consisted of his wife, three sons, George, James, and Allen, and two grand-children, the daughters of a pre-deceased daughter, (Mrs. Quarles). The devise to his son George is in the following terms: "Item, I give and devise to my son, George Anderson, one-fifth part of my real and personal estate, viz: land, negroes, with their future issue and increase, horses, cattle, hogs, implements of husbandry, and every other thing which may constitute a part of my estate at the time of my death, to him, and his heirs forever." The devises to each of his other sons, James, and Allen, are in terms precisely the same as that to George. Special provision is then made for testator's "two grand-daughters, Mary and Susannah Quarles," then in their minority, and for the death of either, or of both of said grand-daughters under age, without issue. It is subsequently

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provided as follows: "Item, My will is that, if any of my children die before the age of twenty-one, and without lawful issue, then

his legacy shall revert to the common stock, and be equally divided among my remaining children and their heirs."

George Anderson, testator's son, attained the age of twenty-one years, was married, survived his marriage four or five years, and then died, in the lifetime of the testator, (probably about 1837,) leaving one child, Robert H. Anderson. After the decease of Allen Anderson, Senior, in 1842, a partition of his estate was made in conformity with the provisions of his will. The real estate not specifically devised to the widow, was sold for division. George McKie testified that, as the guardian of Robert H. Anderson, he, in 1844, received from the executor of Allen Anderson, Senior, the negroes and the cash proceeds of the realty and of some personalty to which his ward was entitled, and gave his receipt therefor. There were five negroes allotted to his ward.

In August, 1849, Robert H. Anderson died, being still a minor and without issue. His next of kin were his grandmother, Mrs. Mary Anderson, widow of the testator, and Mrs. Covington, his maternal grandmother.

On 16 November, 1849, Mary Anderson executed the following instrument, viz:

South Carolina, Edgefield District:

Know all men by these presents that I, Mary Anderson, of the District and State aforesaid, for and in consideration of the natural love and affection which I have to my son, Allen Anderson, of the same State and District, have released and conveyed, and by these presents, do release and convey unto the said Allen Anderson all my right, claim and interest in or to the estate of my deceased grandson, Robert H. Anderson, late of said District, of whom George McKie was guardian, whether real or personal, to have and to hold all my said right, claim or interest in the same to the said Allen, his

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\*heirs and assigns for ever, and I do hereby bind myself, my heirs, executors and administrators, to warrant and defend all and singular my said right, claim and interest in the said estate, to the said Allen, his heirs, executors, administrators and assigns against me and all others claiming under me. Witness my hand and seal, this the sixteenth day of November, eighteen hundred and forty-nine, and in the seventy-fourth year of American Independence.

her  
Mary X Anderson.  
mark

Signed, sealed and delivered in the presence of

Joel Curry,  
H. A. Shaw.

The above instrument was proved before a magistrate by one of the subscribing witnesses; and the bona fides and validity of the transaction was subsequently established at a previous stage of this cause.

It was proved also by George McKie that, besides the five negroes and about three thousand dollars in cash, which he had received from the executor of Allen Anderson, Senior, he had also, as guardian of Robert H. Anderson, received in 1837, about ten thousand dollars, to which his ward was entitled from John B. Covington, in full of his ward's interest in the estate of his father or maternal relations. He testified that, "after the death of his ward, he delivered and paid over to Allen Anderson, Junior, that part of the estate of his ward to which Mary Anderson was entitled as next of kin to Robert H. Anderson. Witness did this at Mary Anderson's request. Witness went to pay it to her, and she told him to pay it to Allen. Allen was present. The negroes were hired to Allen Anderson, Junior, and were in his possession at the death of Robert H. Anderson. They remained in his possession until his death, and after his

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death they went as he thinks, \*into the possession of his executor, Charles Hammond. By advice of the late Mr. Griffin, the guardian (McKie) upon paying over the estate of his ward as above stated, took a joint receipt from Mary Anderson and Allen Anderson, Junior. The negroes had been appraised, and their value was included in the receipt which was produced by the witness. It is dated 8th February, 1850, for the sum of "thirteen thousand and fifty-nine dollars and eighty-six cents, in full of one half of the whole estate and property of Robert H. Anderson, deceased, ascertained by a full and final settlement that day made in the Commissioner's Office of Edgefield District," and is signed by Mary Anderson and Allen Anderson, in presence of Owen E. Sullivan.

These facts as intimated in the judgment of the Court of Appeals, "are conclusive of the controversy of the parties concerning the estate of Robert H. Anderson—so far as received from the guardian." The estate in hands of his guardian was altogether personalty—could have been well transferred by delivery without writing, but was effectually assigned to Allen Anderson by the instrument of 16th November, 1849, whether with or without a seal, and was consummated by the payment of the fund and delivery of the property to the assignee by direction of the assignor.

But it is insisted on the part of the plaintiffs that, Robert H. Anderson having died under age, and without issue so much of his estate as was derived from his grandfather, Allen Anderson, Senior, became, thereupon, divisible "among the testator's, (Allen Anderson,) remaining children and their heirs." That the plaintiffs are within this description. If Robert H. Anderson took any part of his grandfather's estate, it was not because he was the declared object of the testator's bounty, or that he was included as a



beneficiary under any provision of the will. To his father, George Anderson, an estate had been given in terms of the most ample signification, "to him and his heirs forever."

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But \*George Anderson died in the testator's lifetime, and according to familiar principles, the legacy to his son would have failed. To provide against the consequences of this lapse in a particular case it is declared by the ninth section of the Act of 1789, (5 Coop. 107.) that "if any child shall die in the lifetime of the father or mother, leaving issue, any legacy given in the last will of such father or mother, shall go to such issue, unless such deceased child was equally portioned with the other children by the father or mother when living." Under this provision of the law Robert H. Anderson received the legacy to which his father would have been entitled if he had survived the testator. "He did not take under the will, but by law." Some half century after the enactment of 1789, this subject came under the consideration of the British Parliament; and by 1st Vict. c. 26, s. 33, it is declared that, in such case, the devise or bequest to the parent, "shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator." According to the construction given to this statute, the legacy to the parent passed not to his issue necessarily, but as his general estate, "and was disposable by his will, notwithstanding his death before the death of the ancestor." *Johnson v. Johnson*, 3 Hare, 157. But this construction is upon the particular language of the English statute. The general purposes of the legislation were the same. In the Stat. 1st Vict. the object was effectually accomplished by declaring that in such case, no lapse should take place, notwithstanding the death of the legatee in the lifetime of the testator. The legacy consequently passed to the personal representative of the deceased legatee; encumbered, of course, with all the charges and limitations of the will "as if the death of the legatee had happened immediately after the death of the testator." So by the Act of 1789, the purpose is accomplished by declaring, that in such case, "any legacy given in the last will of such father or mother, shall go to such issue." It is the

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\*legacy given to the parent by the will, to which the child thus becomes entitled by law. If it be an absolute gift, the issue takes an absolute estate. If the devise to the parent be an estate for years, the issue takes no more. If the gift to the parent be for life, with a valid remainder to a third person, the issue takes nothing. If an absolute estate (as in this instance) be given to the parent, but defeasible on a particular contingency, the issue takes the legacy just as the parent would have taken it "if he had died immediately after the testator," and de-

feasible only upon the particular contingency declared in the will. To adopt any different construction would embark the Court on a wide sea of speculation as to what the testator probably would have done had he foreseen the event (which he did not contemplate) and attempted to provide for it. It would be to make a new will for the testator and engraft an additional provision on the statute. The plaintiffs' exception submits, that "the portion was taken by Robert upon the conditions and limitations to which it would have been subject in the hands of his father, George Anderson, if he had survived the testator." This language and the principle literally involved in it, appear to the Court to present the true construction of the statute. The object is to conform strictly to the will of the testator consistently with avoiding the consequences of a lapse. The legacy to George is, in terms absolute. It is this legacy which by the operation of the statute, goes to his issue. But the will declares this legacy defeasible in the event that George dies under age and without issue. That contingency never occurred, and never could occur, at the period when the legacy took effect. The argument proposes to defeat the legacy to George, because Robert died under age and without issue—a condition of defeasance, not found in the will of the testator, and at variance with what is there provided. But, as has been already suggested, neither the Act of 1789, nor the English Statute of 1838, purport to

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make a will for the testator, but \*only to prevent in some measure, and under certain circumstances, the entire defeat of his intention in consequence of a rule of law as applicable to an unforeseen event. Under one Statute the issue is made the recipient of the bounty intended for the parent. Under the other statute the existence of issue saves the lapse, and the estate passes as if the legatee, had survived the testator. But neither statute proposes to go further or to do more. The character of the bequest is not changed, nor any charge, limitation or condition, as prescribed by the will, in any manner affected; nor any new limitation or condition, affixed thereto. The legacy stands as declared by the will. In England the personal representative of the legatee takes the legacy as his testator or intestate would have taken. In South Carolina the issue takes as the personal representative takes under the English statute. George Anderson, the legatee, not having died under age or without issue, the legacy under his father's will, and which the law cast upon his son, Robert H. Anderson, was in the hands of the latter, an absolute and indefeasible estate.

It remains to consider the plaintiffs' fourth and fifth exceptions in connection with the clause of Allen Anderson's will which makes provision for his widow. The

house and plantation on which testator resided, containing one hundred acres, together with one-fifth of all his personalty, including debts, &c., are devised and bequeathed to his widow during her natural life, and after her death to be equally divided among testator's children and their legal representatives. Under the view heretofore taken, and according to the authority of *Southworth v. Sebring*, 2 Hill, 587, the interest of Robert H. Anderson in the personal estate thus bequeathed, so far as the same subsequently vested in his grandmother, Mary Anderson, passed to her assignee, Allen Anderson, under the instrument of 16th November, 1849, although the same was without seal, and though possession of the property may not

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have been transferred. It appears \*to the Court unnecessary to consider the effect of that instrument in reference to the interest of Robert H. Anderson in the real estate for the reason about to be stated.

Assuming that the interest of Mary Anderson in the real estate of Robert, was well conveyed to her son Allen, by the instrument of November, 1849, still the fifth exception of the plaintiffs is well taken, to wit: that the title of Allen accrued after the execution of his will of September, 1844, and as to such real estate, Allen died intestate. By the Act of 1797, one-third of his estate in that event vested in his mother, one-third in the plaintiffs, as the children of a deceased sister, and the remaining third in the defendants, the children of his deceased brother, James Anderson. On the decease of Mary Anderson, her third vested in the plaintiffs and defendants in equal moieties. The result is the same, if the deed of November, 1849, be held inoperative for the transfer of real estate. The report of the Commissioner must therefore be reformed.

It was suggested at the hearing that the plaintiffs' first and second exceptions had been reserved for consideration by the decree of 1855. The cause was "remanded to the Circuit on the second point decided by the Chancellor and involved in the defendants' grounds of appeal." This would not embrace a consideration of those exceptions of the plaintiffs. But it may not be improper to direct that the Commissioner should report on those exceptions. This may be due to the officer, and will certainly facilitate the judgment of the Court. It is ordered and decreed accordingly.

The plaintiffs appealed upon the grounds:

1. As to the paper subscribed by Mary Anderson, bearing date 16th November, 1849, the plaintiffs will endeavor to maintain, that at the time of its execution there was no delivery or transfer of possession made to Allen Anderson, Jun'r., of the negro slaves or moneys that she received as her portion of her grandson, Robert H. Anderson's estate—that

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\*there was no sufficient evidence that these slaves or moneys ever afterwards came to the possession of Allen Anderson Jun'r., as assignee or donee under the said instrument. That a voluntary transfer of property in personalty as distinguished from the subject of such property, cannot be effectual inter vivos, except by deed. That Mary Anderson's moiety of Robert H. Anderson's portion in remainder of the estate held by her for life under her husband's will, (assuming Robert to have taken absolutely,) was an interest lying purely in grant, and incapable of being transferred except by deed or will. That the "unsealed transfer" referred to, was therefore ineffectual to transmit to Allen Anderson, Jun'r., his mother's moiety of the estate of Robert H. Anderson, dec'd., or any part thereof, and that the circuit decree is erroneous in holding otherwise.

2. The plaintiffs will maintain that by the operation of the ninth Section of the Act of 1789, Robert H. Anderson took such and the same interest under the will of his grandfather, Allen Anderson, Sen'r., as he would have taken, had he been substituted in the stead of his father, George Anderson, as a legatee under that will, and it is maintained that the circuit decree is erroneous in holding otherwise.

3. The plaintiffs respectfully submit that the circuit decree of 1855, reserved the questions presented by the 1st, 2nd and 7th of the plaintiffs' exceptions to the Commissioner's report, for future consideration and adjudication by the Circuit Court, and not by the Chancellor who pronounced that decree. That the decree of the Appeal Court of December, 1855, did not withhold from the Circuit Court the consideration of the exception referred to, or any of them, and the plaintiffs give notice that they will move that the case be remanded to the Circuit Court to be heard as to the questions presented by those exceptions.

Bauskett, Carroll, for appellants.  
Spann, Bonham, contra.

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\*The opinion of the Court was delivered by

JOHNSTON, Ch. In the decree it is held that the instrument executed by Mrs. Anderson in November 1849, after Robert H. Anderson's death, was sufficient to convey her interest in his estate. In this opinion I concur; because possession was taken by the grantee, under the instrument, of which he should not be deprived. The instrument, regarded as an assignment, or covenant, should not be disturbed, after possession given.

It appears to me, also, that the decree is not erroneous on the subject of the 9th clause of the statute of 1789. The object of the statute may be better understood if we consider what a testator would naturally do if one of his children to whom he had given



a legacy, should happen to die leaving a child. The Legislature acting upon the supposition that it would be natural for him to give the legacy to the child, has declared that it shall go to him, in default of such direction. This is the spirit and scope of the Act.

It may be well, however, to guard against misconceptions that may possibly arise. I am not willing to conclude the point here, either that the fulfilment or non-fulfilment, by George, of the conditions annexed in this will to his legacy, should have any influence in determining the right of his son to receive it. Those conditions were of a merely personal character, confined to George, individually. Such conditions, I apprehend, were extinguished at his death, when he lost all apparent right to the legacy. If they had never been fulfilled by him, they had by that event become impossible; and, as the interests of the estate were in no wise affected by them, the new legatee might take (not through him but by substitution) without being obliged to fulfil them in his own person. It might be otherwise, if the conditions had been of a different character; as for example, if the legacy had been given to George upon condition that he should pay a certain debt of the testator, or release his estate from some

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claim or \*incumbrance. In such case, I suppose the legacy given to him should not go to his child without conferring upon the estate of the testator the benefit for which he had stipulated by annexing it as a condition to the legacy.

It is ordered that the appeal be dismissed, and the decree affirmed.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

### 9 Rich. Eq. \*149

\*D. F. FLEMING, et al., v. BILLINGS & BELK, et al.

(Columbia. Nov. and Dec. Term, 1856.)

[Partnership ⇨176.]

Copartnership creditors are first to be paid out of the copartnership fund, and if that prove insufficient, then they are to come in with the private creditors (respect being had to liens,) as against the individual property of the copartners.

[Ed. Note.—Cited in *Kuhne v. Law*, 14 Rich. 22, 26; *Adickes v. Lowry*, 15 S. C. 136; *Hutzler Bros. v. Phillips*, 26 S. C. 149, 1 S. E. 502, 4 Am. St. Rep. 687; *Blair v. Black*, 31 S. C. 358, 9 S. E. 1033, 17 Am. St. Rep. 30.

For other cases, see *Partnership*, Cent. Dig. § 308; Dec. Dig. ⇨176.]

[Partnership ⇨181.]

If, after paying copartnership creditors, there is a balance left of the copartnership fund, that balance is to be applied to the individual creditors of the copartners, but in such

manner that the creditors of each shall only go against their debtor's share.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 316; Dec. Dig. ⇨181.]

[Witnesses ⇨83.]

Upon a question between creditors as to the amount paid by the copartnership and the amount paid by each copartner for a lot and buildings—the object being to ascertain how much of the value of the lot should be treated as copartnership assets and how much as the individual estate of each copartner:—*held*, that the copartners, they being parties to the bill, were incompetent witnesses to prove how much each had paid out of his individual funds.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 236; Dec. Dig. ⇨83.]

This case was first heard before Johnston, Ch., at Lancaster, June sittings, 1854, who pronounced the following decree:

Johnston, Ch. The plaintiffs are creditors of the mercantile firm of Billings & Belk, the defendants, who carried on business of a very general character at Lancaster.

It appears that the defendants, some years ago, bought a village lot from Mr. Clinton, at the price of five hundred dollars, for which he agreed to execute titles to them jointly by their individual names; and upon receiving the price agreed on, actually made a deed to them jointly.

They are now insolvent, both as partners and as individuals.

One of them, Belk, has confessed two judgments, one to the defendant Cousart for

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about twelve hundred dollars, and \*the other to Mrs. Belk, his mother, for about one thousand dollars.

The defendants had built a store house on part of the premises purchased by them, and on another part they erected a dwelling house. About the time of the confession of the two judgments by Belk, the plaintiffs brought suits at law on their demands against the firm. Under these circumstances a division of the lot by private arrangement was made between the parties, in which the store house with part of the premises was allotted to Belk, and the dwelling house with another portion of the lot to Billings.

An execution of an individual creditor of Billings has been levied on his portion, which has been sold under the levy for twenty-five dollars; but under such circumstances that the purchaser has not complied with the terms of sale nor taken titles.

The execution of Cousart has been levied on the store lot, treating it as the individual property of Belk, and also upon some parcels of lumber lying on the premises.

The bill is to have the lot (I mean the original lot bought from Clinton without regard to its subdivision) declared to be partnership property, and liable to partnership debts.

The proof is that a very considerable portion of the purchase money was paid to Clin-

ton by discounting demands which the partnership held against him. It also appears that a large portion of the work for erecting the buildings was paid for in the same way, and that the lumber was to a considerable extent contracted and settled for in the same manner, and orders from the firm were produced, directing a delivery of lumber by the saw mill.

Without stopping to enquire whether the premises are, by the terms of Mr. Clinton's conveyance, made partnership property, or whether the manner in which they were employed constituted them such property; I think this case may be decided upon another principle.

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\*It is undoubted that a very large portion of the purchase money, both for the lot and its improvements, had been paid out of the partnership assets, thus abstracting from the partnership creditors, property properly liable to their demands. It is impossible, as matters now stand, to pronounce, with certainty, what portion of the purchase money, if any, has been furnished out of the private funds of the partners.

But if a party confounds his rights of property with those of a third person he must bear the consequences of the confusion which he has himself produced, and on a like principle I suppose, if partners commingle their partnership property with their individual property, the partnership creditors are not to suffer loss in consequence.

In this case, were no third persons concerned but the partnership creditors, and the individual partners, I should hold that the creditors would be entitled to relief, let the consequences to the private property of the partners be what they may. But on the other hand, I am to consider the rights of the private creditors. They should not lose.

In the case I have just put, where none but the partners themselves are to be affected by that wrongful act, I should have held, that the burden was upon them to shew, what portion of their private funds entered into the purchase of the property. This would have been right in such a case, because it would be proper to lay the burden of proof upon them, who were familiar with their own conduct and affairs, rather than upon creditors who must necessarily be without such a clear knowledge.

But in this case where there are not only creditors of the firm, but private creditors, it is as much impossible for the latter as for the former to accurately unravel the transaction. In such case I suppose it is the reasonable course to direct a general enquiry, with such proofs as the parties may be able to furnish.

It is ordered, that the private creditors

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of each partner, as also the partnership creditors, be called in, by a time to be fixed by

the Commissioner, by three months publication, to render and establish their demands.

That they be enjoined from proceeding at law until further order.

That the Commissioner do sell the premises (meaning the whole lot bought from Clinton,) but that he sell it in parcels corresponding to the division made by the partners, if he can ascertain the boundaries of such subdivision. That this sale include the lumber as levied on by the sheriff, and be made after at least twenty-one days notice by newspaper publication, and that the terms of sale be a credit of twelve months with interest from the day of sale, the purchasers to give bond with at least two good sureties and a mortgage of the premises to secure the purchase money, and the proceeds of sale to await further order. The sale to be at Lancaster Court House, and on a sale day.

That the Commissioner, after ascertaining the proceeds of sale (deducting the costs therefrom) do report what portion of said proceeds are upon the principles of this decree applicable to the partnership debts, and what portion should stand as the private property of the partners so that the different creditors may receive their proper demands. Under this head it is adjudged, that the partnership creditors are first entitled to be paid out of the proceeds considered to be partnership funds and if that is insufficient to pay them, then they are to come in with the private creditors (respect being had to liens) as against the proceeds regarded as private property. And on the other hand, if the partnership proceeds be more than sufficient to pay the partnership creditors, the residue of said proceeds shall be liable to the individual creditors, respect being had to each partner, so that the creditors of each shall only go against his debtor's portion. And let the Commissioner have leave to report any special matter.

The demand of Cousart has been im-

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peached. But the evidence, with any other that may be produced, may be enquired of further by the Commissioner, on the reference.

The Commissioner, at June sittings, 1855, reported, that he had taken testimony under the order of reference contained in the foregoing decree; that the evidence showed, that nine hundred and twenty-nine dollars and forty-three cents had been paid out of partnership funds for the lot and buildings; that five hundred and ninety-seven dollars had been paid by Belk out of his individual funds, and two hundred and sixty-three dollars and ninety-six cents by Billings; that Billings and Belk had been examined to show the amount each had paid out of his individual funds, but regarding their testimony as incompetent for that purpose, in making up his judgment he had rejected their testimony.



He further reported that he had sold the two lots as directed—the store house lot for eight hundred dollars, and the dwelling house and lot for one thousand dollars—and that there remained in his hands, after payment of costs and expenses, the sum of one thousand six hundred and six dollars and fifty cents, applicable to the demands of creditors; that of this amount nine hundred and twenty-nine dollars and forty-three cents should be applied to the partnership debts, and the balance to the individual debts of Billings and Belk.

He further reported the amount of debts established with the names of creditors.

The different parties filed exceptions to the report. The only legal question made by the defendants, in their exceptions, was as to the competency of Billings and Belk as witnesses.

Wardlaw, Ch. This case comes before me on exceptions to the report of the Commissioner under the decree of Chancellor Johnston of July 1, 1854. The exceptions are many and long but chiefly relate to small matters of detail as to which I am disposed

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to give to the Commissioner's report \*the efficacy of a verdict. The Commissioner's report on the exceptions is satisfactory to me so far as it goes, but it contains no observation on the exceptions of Andrew Mayer which were filed just before the hearing. It was only in relation to the last exceptions that counsel addressed the court. Mayer is

not a nominal party on the record, but he has made himself a party under the former decree calling in the partnership and private creditors of Billings & Belk. I should have been content if the Commissioner had not diminished the claim of Mayer upon Billings by the amount of twenty-five dollars, bid for a portion of the lot; but considering that the sale was at his instance, with full notice that this bill had been filed, upon mere speculation, and that it does not appear that he complied with the terms of sale, I shall not disturb the conclusion of the report.

It is ordered and decreed that all the exceptions be overruled and that the report be confirmed.

The defendants appealed on the ground, that the Chancellor erred in overruling their exceptions to the Commissioner's report, and especially their exception as to the competency of Billings and Belk as witnesses.

Williams, for appellants.

Moore, contra.

PER CURIAM.—We concur in the Chancellor's decree, and it is affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, and WARDLAW, CC., concurring.

DARGAN, Ch., absent at the hearing.  
Appeal dismissed.

# CASES IN EQUITY

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

CHARLESTON—JANUARY TERM, 1857.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,  
“ BENJ. F. DUNKIN,  
“ GEORGE W. DARGAN,  
“ F. H. WARDLAW.

9 Rich. Eq. \*155

\*E. WAGNER, et al. v. THE VESTRY AND  
WARDENS OF THE EPISCOPAL  
CHURCH IN THE PARISH OF CHRIST  
CHURCH.

(Charleston. Jan. Term, 1857.)

[*Quo Warranto* ⚡18.]

Where a corporation acting as a single body is sought to be restrained from an abusive exercise of its powers, the proceeding should it seems be by information ex relatione, through the Attorney General.

[Ed. Note.—For other cases, see *Quo Warranto*, Cent. Dig. § 19; Dec. Dig. ⚡18.]

[*Religious Societies* ⚡18.]

The corporation of the Episcopal Church of Christ Church Parish have the power under their charter to build a church or chapel of ease at Mount Pleasant.

[Ed. Note.—For other cases, see *Religious Societies*, Cent. Dig. § 125; Dec. Dig. ⚡18.]

Before Dargan, Ch., at Charleston, June, 1856.

Dargan, Ch. The Vestry and Church Wardens of the Episcopal Church in the Parish of Christ Church, were incorporated by an Act of the Legislature, passed in 1787. The preamble to the Act recites, that the Parish Church, which is situate about six miles from

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the town of Mount \*Pleasant, had been burnt down; that money had been given by several persons for re-building and fitting up the Church, and for providing for the maintenance of a minister, and the payment of other proper officers of the same; and that these objects could be more successfully accomplished if the Church were incorporated. The Act then erects the Vestry and Church Wardens, and their successors, into a body

corporate, “with all the powers and authorities that are vested in any corporated and established Church in the State,” and empowers them to hold the real and personal property, then belonging to them, and to acquire any other property by purchase or gift, and at their discretion, to sell and dispose of the same, “for the purposes aforesaid.” The Act then proceeds to make it their duty to re-build or repair the Church, and authorizes them to assess the pews for payment of the cost, and also to appoint and remove at pleasure, ministers, and other necessary officers, and to provide salaries for them.

The Church was re-built, and ministers have been appointed and paid by the Vestry and their successors, from time to time. And there is now a minister, of their appointment, who officiates regularly in the Parish Church, except during the sickly months of the year.

The Vestry have a fund in their hands, invested in securities amounting to about eleven thousand dollars. The origin of this fund cannot be ascertained. It is not even known certainly, whether any part of it existed at the date of the Act of incorporation, or whether it has been acquired in whole or in part, since that time.

In the year eighteen hundred and thirty-three, some of the inhabitants of the town of Mount Pleasant, which is situated within the Parish of Christ Church, built a small Episcopal Church there, and at their request the Vestry took charge of the building and have allowed the minister of the Parish Church to perform services in it.

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\*The population of Mount Pleasant has in-



creased very much of late, and the Episcopal inhabitants finding the present Church too small for their accommodation, have applied to the Vestry to build a larger one out of the fund referred to, or to aid them by making up so much of the cost as they may fail to raise by subscription.

A majority of the Vestry resolved to grant the application, and appointed a committee from their body, who have advertised for estimates for the building. The present bill is filed by the minority of the Vestry, and prays for an injunction.

The question to be decided, therefore, is, whether the Vestry may lawfully use the fund in the manner proposed?

In the absence of any special trust in this matter (and none such has been shown,) the powers of the Vestry in relation to this fund must be ascertained from the Act of incorporation. In this respect, they stand on the same footing with other corporations. They cannot use their property for any purpose that is not allowed by the Act, or that might not by fair interpretation be brought within its scope, if its terms were general. But this Act is explicit as to the objects for which the Vestry were incorporated. Those objects are set forth in terms, to be the re-building or repairing, and fitting up the old Parish Church, providing ministers and other necessary officers for the same, and paying their salaries, as already mentioned; and it is clear, that by the "purposes aforesaid," for which, in the second section, the Vestry are allowed to sell or dispose of any of their property as they might think expedient, those objects are intended. There is no room for saying that the Vestry were clothed with power to use the fund for the general purposes of christianity within the Parish, as was urged in argument. Nor is there any occasion to resort to the law ecclesiastical to determine the powers of this Vestry over the fund. Those powers are sufficiently defined in the Act.

It is also immaterial to this case, wheth-

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er the present fund \*existed at the date of the Act, or was acquired afterwards, for the Act itself gives the same directions as to the fund then in the Vestry's hands, and any fund that might afterwards come to them.

It is evident, that the building of a Church or Chapel in the town of Mount Pleasant, is not one of the objects for which this Vestry may use their fund, as those objects have been explained above. It is therefore ordered, that the defendants, the Vestry and Church Wardens of the Episcopal Church, in the Parish of Christ Church, be perpetually enjoined from using the fund in their hands, or any part thereof, for or towards the building of a Church or Chapel in the town of Mount Pleasant. Costs to be paid by the defendants.

The defendants appealed on the ground

That the defendants, being clothed by their Charter of incorporation, with all the power and authority which are vested in any corporate Church in the State, have a right to appropriate a reasonable portion of the fund in their hands to the construction of a Chapel for the ease of the Parishioners of the Mother Church.

Petigru and King, for appellants.

Lesesne, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. As no such point has been raised by the defendant, we are not disposed to volunteer the inquiry which has suggested itself to our minds—whether the plaintiffs should not have brought their complaint in the form of an information ex relatione, through the attorney-general; which would seem to be the more fitting proceeding when a corporation, acting as a sin-

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gle body, without reference to majority \*or minority, is sought to be restrained from an abusive exercise of its powers.

We are satisfied, upon other grounds, that the plaintiffs are not entitled to hold their decree.

The corporation, whose acts are now under examination, did not originate in the statute of 1787, 5 Cooper, 140, referred to in the decree as its charter. It was created as far back as 1706. By a statute of that year, 2 Cooper, 282, the county of Berkley—which, by an order of the Lords Proprietors, given in 1682, embraced Charlestown, and extended on the coast, from Sewee on the north to Stono-creek on the south, and had for its inland boundaries, Craven county, northward, and Colleton county, southward,)—was divided into six parishes, of which Christ Church was one: and by several sections of the same statute, the rights, and privileges of the rectors, select vestries and wardens of the different parishes, with the modes of their appointment, were fixed and regulated. The statute is in its terms perpetual.

It is well known that the Episcopal Church was the established Church in the south part of the province of Carolina, now called South Carolina, from the time of Sir Nathaniel Johnson, during the residue of the proprietary government, and from the beginning of the royal government, after the surrender of their charter by the lords proprietors, up to the time of the revolution.

Then we have the constitution of the 26th March, 1776, 1 Cooper, 128, by the 29th clause of which, it is declared that "all laws now of force here, and not hereby altered, shall so continue, until altered or repealed by the legislature of this colony, unless where they are temporary, in which case they shall expire at the times respectively limited for their duration."

The constitution of 19th March, 1778, 1

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Cooper, 137, clause 38, while \*extending toleration to "all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped," and announcing that "the christian protestant religion shall be deemed, and is hereby constituted and declared to be the established religion of this State," and that "all denominations of christian protestants in this State, shall enjoy equal religious and civil privileges:" proceeds "to accomplish this desirable purpose, without injury to the property of those societies of christians which are by law already incorporated," by establishing certain process by which those societies desiring incorporation may obtain it: and expressly declares "that the respective societies of the Church of England that are already formed in this State, for the purpose of religious worship, shall still continue incorporate, and hold the religious property now in their possession."

Thus stood the Episcopal Church of the parish of Christ Church, when in 1787, the Act 8 Cooper, 140, was passed which has been regarded as its present charter. (a)

If this statute gave to it certain powers suited to particular circumstances, or powers of a circumscribed nature, it did not take away the general or larger powers it already possessed. In such cases, the new charter is regarded as amendatory of the old, the new is purely cumulative, and the case is as if the old and the new were issued together, forming one charter.

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\*I suppose that the vestry and wardens of this parish church, independently of the statute of 1787, and acting merely as a corporation under the statute of 1706, according to the polity of a colonial Episcopal Church, had a right to apply any church funds, not devoted to specific objects, to the advancement of general religious purposes in the parish. (b) If their church building were destroyed, or its site become insalubrious or the bulk of the parishioners collected in some other neighborhood,—if any circumstances rendered it advisable, having respect to

(a) And see Constitution of June 3, 1790, Article 8, § 2, (1 Cooper's Statutes, 191), which declares that "the rights, privileges, immunities, and estates of both civil and religious societies, and of bodies corporate, shall remain as if the constitution of this State had not been altered or amended." In this, and in the previous revolutionary constitutions, the saving of pre-existing laws, would seem to have been unnecessary; for such seems to be the result under every conquest or revolution, except so far as the laws are repugnant to the constitution or structure of government, of the conqueror or revolutionary party. So far as the prior laws are political, they give way; so far as they are purely civil, or municipal, they remain.

(b) See Vestry & Wardens v. Barksdale, 1 Strob. Eq. 200, et seq.

the whole parish—I suppose it was competent to change the location, and erect a new church edifice elsewhere. And so, I suppose, if for a portion of the year, a majority of the parishioners were collected for their health at Mount Pleasant, it was competent to make provision for a chapel for public worship there, provided the consent of the Rector, and of the Bishop were obtained.

These privileges were not taken away by the statute of 1787. But if we confine ourselves to that statute alone, I am still of opinion, that the proceeding against which the injunction has been granted was within the powers of the corporation.

The statute incorporates them as an Episcopal Church; which, in my opinion, gives them all the powers belonging to churches of that order; as to which I have already spoken. But, it moreover appears in the statute, that it was passed in answer to their petition to be incorporated "and vested with all the powers privileges and immunities which any of their sister churches enjoy." They are accordingly in express terms, "vested with all the powers and authorities which are vested in any corporated and established Church in this State." By this I understand, not all the powers belonging to churches of a different denomination, but to those of their own ritual. Here, again, we have a general grant of powers, such as belong to the vestry and

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wardens of Episcopal churches. \*And it so happens, that in an Act, 8 Cooper, 137, passed but five days before this, the vestry and wardens of the parish of St. Bartholomew, were incorporated, with express power to restore dilapidated chapels.

I think it is but fair to give statutes incorporating churches a liberal construction, for advancing the cause of religion: and while I would never favor such a construction as would permit any church, or any majority in it, to pervert its tenets, its organization or its ritual from their true denominational character, I would do every thing in my power, to advance all its acts, (not revolutionary,) tending to wholesome purposes.

It appears that in 1787, this corporation possessed funds which had been contributed for the special purpose of reconstructing their church building, which had been burned down by the enemy, during the revolutionary war. If these funds remain, and any portion of them enter into the appropriations complained of in the bill, the appropriation might be restrained. But the burden of showing this was on the plaintiffs, and it has not been shown. Are we, without proof, to presume that when funds have been raised to build a church, and the church has been built, it has not been accomplished by expending the funds? Are we to presume any thing of such a character, after a lapse of seventy years?



It is ordered that the circuit decree be set aside, and the bill dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Decree reversed.

### 9 Rich. Eq. \*163

\*WILLIAM J. BENNETT v. THE CALHOUN LOAN AND BUILDING ASSOCIATION, E. WELLING, and E. DE TREVILLE.

(Charleston. Jan. Term, 1857.)

[Execution ⇨113.]

Where mortgaged land is sold by the sheriff, under junior executions, the purchaser takes subject to the lien of the mortgage.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 242; Dec. Dig. ⇨113.]

[Mortgages ⇨437.]

Where, pending a bill to foreclose a mortgage of land, the land is sold by the sheriff under junior executions, the complainant is not bound to amend his bill so as to make the purchaser at sheriff's sale a party.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1290; Dec. Dig. ⇨437.]

[Equity ⇨296.]

If the purchaser wishes to be heard, he may, it seems, bring himself before the Court by supplemental bill, in the nature of a cross bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 586; Dec. Dig. ⇨296.]

[Equity ⇨428; Judgment ⇨507.]

The Acts of 1784, 1789, and 1810, in relation to the time within which causes in equity should be decided, were intended for the parties themselves. A third person cannot impeach a decree because of delay in obtaining it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1015-1019; Dec. Dig. ⇨428; Judgment, Cent. Dig. § 950; Dec. Dig. ⇨507.]

[Mortgages ⇨178.]

Where mortgaged land is sold by the sheriff, under executions junior to the mortgage, and the mortgagor afterwards takes the benefit of the Insolvent Debtor's Acts, the mortgagee, by failing to prove his mortgage in the Law Court, as directed by the Insolvent Law, does not forfeit his lien upon the land as against the purchaser.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 426; Dec. Dig. ⇨178.]

[This case is also cited in *Bulow v. Witte*, 3 S. C. 326; *Hagood v. Riley*, 21 S. C. 145, as to the doctrine of laches.]

Before Dargan; Ch., at Charleston, June, 1856.

Dargan, Ch. The Calhoun Loan and Building Association is a corporate body, and Edwin Welling, one of its members, on the 17th day of April, A. D. 1853, executed to the said Association a bond, conditioned for the payment of five thousand dollars, in instalments, and to secure the payment thereof, executed a mortgage of a lot in the city of Charleston, at the corner of Beaufain and Rutledge-streets. There was much said at the trial, and there is a good deal in the evi-

dence, as to the manner in which the debt was created. But all that I regard as immaterial to the issues presented for adjudication in this case. The mortgage was duly proved and recorded.

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\*On the 13th May, 1854, the Association filed a bill against Edwin Welling for a foreclosure of the mortgage. From the date of the filing to the 11th February, 1856, no proceeding was had in the case, when an order pro confesso was taken against Welling. The case was referred to the Master on the 19th February, 1856. On the 4th March, 1856, there was a report, and on the same day the report was confirmed, and there was a decree for the foreclosure of the mortgage, by which the premises were ordered to be sold, and the proceeds of the sale applied in satisfaction of the amount reported to be due, and the balance, if any, to be paid to the mortgagor, the said Edwin Welling.

After the filing of this bill, Edwin Welling was arrested on a *capias*, and having petitioned for the benefit of the Act passed for the relief of insolvent debtors, on the 8th October, 1855, he was regularly and duly discharged as an insolvent debtor. The Association adopted no proceedings to prove their debt as a suing creditor, according to the directions of said Act. E. DeTreville, one of the defendants, was appointed the assignee.

Subsequent to the date of the mortgage, to wit, on 24th May, 1854, Edwin Welling executed and delivered to the plaintiff, William J. Bennett, a bond, bearing that date, in the penal sum of seven thousand dollars—conditioned to indemnify the said William J. Bennett for the liability he was then about to assume by the endorsement of Welling's note for three thousand seven hundred dollars, to the Planters' and Mechanics' Bank. On the same day, Welling gave a confession of judgment for the penalty of the bond, and a writ of fieri facias was lodged with the sheriff to bind. The plaintiff alleges that he has been obliged to pay the note, besides, that he has made other pecuniary advances for said Welling, for all of which he has received no reimbursement, and that the said Welling is utterly insolvent. In the meantime the mortgaged premises have been sold, not under

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the decree for fore\*closure, but under sundry writs of fieri facias in the hands of the sheriff, against the said Edwin Welling. William J. Bennett (this plaintiff) became the purchaser, and the purchase money has been paid to the sheriff, and applied to the executions in his hands, according to their legal priority.

The plaintiff charges that the decree of foreclosure, in the case of the Calhoun Loan and Building Association v. Edwin Welling, was, under the circumstances, a nullity, and

prays that it may be so declared by a decree of this Court. He charges that the lien of the mortgage was lost, and the mortgage itself forfeited, by the omission of the said Company to institute proceedings for the recovery of their debt in the Insolvent Court. He prays that the lot at the corner of Beaufain and Rutledge-street may be sold by a decree of this Court, and the proceeds applied to the payment of his judgment, and for general relief.

The three defendants have filed separate answers, in none of which are the facts above stated controverted or denied. And these are the facts on which the judgment of the Court will be formed.

One of the grounds, upon which the plaintiff claims to have the decree for foreclosure vacated, is, that the suit of the Calhoun Loan and Building Association against Welling had abated at the time the order pro confesso was taken. His proposition is, that the case was out of Court, and that there was, at that time, no suit pending in which any order or decree could be taken against the defendant. In this view of the case I entirely concur.

I have already stated, that, from the filing of the bill, on 13th May, 1854, nothing was done in the advancement of the cause until the 11th February, 1856, when the order pro confesso was taken. A period of nearly twenty months elapsed without the plaintiff's moving.

There is both reason and necessity that there should be some limitation to the time,

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during which the plaintiff shall \*be permitted to keep his case pending in Court, without advancing. If a year is not enough, how long a time should be allowed?

The Act of Assembly of 1784, for establishing a Court of Chancery, affords a rule for this matter. The 6 Sec. 7 Stat. 209, is in these words: "That no suit or petition in Chancery, in which a decree or dismissal has not yet been obtained, shall be considered as dismissed or discontinued for any past delay of prosecution, but that all such suits and petitions shall be deemed to be pending in the Court hereby established, and to be now in the same state in which they were when the last proceedings were had thereon: and that every such suit or petition shall be finally determined within one year from and after the passing of this Act; and every suit or petition which shall hereafter be presented or instituted in said Court, shall be finally decided within one year after the same shall have been preferred or commenced, unless upon application in full and open Court, in Term time, and for special reasons to be assigned on account of the absence of material witnesses, or of some of the parties, or any other equitable cause, the Court shall think proper to extend the time (not exceed-

ing twelve months longer) for the determination of the suit."

The language of the Act, that no suit in Chancery, then pending, "shall be considered as dismissed or discontinued for any past delay of prosecution," clearly implies, that before that time, delay of prosecution did operate for the dismissal or discontinuance of causes. The Act then provides a rule for the future, and declares that all suits thereafter instituted shall be finally decided within one year from the time of their commencement, unless upon cause shown in open Court, in Term time, they shall be continued. When a case is marked "continued" upon the docket by the presiding Chancellor, I apprehend it is a sufficient compliance with this latter provision of the Act, in respect to the manner of continuing causes. The case of the Calhoun Loan and Building As-

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sociation did not \*go upon the docket until February Term, 1856, when the decree for foreclosure was obtained. My opinion is, that no case was then pending in which it was competent for the Court to give a decree.

I am also with the plaintiff on the other grounds upon which he predicates his prayer for relief. After the filing of the bill, and before the decree for foreclosure, to wit, on the 7th July, 1855, Welling filed in the Court of Common Pleas a petition for the benefit of the insolvent debtor's Act. On the 20th October, 1855, he obtained his discharge, which was under the usual formalities, and in the usual form. This, it is contended, operated as an abatement to the suit of the Calhoun Loan and Building Association v. Welling. There are authorities to that effect, though I am not prepared to go so far as to say that the suit abated. The bankruptcy of a plaintiff, or his discharge under the insolvent debtor's law, would certainly operate as an abatement. For any voluntary act of a defendant to abate the suit, would be an anomaly in the rules of practice. He is, in general, not allowed to put an end to the suit by his own act. The discharge of an insolvent may, without violence to a due construction of the proceedings, be considered as compulsory. His arrest is not voluntary. And after that proceeding, he must remain incarcerated, unless he petitions for his discharge.

Upon the question, whether the discharge of an insolvent operates as an abatement of a suit pending against him, there is conflict in the authorities. The better opinion is, that where a defendant becomes a bankrupt after the commencement of the suit, the bankruptcy is no abatement, and the plaintiff may elect to dismiss his bill, and go in under the bankruptcy, or to go on with the suit, making the assignees parties by supplemental bill. *Monteith v. Taylor*, 9 Ves. 615; *Sedgewick v. Cleveland*, 7 Paige, 290; *Story's Eq. Pl. and Pr.* 342. In *1 Daniel's Chau. Pl.* and



Pr. 230, the author, summing up, observes, "After what has been said, it is scarcely

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\*necessary to say, that where a party who is a defendant to a suit becomes a bankrupt, or takes advantage of the insolvent debtor's Act, it will be necessary for the plaintiff, if he proceeds with his suit, to bring the assignees before the Court by a supplemental bill."

In *Randall v. Munford*, 18 Ves. 427, Lord Eldon uses this language: "This Court, however, without saying whether a bankruptcy is or is not strictly an abatement, has said, that according to the course of the Court, the suit has become as defective as if it was abated." If the suit does not abate, all the decisions agree in this, that the assignees must be made parties by supplemental bill.

There is yet another ground on which the plaintiff is entitled to the relief which he seeks. When Edwin Welling petitioned for the benefit of the insolvent debtor's Act, and when he obtained his discharge, the Calhoun Loan and Building Association was a suing creditor of the petitioner, by bill in this Court to foreclose a mortgage.

By the provisions of the Act of 1759, 4 Stat. 86, all the creditors of an insolvent debtor petitioning for his discharge (as well those suing, as those who are not) are required to prove and establish their demands before the Court in which such application is pending (i. e., the Court of Common Pleas). Such a proceeding, in that Court, operates ipso facto, as a discontinuance of any action, before any other Court, which a creditor of the insolvent petitioner is prosecuting against him. The Court of Law, under this Act, has the power, and undertakes to administer the estate of the insolvent debtor through the medium of an assignee, and to distribute it among his creditors, according to their respective rights and legal priorities. The proceeding of the creditors in the Insolvent's Court is in the nature of an action against him. The Court renders a judgment as to all the claims that are proved, according to the form prescribed. A distribution is made. All the suing creditors are bound to take their dividend. The insolvent

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is \*discharged as to their claims, and they must look to the fund. The non-suing creditors may elect to take their dividends, or not. In the latter case, not having a judgment, they may wait, and afterwards prosecute their case against the insolvent, but neither they, nor subsequent creditors, can sue or implead the discharged insolvent within twelve months from the date of his discharge.

My object, in making these commentaries upon the Act of 1759, is to show that the Act was intended to establish a complete system of relief for insolvent debtors and their creditors, and that all parties were re-

quired to appear before the one jurisdiction invested with authority for that purpose. It is not reasonable, and it is made unlawful, for the creditors to drag an unfortunate debtor before more than one tribunal.

The Calhoun Loan and Building Association, at the time of the application of Edwin Welling to the Court of Common Pleas for his discharge as an insolvent debtor, and at the time of his discharge, 8th October, 1855, was a suing creditor of the said Edwin Welling in the Court of Equity, in a bill to foreclose a mortgage. When the Court of Law entertained the petition, and advertised for the creditors of the petitioner to present and prove their demands before that Court, the suit in equity to foreclose was discontinued. As to the Court of Equity, it was coram non judice. After this, whatever right the mortgagee had, was to be enforced alone in the Court where the case of the insolvent petitioner was being tried. If he omits to present and prove his claim and mortgage, in the manner prescribed by the Act, he loses the benefit of the lien of his mortgage. *Porteus v. Sullivan*, 1 McC. 397.

The 4th section of the Act provides, that mortgagees of the insolvent debtor, and persons to whom his estate has been assigned or conveyed in trust, for his benefit, shall, at the time and place appointed for the appearance of the creditors of the insolvent petitioner, appear, "and deliver to the said Court a fair account or accounts, on oath, of all

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monies that are really \*and bona fide due and owing to them," &c., "upon such mortgage, assignment or conveyance." The Act then proceeds to declare, that the Court shall have power to order sale of such property, and apply the proceeds first to the satisfaction of the debt, for the payment of which the property has been mortgaged or assigned, and the residue, if any, is to be paid to the assignee of the insolvent debtor, for the benefit of his creditors generally, according to their respective rights.

The 7th section provides, that if the directions of the Act are not pursued, in relation to such mortgages and trusts, they are declared to be fraudulent, null and void, and the property so mortgaged, or conveyed in trust, shall be vested in the assignees of the insolvent debtor, "in like manner and for the like purposes as all the other estate and effects of the said petitioner are hereby directed to be vested." 4 Stat. 251.

The Calhoun Loan and Building Association, disregarding the provisions of this Act, instituted, as therein required, no proceedings in the Court of Law to prove their debt and foreclose their mortgage; but prosecuted their suit in Equity to a decree. The mortgage thereby has become a nullity, and the legal estate in the mortgaged premises has vested in the assignee of the insolvent, E.

DeTreville, who is a party in this cause, insisting upon his rights.

It is ordered and decreed, that the decree of foreclosure in the case of the Calhoun Loan and Building Association v. Edwin Welling, rendered at February Term, 1856, be set aside and vacated. It is further ordered and decreed, that the lien of the mortgage of Edwin Welling to the said Calhoun Loan and Building Association, of the lot at the corner of Beaufain and Rutledge streets, be set aside, and that the said mortgaged premises be sold by one of the Masters of this Court, at such time and on such terms as the said Master in his discretion may deem most conducive to the interest of the parties concerned. It is further ordered and decreed, that the proceeds of said sale, after deducting the plaintiff's costs in these pro-

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ceedings and those of the defendants, Welling and Treville, be paid to the said E. DeTreville, the assignee of Edwin Welling, to be paid by him to the creditors of the said Edwin Welling, according to their respective rights.

The defendants, the President and Directors of the Calhoun Loan and Building Association, appealed on the grounds:

1. That the 6th sect. of the A. A. of 1784 has never been followed in the practice of this Court, and has been virtually repealed by the subsequent Acts regulating the Court of Chancery.

2. That if the said Act is authority, its provisions were intended for the benefit of defendants; and it is in proof that Welling, in fact, waived any such benefit, his conduct amounting to a consent to the decree, and it is not competent for any other than Welling to interpose such an objection as the complainant has made.

3. The bill does not allege the want of necessary parties to the proceedings for foreclosure, neither Welling nor his assignee having made any objections, except in their answers, and the complainant's position precludes him from making such an objection.

4. That the assignee of the insolvent debtor was not a necessary party to the original suit, as Bennett had purchased all of Welling's remaining interest in the mortgaged premises before Welling's discharge, and there was nothing, therefore, to vest in his assignee.

5. That the analogy between the relief of insolvent debtors by our laws, and bankruptcy in England, will not hold; the former being voluntary, the latter compulsory; and,

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under a contrary view, any defendant arrested under a *capias* would have it in his power to abate a suit against him in the Court of Chancery.

6. That even if the assignee should have been a party to the proceedings for foreclosure, it was his duty to apply to be ad-

mitted, and he cannot be benefited by his own neglect.

7. That the provisions of the Acts for the discharge of insolvent debtors from suing creditors, apply to suits in personam, and have never been held to arrest proceedings for foreclosure of mortgage.

8. That at the time of Welling's petition for relief under the Insolvent Debtor's Act, and at the time of his discharge, proceedings were pending in this Court, by the mortgagees, for the enforcement of their lien, and they are therefore entitled to the protection of this Court.

9. That when the Insolvent Debtor's Act was passed, and down to the year 1843, there was no law rendering the recording of mortgages necessary to the preservation of their lien. The latter statute has, therefore, altered the whole policy of the law of mortgages, and is virtually a repeal of the 4th and 7th sections of the Act of 1759.

10. That the clauses of the Act of 1759, last referred to, are directed against secret trusts or liens, holding that the mortgagees in the case provided for shall "be deemed to have taken the mortgage from the petitioner upon a false or feigned trust, with the intention to defraud the creditors of the petitioner," an inference clearly precluded, in this case, by compliance with the Act of 1843, and the institution of proceedings in Chancery for enforcing the lien of the mortgage.

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\*11. That the Act of 1843 declares the cases in which mortgages are to be held void. And it is submitted, that a duly recorded mortgage cannot be held or deemed a secret trust, nor declared void, except for actual fraud.

12. That Welling was discharged in the City Court, the jurisdiction of which, as to parties and amounts, is limited, and the 4th and 7th sections of the Act of 1759 are not applicable to the City Court, if they are to the Court of Common Pleas.

13. That, by the decree, the Calhoun Loan and Building Association are held both as suing and non-suing creditors, and are subjected to all the penalties which attach to both.

14. That the decree is, in other respects, contrary to law and equity.

Martin, for appellants.

Campbell, Richardson, for complainant.

B. J. Whaley, R. DeTreville, for assignee. Buist, for Welling.

The opinion of the Court was delivered by

DUNKIN, Ch. The Calhoun Loan and Building Association is an incorporated institution, and Edwin Welling, one of the members of the Association, on 17th April, 1853, executed to the said Association a bond, in the penalty of ten thousand dollars, conditioned for the payment of five thousand dollars, in monthly instalments of fifty dollars



each, and, to secure the payment of the

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bond, executed a mortgage of a \*lot in the city of Charleston, at the corner of Beaufain and Rutledge streets. The mortgage was duly proved and recorded. Some of the instalments being in arrear and unpaid, the Association, on 13th May, 1854, filed a bill against Edwin Welling for a foreclosure of the mortgage. The defendant was, on the same day, served personally by the sheriff with a copy of the subpoena ad respondendum. No further proceedings were had until 11th February, 1856, when an order pro confesso was taken, and the cause docketed.

The case was referred to the Master, to ascertain the amount due on the defendant's bond. This order of reference was taken on 19th February, 1856, and on 4th March, 1856, the report of the Master was made and confirmed, and a decree of foreclosure entered, by which it was directed that the premises should be sold by the Master, and that the proceeds should be applied to the satisfaction of the amount reported to be due, and any surplus be paid to the defendant, the mortgagor.

During the interval between the filing of the bill by the Association, and the decree of foreclosure, to wit, on 24th May, 1854, Edwin Welling confessed a judgment to William J. Bennett, the plaintiff in this cause, to indemnify him against certain liabilities assumed in his behalf. On this judgment a fieri facias had been issued, and lodged to bind. But Welling becoming unable to meet his various engagements, this property was levied upon under other executions, and was sold by the sheriff on 6th August, 1855. At this sale the plaintiff, William J. Bennett, became the purchaser at the sum of three thousand five hundred dollars. Of this sum, two thousand five hundred dollars was applied to the discharge of executions older than that of the plaintiff, and the surplus towards payment of his own execution, leaving a large balance due thereon. At the same time, the plaintiff took from the sheriff a conveyance of the premises. About two months after this transaction, to wit, on 8th October, 1855,

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\*Edwin Welling was admitted to the benefit of the Insolvent Debtor's Act, and E. De Treville, Esq., was appointed assignee.

On 10th April, 1856, this bill was preferred by the plaintiff against the Calhoun Loan and Building Association, and Edwin Welling, and his assignee, E. DeTreville. It is alleged, in substance, that before the plaintiff consented to assist Edwin Welling with his name, he caused an inquiry to be instituted, through his solicitor, relative to the incumbrances upon his property; that he was apprised of the mortgage to the Calhoun Association, but "was given to understand that there never was more than three thousand six hundred dollars due thereon, and

that this had been reduced by payments to about twenty-four hundred dollars." He avers that he was not aware, nor does he believe his solicitor was aware when he took the judgment, that proceedings were then pending for the foreclosure of the mortgage to the Calhoun Association; "but that, soon afterwards, his solicitor was informed by Welling, that a bill had been threatened or filed, but that he had stopped it by some adjustment or payment of the debt;" and that he (the plaintiff) heard no more of it until 8th March, 1856, when he discovered that the decree of 4th March had been entered. The prayer of the bill is (among other things), that the decree of 4th March, 1856, may be declared to be irregular, and not binding upon the plaintiff as to the lot at the corner of Rutledge and Beaufain streets, as the plaintiff was not a party thereto, and, at the time of the order pro confesso, there was no bill or suit pending, but the same was discontinued by force and operation of law, for want of prosecution; that the mortgage executed to the Calhoun Loan and Building Association may be declared null and void, because, at the time when Welling was admitted to the benefit of the Insolvent Debtor's Act, to wit, 8th October, 1855, the Calhoun Association did not render, on oath, an account of the amount due, and also make oath of the validity of their mortgage; and that,

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in any event, only \*so much may be allowed on said lien as is actually due after the payments have been deducted.

The Chancellor, at the hearing, ordered that the decree of foreclosure, in the case of the Calhoun Loan and Building Association against Edwin Welling, rendered February Sittings, 1856, should be set aside and vacated, on the ground that, "at the time the order pro confesso was taken, the case was out of Court, and that there was, at that time, no suit pending in which any order or decree could be taken against the defendant, Edwin Welling." It was also declared, that as the Calhoun Association "had instituted no proceedings in the Court of Law to prove their debt and foreclose their mortgage, but prosecuted their suit in equity to a decree, the mortgage had thereby become a nullity," according to the provisions of the Insolvent Debtor's Law.

Before discussing the doctrines announced in the decree, it may be well to consider the relative rights of the plaintiff and the Calhoun Loan and Building Association. On 24th May, 1854, the plaintiff undertook to assist the defendant, Edwin Welling, with a full knowledge of the existing mortgage to the Calhoun Loan and Building Association. He was given to understand, as he alleges, that, at the time, only about two thousand four hundred dollars were due on the mortgage. On 6th August, 1855, the plaintiff became the purchaser of the mortgaged premises, sold by

the sheriff under executions against the mortgagor, Welling. What passed to the purchaser, at such sale, has been settled for the last thirty-six years by repeated adjudications. The purchaser "takes the land subject to the lien of the mortgage. He takes all that the mortgagor possessed." *Ex parte City Sheriff*, 1 McC. 399. "Under the A. A., 1791, the right of the mortgagor is a legal one, may be levied on and sold, and the purchaser takes the place of the mortgagor." *State v. Laval*, 4 McC. 336. The plaintiff paid the amount of his bid, and took the sheriff's conveyance. He became, there-

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by and \*thenceforth, the proprietor of all the rights in the land of the defendant in the execution, or of his creditors, and subject only to the lien of the mortgage. If no judgment had at that time existed against the defendant, E. Welling, and he had conveyed the premises in fee to the plaintiff, for valuable consideration paid, the relative rights of the plaintiff, and of the Calhoun Association, would have been precisely as they now exist. From the moment of the sheriff's sale, the creditors of Welling ceased to have any interest in the premises. Their agent, the sheriff, had conveyed their interests to the purchaser, and his money had been applied to the satisfaction of their demands in the order prescribed by law.

Under these circumstances, and occupying this position, the plaintiff has filed his bill to vacate the decree of foreclosure. It is not suggested that, as a bona fide purchaser from the mortgagor, pending a bill for foreclosure, the plaintiff in the bill was bound to make him a party defendant. The authorities cited in the argument (and none more strongly than *Sedgwick v. Cleaveland*, 7 Paige, 290, adduced by the plaintiff's solicitor) show the contrary. It was the voluntary act of the plaintiff to become the purchaser at sheriff's sale, as much as if he had bought directly from the mortgagor, and in such case he cannot be permitted to defeat the complainant's rights or delay their proceedings by his purchase pendente lite. "He has no right to be heard," says the authority, "unless he brings himself before the Court by a supplemental bill, in the nature of a cross bill; which he may do to protect his rights."

He knew of the mortgage. He is presumed to have known of the pending litigation to enforce it. He occupies in no respect the condition of an involuntary trustee or assignee of a bankrupt, under the Insolvent Debtor's Law, and the distinction is pointed out and recognized by the Chancellor, in *Sedgwick v. Cleaveland*.

The plaintiff prevailed in his application

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to vacate the \*decree, in the case of the Association against Welling, on the ground that, at the time when the order pro confesso was taken, no suit was pending against the said

defendant in that cause. So much of the Acts of 1784, 1789 and 1810, as relates to this subject, was manifestly intended, as is suggested in the principal Act, to dispatch business in the Court of Chancery, and to prevent unnecessary delay on the part of suitors. With this view it is declared, in the Act of 1784, that every petition or suit "shall be finally decided within one year after "the same shall have been preferred or instituted," unless upon cause shown, and in the manner therein specified, the Court shall think proper to extend the time not exceeding one year longer (or two years from the institution of the suit), for the determination of the suit. The Act of 1789 authorizes the extension of this period to three years; and, by the Act of 1810, the Court is "authorized to continue any cause, depending in the said Court, for a longer period than three years by consent of parties; and, without such consent, on good and sufficient cause shown, in any case where any decretal order shall have been pronounced, within the term of three years from the time of filing the bill."

This Court is well satisfied with the observation of Chancellor Harper, in *Jeannerett v. Radford*, Rich. Eq. Cases, 469, that, according to the uniform practice of the Court, the cause is not regarded as ipso facto out of Court, although these directions may not have been strictly observed. It is not declared by the Act, that if the cause be not decided within that time it shall be ipso facto at an end and out of Court. The law of 1784 directs the cause to be "finally decided" within one year, unless for satisfactory cause shown. Under that Act, a party defendant might have had the bill dismissed for want of prosecution, unless for satisfactory cause shown to the contrary; or it would have been in the power of the Court, of its own motion, and after the cause was docketed, if the parties delayed their proceedings, to

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strike off the cause, \*or make such order as would be a final decision; or it might refuse to proceed further against the defendant, or might set aside a decree improvidently entered against him. But these directions of the Act should be, and have been, always construed to subserve the purposes of justice, and not to take advantage of inadvertence or misapprehension. As is remarked by Chancellor Harper, if such motion be not made by the party defendant, being in Court, this may be held evidence of consent on his part; and, it may be added, that if no order be entered by the Court, it may be inferred that the Court was satisfied that the delay was reasonable. In this case the bill was filed, and the defendant personally served with process on 13th May, 1854. He was then properly in Court. Negotiations took place between the parties, and some payments were made. In the meantime, no motion was submitted on behalf of the defendant. On the contrary,



from the statement of the agent of the mortgagees, they were under the impression that he assented to the delay, and that every thing should stand against him as before. On 11th February, 1856, an order pro confesso was taken, and, after the usual intermediate orders of reference, &c., a decree pronounced on 4th March, 1856. If, on 10th April following (when this bill was filed), a motion had been submitted, on behalf of Welling himself, to vacate the decree, not on the ground of surprise or other such cause, but under the provisions of the Act of 1784, his case would have been less strong than that of the petitioner in *Jeannerett v. Radford*, which was, we think, properly dismissed. But the Acts referred to were manifestly intended for the parties in the cause. This bill is preferred by one who was no party. It would be of dangerous consequence to permit a third person to inquire into such proceedings, and because of a supposed unwarrantable lapse in a long litigation, to vacate a final judgment, in which no fraud is alleged, and which the parties themselves have not assailed for irregularity, or to which they may

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have \*consented. In a cause which is reported (*Smith v. Hunt*), a bill was filed in 1825, and a final decision not made until 1851. At one stage of the litigation, an order was made for the removal of the cause from Georgetown to Charleston. It lost its place on the Georgetown docket, and was not placed on the Charleston docket for two or three years. It was at length placed on the latter docket, and earnestly prosecuted, and not less earnestly defended, until the final decree. Would a creditor of the defendant, or a vendee of part of the property sold after the decree, be permitted to impeach the decree of 1851, because of an intermediate lapse or delay in the proceedings between the original parties, and have the judgment vacated because there was no cause in Court when the decree was made? Such seems to be the case of the plaintiff, and the character of his application.

But it would avail the plaintiff very little, merely to set aside the decree of March, 1856. The mortgage of the Calhoun Association would still remain in full force, and it would only be necessary for the mortgagees to renew their proceedings for foreclosure. But the decree has further declared, that the mortgage has become a nullity under the provisions of the Insolvent Debtor's Act. It is impossible to examine these provisions of the law without perceiving that their purpose is to secure the estate of the insolvent debtor for the benefit of his creditors, or of those of them who may be entitled under the assignment, and whose debts are discharged by this act of the law. The severe penalties of the law (amounting to forfeiture) are levelled against secret incumbrances. If they were suffered to be effectual, it might not only

deceive creditors inclined to accept the assignment, but would interfere with the successful discharge of the duty of the assignee in making sale of the estate of the insolvent debtor. A mortgagee is therefore required to present his claim, and make oath of the validity of the mortgage and of the amount due thereon. And the assignee is required to

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pay \*this amount, in the first place, from the sales of the premises. It is declared, that if the mortgagee shall not appear and make oath, as required, the mortgage shall be deemed fraudulent, &c. Under the provisions of this law, in the case of *Porteus v. Sullivan*, 1 McC. 399, the Court held, that the mortgage of a slave, which slave was in the possession of the insolvent debtor, and included in his assignment, was void, because the mortgagee had not pursued the provisions of the Act. In the case now before the Court, the mortgagees, at the time when the insolvent debtor instituted his proceedings, had already filed their bill in this Court for foreclosure of their mortgage. According to the authorities cited in the decree, it would have been incumbent on them to have made the assignee a party defendant to their bill. The validity of the mortgage, as well as the amount due, were subjects already before the proper tribunal for adjudication. It may very well be doubted, whether the penalties of the law were applicable to a mortgage already sub judice, or whether it was intended to withdraw the inquiries in relation to the matter from the tribunal which had cognizance of it, and bind the assignee by the ex parte oath of the mortgagee; for no provision is made for any further inquiry by the Court administering the Insolvent Law. But it is unnecessary to solve or to consider this question. These provisions of the Insolvent Debtor's Law have no application whatever in the case submitted by the plaintiff. On 6th August, 1855 (more than two months before *E. Welling* was admitted to the benefit of the Insolvent Debtor's Act), all his right, title and interest in the premises were sold to the plaintiff; the premises were conveyed to him by the sheriff, and, according to the allegations of his bill, have been ever since in his possession. From the time of that sale, it is very clear that neither Welling nor his creditors had any interest in the premises. The value of his interest, whatever it was, was on 6th August, 1855, paid by the plaintiff, and ap-

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propriated to the demands of the creditors. On 8th October, 1855, when Welling took the benefit of the Act, he had no more right to include in his assignment these premises, than to include in it his neighbor's lot at the other corner of the street. Whether the mortgage to the Calhoun Association was valid or invalid; whether anything, or nothing, or how much, was due on the mortgage,

were inquiries which concerned only the Calhoun Association, who held the mortgage, and the plaintiff, who held the fee charged only with what might be due on that mortgage. The plaintiff has, therefore, very properly insisted that the defendant, the assignee of E. Welling under the Insolvent Debtor's Law, has no interest in the proceeds of the sales if the mortgage should be declared invalid, but that they belong exclusively to him under his purchase at the sheriff's sales, and he justly repels the pretensions of the assignee, or the creditors, to any participation in such proceeds. If, in May, 1854, E. Welling, for valuable consideration, had conveyed the premises in fee to the plaintiff, with notice of the incumbrance, and, in October, 1855, had been admitted to the benefit of the Act, it is difficult to conceive upon what principle he could include in his assignment the premises of which he had ceased to be the proprietor eighteen months before. This is substantially the relative situation of the parties. The plain intent of the Act is to declare void all secret liens upon the estate of the insolvent debtor, the legal title to which had passed to his assignee, for the benefit of his creditors. These premises constituted no part of the estate of the insolvent debtor, and the title never passed to the assignee. If the mortgage should be declared void, and the assignee attempted to pursue the directions of the Act, by making sale of the premises, he would be a mere trespasser. The Court is of opinion that the mortgage to the Calhoun Association was not invalidated in consequence of the circumstances stated in the decree.

Although the Court has come to the conclusion that the plaintiff is not entitled to

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relief upon any of the grounds \*stated, he may, nevertheless, have claim to aid for other causes; if the allegations of his bill be sustained. He has charged misrepresentation on the part of the mortgagees as to the amount due to them, by which he was misled; and in respect to the defendant, Welling, or his assignee, he would be entitled to a modification of the decretal order of March, 1856, so far as it directed any surplus to be paid to him.

It is ordered and decreed, that the decree of the Circuit Court be set aside, and that the cause be remanded for further hearing upon the matters involved in the pleadings, and not herein adjudicated.

JOHNSTON and WARDLAW, CC., concurred.

DARGAN, Ch., dissented.

Decree set aside, and cause remanded to Circuit Court.

9 Rich. Eq. \*184

\*LAURA A. W. SPEAR, et al., by Next Friend, v. JAMES E. SPEAR and SUSAN WOOD.

JAMES E. SPEAR, et al., v. SUSAN WOOD. (Charleston. Jan. Term, 1857.)

[*Guardian and Ward* 35, 53; *Trusts*, 233.]

It is a breach of trust, for a guardian or other trustee, to use, in his own business, the funds of his wards or cestui que trusts. He should invest them in public securities, or bonds secured by lien on real estate, or at least bonds of third persons with proper sureties.(a).

[Ed. Note.—Cited in *Rhame v. Lewis*, 13 Rich. Eq. 311, 327; *Nance v. Nance*, 1 S. C. 218, 219, 221; *Pope v. Mathews*, 18 S. C. 449.

For other cases, see *Guardian and Ward*, Cent. Dig. §§ 162, 234; Dec. Dig. 35, 53; *Trusts*, Cent. Dig. § 339; Dec. Dig. 233.]

The reasoning of the Court in *Sweet v. Sweet*, Sp. Eq., 311, discussed and disapproved of.

[Ed. Note.—Cited in *Nance v. Nance*, 1 S. C. 219, 220; *McDuffie v. McIntyre*, 11 S. C. 564, 32 Am. Rep. 500; *Clark v. Crout*, 34 S. C. 441, 13 S. E. 602.

Before Wardlaw, Ch., at Charleston, June Sittings, 1853.

Wardlaw, Ch. On November 11, 1840, in contemplation of a marriage, soon afterwards solemnized, between James E. Spear and Laura Ann Wood, daughter of Susan Wood, an indenture of marriage settlement was executed by the three persons named, at Savannah, Georgia, where they all three resided; whereby, all the estate, real and personal,

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\*of the said Laura Ann, particularly that derived from and through her late father, was

(a) In a case of *SIMMONS and Wife v. LOGAN*, heard at Charleston, in January, 1829, the following circuit decree was pronounced by [This case is also cited in *Clarke v. Deveau*, 1 S. C. 179, as to protection of contingent interest.]

HARPER, Ch. The bill charges that stock to a considerable amount was transferred to the defendant in trust to pay the proceeds to Mrs. Mary Loyd, the mother of the complainant Mrs. Simmons, for her life, and after her death to transfer it to such of her children as shall then be living, and that defendant has wasted and misapplied the trust fund. The bill prays that defendant may be compelled to give security to complainants for their interest in the said trust fund, whenever the same may accrue to them.

The answer of defendant submits that the complainants have no right to call upon him for such security, as they have no present interest in the fund, and states that he has always paid the interest regularly to Mrs. Loyd and will continue to do so. Upon the answers being excepted to, the defendant made certain statements before the master, which, as the master testifies, were read and assented to by him. These are in evidence as the defendant's admissions. They amount to this, that he has made use of about \$4000 of the trust fund for his own purposes, and he conceives that so long as he continues to pay the interest regular-

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ly \*no one has a right to call the act in question, at all events not the complainants who have no present interest.

The defendant seems to conceive that a trustee



conveyed in fee to the said Susan Wood, in trust, that she would hold the same for the sole and separate use of the said Laura Ann for life: and that from and after the death of the said Laura, she would convey the same in fee, free from any trust, to such children of said Laura as might be living at her death, &c., with a proviso, that the trustee, with the written consent of said Laura, might employ the money belonging to the said Laura in the purchase of any property to be held on the same trusts, or lend out the same, or employ it in merchandizing, using in all these matters a reasonable discretion.

Sometime after the marriage all the parties removed to Charleston, where the survivors of them still reside.

Laura Ann Spear died September 16, 1851, leaving surviving her said husband, James E.,—and two infant children, the said Laura A. W. and Antoinette A.

The estate to which said infants are now entitled under the said settlement, seems to consist principally of the proceeds of sale of a slave in the hands of said James E.

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Spear, and \*of certain stocks, cash, and notes in the hands of said Susan Wood. The notes referred to are represented to be for the sums of one thousand five hundred and eighteen dollars and thirty cents, and one thousand one hundred and two dollars and ninety-two cents, and made by the said James E. Spear without security, upon a loan to him by the trustee of so much of the trust money.

Soon after the death of Laura A. Spear, Susan Wood commenced a suit in the Common Pleas against the said James E. Spear, for the recovery of the monies mentioned in said two notes. Afterwards, James E. Spear was appointed by this Court, guardian of his said two children: and he has given bond with approved sureties, in a penalty equal to three times the value of the infants' estates, including the sums of his two notes, for the faithful performance of his trust. Upon re-

has an unqualified right of disposing of the trust fund as he thinks proper, and that no breach of trust is committed so long as he continues to pay the interest. This is a mistaken notion which ought to be corrected. The complainants only pray that their contingent interest may be secured to them, and to this they have an unquestionable right as there is so much reason to suppose the fund in danger. But it is my duty to make the defendant aware that if Mrs. Loyd had joined in the suit, and an application to that effect had been made, the Court would have been under the necessity of ordering him to be removed from the trust and to stand committed until the stock should be replaced.

It is ordered and decreed that an account be taken of the fund which has come into the hands of the defendant, and that he give bond to the proper officer of this Court with security to be approved by him to the full amount of the said trust fund, conditioned to pay or transfer to the children of the said Mrs. Mary Loyd who shall be living at her death, the amount to which they shall be respectively entitled of the said fund, and that he pay the costs of this suit.

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ceiving this appointment, Spear demanded from Mrs. Wood the surrender to him of all the funds in her hands belonging to his wards, and the discontinuance of her suit at law. Instead of yielding to this demand, she procured the bill first named in the caption to be filed in the names of the infants by next friend, against Spear and herself, for an account and investment of the funds of the infants. Thereupon, James E. Spear, for himself and his wards, filed the second bill in the caption named against Susan Wood, praying that her suit at law might be enjoined, and that she might be compelled to account with and transfer to him as guardian, all funds of the wards within her control. To both bills Susan Wood filed answers, setting forth the particulars of the trust estate in her possession, and professing her willingness to account under the direction of the Court: but in her answer to the latter bill, she suggests, that she should not be doubly vexed as to the same subject of litigation, and that Spear has misjoined the infants with him as plaintiff, inasmuch as to the extent of his wards' funds used by him in his own business, his

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interests and theirs are adversary. \*Spear answered the former bill, insisting upon his right as guardian to the custody and management of the whole fund.

It was stated at the hearing on one side, that the next friend in the former suit was insolvent, perhaps dead; and on the other side, that one of the sureties in the bond of the guardian was insolvent. No foundation is laid for either of these statements, in the pleadings, or the evidence: although it may be well to act upon them to some extent.

No inquiry has been made by the Master which of these suits, so far as their purpose is common, is most for the benefit of the infants; nor is it the practice of this Court to make such comparative inquiry, unless two suits for the same purpose are instituted in the name of an infant by different persons acting as his next friend. Here one of the suits is by a guardian, who unquestionably is entitled to the general custody and management of his wards' funds, and to call to account a person detaining them: and the other is instituted by a next friend after a guardian is appointed for the infants, as the bill itself states; and before the guardian had exhibited remissness in the prosecution of his remedies against the former trustee. As to this latter suit, the guardian in a regular procedure, should have sought an inquiry whether the suit was for the benefit of the infants—and I regret that this course was not pursued: but after full hearing, I must determine this question, so far as is necessary for the protection of the infants, without the aid of the Master. As against Susan Wood, the interposition of the next friend was at least premature until the guardian had been tardy and remiss in pursuing his

remedies; and as against Spear, the only plausible showing of benefit to the infants appears in the allegation, that Spear borrowed some of the trust money from the trustee of his wife, without giving security for the loan. But this was before he had assumed any trust for his children—and the fault, if any, was that of the acting trustee. Granting that both Spear and the trustee in this matter are liable for a breach of trust,

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he certainly increased the security of this fund by giving a guardian's bond with sureties; and apparently the fund is now safer than if paid over to the former trustee, and as safe as if paid into Court. It is not alleged in the bill, that the fund is unsafe in the hands of the guardian—nor is it stated in what business, hazardous or otherwise, it is employed by him. If he was bound when appointed guardian with convenient despatch to make some other investment of the fund, no convenient time was allowed him for this purpose before he was sued. Is he bound to make such other investments? It is a technical breach of trust for a trustee to employ trust funds in his own business: so that if he make extraordinary profits he is liable for these to the beneficiaries, and if he make no profit, he is still liable for the ordinary rate of interest. But the Court does not encourage the pragmatical interference of strangers with the discretion of a trustee, in the investment and management of a trust estate, where they make no showing of unproductiveness or unusual hazard in the existing use of the funds. There is no special mode of investing his wards' funds absolutely prescribed to a guardian, by any statute or rule of Court in this State: and our chief reliance for the safety of the estate under his charge, must be on his fidelity, and the sufficiency of his bond. It is suggested in the opinion in *Sweet v. Sweet, Speers' Eq. 311*, that it is difficult for the Court to control a guardian in the use of the money of his wards—that the employment of it by the guardian, in his own business, may be the most profitable and secure use of it that is practicable—and that the supervision of the Court must be mainly directed to the continuing adequacy of his bond. In the present instance the guardian is father of his wards, and bound by nature and law to protect their interest, and provide for their welfare: and no special reason is presented for controlling his discretion, in the management of their separate estates committed to him. It does not appear to me, that the bill in the names

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of the infants by next friend \*is for their benefit: but I shall direct principally with a view to costs, some additional inquiry on that point.

I have hitherto assumed, that at the death of Laura A. Spear, leaving children, the trust of Susan Wood ceased, except so far

as it was necessary to place the children in possession of the property. It was argued, that the terms of the settlement directing her "to convey" the property to the children, make this a continuing trust in her: but this direction refers merely to the mode of transferring the subject of trust, and does not prolong her estate. Her trust terminated at the death of her daughter—although, of course she could not transfer the property itself, until some person was authorized to receive it, and when the guardian was appointed, his authority retroacted and covered all the rights of his wards as to chattels and choses: and she might safely, without waiting for a specific direction from the Court, deliver to him the chattels, and assign to him the choses of his wards: indeed, this was her duty.

It is ordered and decreed, that upon the payment by James E. Spear of the costs which had accrued thereupon before he was appointed guardian, Susan Wood be perpetually enjoined from prosecuting her suit at law against James E. Spear upon the two notes above mentioned.

It is also ordered and decreed, that the said Susan Wood deliver to said James E. Spear as guardian the property and moneys, and assign to him the certificates of stock and other choses, belonging to his wards, which may be in her possession, and account to him for her transactions concerning the estates of said wards. And it is referred to one of the Masters to take the account, on the principles of this opinion.

It is further ordered, that one of the Masters inquire and report as to the sufficiency of James E. Spear's bond as guardian, and the safety and productiveness of the money lent to him by Susan Wood as trustee: with leave to report any special matter bearing on

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the question, whether the suit in \*the caption of this opinion first named be for the benefit of the infant plaintiffs.

Costs of the bills in equity to await the Master's reports.

The Master submitted the following report:

"The decree of Chancellor Wardlaw of the 30th November, 1853, directs the trustee, Mrs. Susan Wood, to deliver to James E. Spear, the guardian of his children, their estate in her hands; and it was referred to me to take the account of the trustee; and that the Master should inquire and report as to the sufficiency of James E. Spear's bond as guardian, and the safety and productiveness of the money lent to him by Susan Wood as trustee, with leave to report any special matter bearing on the question, whether the suit first named in the caption of the decree be for the benefit of the infant plaintiffs. I respectfully report, that in obedience to the decree, Mrs. Susan Wood has delivered to the guardian the estate of the infants which



came to her possession as trustee, and accounted for the money in her hands, and paid over a balance in money of six hundred and twenty dollars thirty cents to the said guardian, which account was properly vouched.

"I further report, that under an order of this Court appointing James E. Spear guardian of the persons and estates of his said children, the said guardian executed to me two bonds, each dated the 14th February, 1852—each in the penal sum of seven thousand five hundred and ninety-one dollars, (\$7591.00.) with the same three sureties to each, viz.: James S. Roberts, Daniel H. Silcox and John S. Bird, which bonds are in treble the value of each infant's estate. I have taken testimony and find that James E. Spear is a man in prosperous business, possessing a large and valuable jewelry store in King street; that although James S. Roberts, one of the sureties, is not considered to be good for the amount of the bonds, the other two Mr. Silcox and Mr. Bird, are both men of considerable property, exceeding in value the amount

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of the \*bonds; and I regard the estates of the infants as safely and productively invested in the bonds of the guardian; but in my judgment, it would seem to be the duty of the guardian to make the investments of his children's moneys in other and independent securities. But as the case of *Sweet v. Sweet*, Speers' Eq. 309, seems to indicate that the guardian is not bound so to invest the money, Mr. Spear is protected by the law.

"I further report, that Mr. Spear has duly rendered to me his accounts as guardian, in which he debits himself with interest on the money of his wards.

"In the account of the trustee, there is a charge of one hundred dollars for a fee paid the solicitors in the cause first mentioned in the caption of this report; but as Mr. Spear had been duly appointed the guardian, and executed his bonds before that bill was filed, I think this charge cannot be allowed, it not being for the benefit of the infants. In this view of the matter, Mrs. Wood ought to pay that one hundred dollars to the guardian as part of the true balance of cash."

To this report Susan E. Wood, and the next friend of the infants, in their name as well as his own, took exceptions as follows:

1. The evidence of Ezra Wood, and the documents, show that James E. Spear, after signing the marriage settlement, received his wife's fortune without the consent of the trustee, to whom he afterwards gave a mortgage as security. That on the death of his wife he refused to renew the notes which the trustee held, and became guardian of his children, and immediately filed his bill to enjoin the action which Mrs. Wood, the trustee, had commenced against him; and his answer to the interrogatories filed in the Master's office, shows that he took the guard-

ianship for the very purpose of getting his children's money into his hands, and using it

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as his own; \*and these circumstances are sufficient to justify the interference of the next friend.

2. The evidence of Mr. Cohen shows, that if ordinary care be taken of the infants' interest, they are entitled to have their money laid out on real security, and therefore it is demonstrable that this suit is for the infants' benefit.

Wardlaw, Ch. The exceptions to the Master's report in these cases renew questions substantially considered in my former decree. I suppose the purpose of the exceptant is not so much to effect conversion of my opinion, as to bring the case, with the new light afforded by the evidence before the Master, under the review of the appellate tribunal. This is a very proper purpose, for some of the doctrines in controversy are doubtful and important.

As the leading statement of fact in the exceptions is not proved to my satisfaction, it is proper before proceeding to discussion, to set forth more distinctly some of the results of the evidence. I conclude, particularly from her own answers, that Susan Wood did consent that James E. Spear should receive from Ezra Wood a portion of the patrimony of Spear's wife. Throughout the pleadings, the money thus received by the husband is treated as a loan by Mrs. Wood, as trustee. Among the documents produced by the trustee, is the consent of the wife, on July 20, 1843, to the husband's use of her money. When the money was originally received by the husband, he gave a promissory note to his wife, dated January 12, 1841, for two thousand six hundred and twenty-six dollars and twenty-nine cents, which of course was of no validity at law. Afterwards, on February 25, 1842, he gave his promissory note to Susan Wood, trustee, for the same sum, payable one year afterwards, with interest from date; and, on the same day, executed a mortgage to her of all his stock in trade, and fixtures, in his

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store in Savannah. \*This note was probably renewed, and partly paid. On January 27, 1848, J. E. Spear, in further renewal, gave his two notes to Susan Wood, as trustee, payable a year afterwards, one for one thousand five hundred and eighteen dollars and twenty-six cents, with interest from date, and the other for one thousand one hundred and two dollars and ninety-two cents, "for interest on money loaned." Laura A. Spear, the wife, died September 16, 1851; and on November 4, 1851, Susan Wood placed these notes in the hands of counsel for collection, and the counsel wrote to Spear, requesting payment of the notes, or, if this were inconvenient, security for them. James E. Spear was appointed guardian of his children, pro-

visionally, on February 2, 1852, and executed the bonds required on April 14, 1852. On March 15, 1852, he applied by letter of his solicitor to Mrs. Wood, for a transfer to him of the property of his wards; and on the next day, through her solicitor, she expressed a desire that this property should be securely invested. Some further correspondence ensued, in the course of which these parties respectively took the positions, afterwards maintained in their pleadings. The infant wards, by Hunting, as next friend, filed their bill against Spear and Wood, April 9, 1852: Spear filed his bill against Mrs. Wood on June 12, 1852.

The case of *Sweet v. Sweet*, Speers' Eq. 309, controls my opinion, as it did that of the Master. The mandatory judgment in that case, is merely that a guardian should not be removed from his office, because he had employed in his own business the funds of his ward; and clearly it is the judgment only which is authoritative, and not the particular reasons which may be assigned by the organ of the Court in pronouncing judgment. Still a subordinate judge should not rashly disparage the reasoning of a higher tribunal, and in general should carry out its views, even when they may not amount to absolute mandate or authoritative declaration. It is manifest that, although the particular remedy sought in *Sweet v. Sweet* was

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\*the removal of the guardian, the Court should have ordered a different investment of the ward's funds, if it had considered the course pursued by the guardian as amounting to a breach of trust which jeopardized the estate. It is the duty of the Court to interpose for the security of estates under its supervision, in behalf of all beneficiaries, especially of those under disability; and it sometimes acts for this purpose by extra judicial directions, made on the information not only of its immediate officers, but of any *amicus curiæ*, or stranger, that such an estate is mismanaged. Lord Dudley's case, cited 2 Ves. Sen., 484. The case from Speers must be considered as determining in effect, that a guardian's use in his own affairs of a ward's estate, is not of itself mismanagement.

To some of the remarks made in that case, if they be intended to apply to all guardians and trustees, I should be reluctant to assent. According to the doctrines of the English Chancery, which are generally followed here, the first duty of trustees is to place the property committed to them in a state of security. For instance, an executor makes himself responsible if he allow assets of the estate to remain outstanding on personal security longer than absolutely necessary, although they may have been so invested by his testator: *Powell v. Evans*, 5 Ves. 844; *Lowson v. Copeland*, 2 Br. C. C. 156. So, too, if an executor himself invest the as-

sets on personal security; *Holmes v. Dring*, 2 Cox, 1; or, it seems, if he lend them on security of real estate beyond two-thirds of the value of freehold estate, or even to that extent if the value be much fluctuating as where it is dependent on houses liable to dilapidation; *Stickney v. Sewell*, 1 Myl. & Cr. 8; *Wm.'s Ex'ors*, 1537, 1547; *Lew. Trusts*, C. 16. If a trustee mix trust funds with his private monies, and employ the aggregate in a trade or adventure of his own, the beneficiary may, at his option, take a proportionate share of the profits or interest on the sum of trust funds so employed; *Docker v. Somes*, 2 Myl. & K. 655. A guardian is responsible

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to the \*same extent as other trustees; *D. of Beaufort v. Berty*, 1 P. Wm.'s 704. Upon these elementary principles, it is manifestly at his own risk that a guardian uses in his own business the funds of his ward, for he thereby makes himself absolutely liable for re-imbursement of the capital, with usual interest, and for extraordinary profits, if such be made. But it does not follow, that the Court should peremptorily rebuke such employment of a ward's estate by a guardian, and direct a different investment, when proper provision is made for the ward's maintenance, and his interests are amply secured. While the Court will discourage such irregular dealing with trusts, it will refrain from active interference with the guardian's management, until the safety of the estate is put in jeopardy. It may become necessary hereafter—it does not seem to be so now, according to the report of the Master—to require the present guardian to invest the funds of his wards differently, or to give additional security.

The fact, that when a father becomes guardian of his child by appointment of the Court of Equity in this State, he is required, as other guardians, to give bond with sureties for the faithful performance of his trust, may justify some departure from the rules of the English Chancery, but not from the principles recognized there which seek to exact security for the estates in a different form. In *Ex parte Mountford*, 15 Ves. 445, Lord Eldon said the Court never appointed the father guardian, and expressed the opinion that a third person could not be appointed by the Court guardian of an infant while the infant's father was living, although such person might be appointed to act as guardian of the person and estate of the infant under peculiar circumstances. In *Barry v. Barry*, 1 Mol. 213, (12 E. C. R. 103,) Sir A. Hart, Ld. Chancellor of Ireland, says that a father is guardian of his children by law—by title paramount to the Court's appointment—and while he lives, the Court cannot appoint another person, except under very peculiar

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circumstances: \*and that such person, when appointed, is not guardian, but rather a cura-



tor to take care of the children and protect them against some prejudice during the life of the father; and that a guardian so constituted is not required to give any security: the Court, however, always assumes the superintendence of the fortunes. Notwithstanding these opinions, guardians for children were appointed by the Court in the lifetime of the father, by reason of his immorality, in *Wellesley v. Dk. Beaufort*, 2 Russ. 1; 2 R. & My. 640. Blackstone says, "If an estate be left to an infant, the father is by common law the guardian, and must account to the child for the profits;" and again, "a father has no more power over his son's estate than as trustee or guardian; for though he may receive the profits during the child's minority, yet he must account for them when the child comes of age," 1 Bl. Com. 453, 461. The case of a father is peculiar in other respects. He is entitled to the earnings of his children's labor while they live with him and are maintained by him; and yet he is bound generally, if he can, to maintain his infant children from his own estate, without aid from their separate property, however large it may be. He is authorized, although he may be himself an infant, to appoint by deed or will guardians of his infant, unmarried children, born or to be born, with ample power over their estates. 3 Stat. 707; 7 Ves. 348. This authority does not seem to be restricted to estates acquired from the father. These circumstances justify the Court in trusting much to the discretion and duty of a father when appointed guardian of his children. I am not unmindful of the consideration that prevention is better than remedy, and that children should be saved, to reasonable extent, by precautionary measures, from the painful and disturbing necessity of pursuing a father and his sureties after he had wasted the estate of his wards: but perhaps the preponderance of considerations is in the scale of leaving much to the natural duty of the father, stimulated by affection and legal obligation.

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\*Besides, the suit of the infants, in the name of Hunting as next friend, but by procurement of Mrs. Wood, was instituted immediately after the father was provisionally appointed guardian, and before by giving bond he was fully invested with the office: and the bill does not state the adventure in which the funds of the infants are employed, except by a general allegation that Spear had mixed these funds with his own estate. Mrs. Wood had not at the filing of this bill, nor before the guardian's suit, delivered to the guardian that portion of the estate which remained in her hands after her loan long previously made.

It is ordered and decreed, that the exceptions be overruled and the Master's report confirmed.

It is further ordered, that the next friend

Hunting pay the costs of the suit instituted by him in the name of the infants; and that, if he be not of ability to pay, Susan Wood pay these costs: and further, that she pay the costs of the suit by J. E. Spear and his wards against her.

On behalf of the infants, an appeal was taken on the ground that the bill was properly had, and that the fortune of the infants ought to be invested for their use.

Petigru, for appellants.

Mitchell, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. It is manifest from the Circuit decrees in these cases, that the Chancellor was dissatisfied with the reasons expressed for the judgment of the Court of Appeals in *Sweet v. Sweet*, Speers' Eq. 311, yet was restrained by deference to his superiors in authority, from the full expression of his dissatisfaction. In this tribunal we are not fettered by this consideration, and we may

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frankly discuss the reasoning \*of foregoing equals in authority. The point decided in that case was simply, that it was insufficient cause for the removal of a guardian from his office, that he had employed in his own business the funds of his ward; and so far as it goes, the decision seems reasonable, although the Court might well have proceeded to direct a change of investment, with warning that the guardian would be removed if he persisted in retaining the trust funds for his own use and accommodation. It is, however, the argumentation of the Chancellor delivering the opinion of the Court which is most objectionable. He says in substance, that the retaining by a guardian for his own use of the funds of his ward, might be the very best use of them—that he was liable for interest as a borrower would be, with the advantage that there would be no break in the time the interest was accruing; whereas, as to sums received from a borrower, some time would be allowed to the guardian for reinvestment—that the funds were as secure in the possession of a guardian, by reason of his bond being always under the supervision of the Court, and annually brought to its special attention, as they would be by the bond of any borrower, that it was not usual, nor required by law in this State, that trust funds particularly of small amount in the country should be invested in public securities, or in any special mode—and that it was difficult for the Court to control a guardian in his use of moneys.

The authorities cited in the latter of the Circuit decrees under consideration demonstrate, that the first duty of a trustee is to put the estate committed to him in a state of security. Equity and common sense require that he should be unbiassed in the discharge of this primary duty. His beneficiaries are entitled to the exercise of this

independent, impartial, judgment: but this is impossible if he lend to himself. All the reasons which inhibit a trustee to sell from buying at his own sale, exact with equal force that a trustee to lend shall not borrow from himself. *Mulligan v. Wallace*, 3 Rich.

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Eq. 111. \*He has the same superior knowledge of the condition of the estate, and the same temptation to obtain it at undervalue. It is proper for the security of his beneficiaries and of his own sureties, and for the avoidance of litigation of a particularly disturbing character, that the trust estate should be secured doubly, First, by stocks or bonds, in which it may be invested, and then by his own bond. There can be no doubt of the principle asserted by the Chancellor, that if a trustee mix trust funds with his private moneys, and employ the aggregate in a trade or adventure of his own, he is liable at the option of the beneficiary for re-imbursement of the capital so employed, with usual interest, or for the capital and all profits, which have been made. But suits by beneficiaries against trustees for extraordinary profits, so frequently lead to perjury or suppression of the truth where all the evidence is in possession of the trustees, and so frequently lead to estrangement and hostility where the parties are of kin, that it is politic to prevent as far as practicable such irregular dealings, with trust estates. It has become a crying evil in our times, that persons seek trusts, especially administration and guardianship, not for the good of those beneficially interested, but for the accommodation of themselves and their sureties and other special friends. This is in flagrant violation of the rules and doctrines of equity concerning trusts.

In support of these principles some cases will be added to those cited in the circuit decrees. Lord Thurlow said in *Sadler v. Hobbs*, 2 Br. C. C. 17, the trustee suffered the money to be out for a very long time in the hands of a tradesman, and neglected to call it in, notwithstanding the party interested in the fund was an infant: in such case he is clearly chargeable. In *Freeman v. Fairlee*, 3 Meri. 41, Lord Eldon said, the executor has done what no executor is justified in doing; he has blended the accounts of the estate with his own commercial houses. In *Wilkes v. Steward*, Geo. Coop. C. C. 6, where executors were empowered to invest a legacy

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in the \*public funds or in such other security as they could procure and think safe, Sir William Grant was clearly of opinion that they had no power to lay out the money upon personal security, and that their case was like that of trustees to sell who could not be justified in selling for any but the best price obtainable for the property, and that the legatee was fully entitled to the security of the Court. *Adye v. Fanillateau*, 1 Cox, 60

and n.; *Smith v. Smith*, 4 Jno. C. C. 281, 445. In *Langston v. Ollwant*, G. Coop. 33, the will gave the trustees power to invest a legacy upon real or personal security, and declared that they should not be answerable for any loss happening without their wilful neglect or default; they lent the money (and some of their own too) on his bond to the legatee's husband, a trader in good credit and circumstances, who some years afterwards became bankrupt: held that the authority of the trustees did not extend to an accommodation of their kinsman, and that they were liable for the loss. In *Stickney v. Sewell*, 1 Myl. & Cr. 8, two executors as trustees were empowered to lend money on government, real or personal security, and one of them lent the money to his co-trustee and the partner in trade of the latter on mortgage of real estate of fluctuating value; the borrowers became bankrupt, and the mortgaged estate proved inadequate for the satisfaction of the loan: Lord Cottenham held the executors liable for the deficiency, saying the testator intended that the estate should have the benefit of the executors' discretion, but they lend to themselves.

There can be no doubt that a guardian is a trustee and liable as other trustees are; *Duke of Beaufort v. Baty*, 1 P. Wms. 704. It may be that to trustees not under bond and such as are not required to account annually to the Court, as executors and trustees of the appointment of parties, the doctrines of the Court might be somewhat more promptly and stringently applied, than to guardians who give bond and are required to account to the Court annually, and are

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under \*the responsibility of giving additional sureties when it seems requisite; still it is not safe to indicate any relaxation of the rules in equity concerning trustees in favor of such as have given bond. Suppose a Master or Commissioner in equity, who is under bond for the faithful execution of his office, were directed by the Court to invest on proper security funds in the custody of the Court, and he should report that he had taken the funds for his own accommodation, and that his official bond was fit security, would any Chancellor deem this a safe investment? Or take the case of a trustee appointed by the Court and under bond for the faithful execution of his duties, who was directed to sell and re-invest the trust estate, could it be tolerated that he should sell and take the moneys for his own use, and coolly refer for security to his official bond? It is unsafe to trust to bonds merely, for common experience teaches that, where the principal fails in the discharge of his duties and in his pecuniary means, the sureties contrive to be likewise insolvent. Integrity of the trustee is a surer safeguard than any common law obligation. But where we must depend on bonds.



we should have as many as can be reasonably procured.

In the present case the guardian is engaged in trade, and although there is no express charge in the bill nor admission in the answer, that the funds of his wards are employed in this trade, yet from the general charge and admission that the funds are employed for his use, it is pretty plain that the estate of his wards is exposed to the hazards of his mercantile enterprise. They seem safe now, but who can tell how long they will be safe? We are of opinion that the guardian should change as soon as practicable the investment of the funds of his wards into public securities, or bonds secured by lien on real estates, or at least bonds of third persons with proper sureties. It is the special duty of the Master to report concerning such subject, but the Court is not disinclined to receive information for security of

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funds within its control \*from any person moved by friendly and proper motives towards the beneficiaries.

Nevertheless we affirm the conclusions of the Chancellor in these cases, under the special circumstances. The bill against Spear, was filed at the instance of Mrs. Wood, seemingly for the gratification of ill-nature towards him rather than the conservation of the interests of his children and wards, before he had any opportunity of changing an investment originally and long before made by her as trustee by breach of trust, and before, in fact, he had formally become trustee. She was, however, liable as trustee for breach of trust, and had some pretext for interposing to save herself from the consequences. If she had not perversely refused to pay over to the guardian when appointed, the funds remaining in her hands, she would have been entitled to more indulgence.

Costs are considered within the discretion of the Chancellor, and are not per se the subject of appeal, nor are they made so in this case. My brethren have left this matter to me, and as I determined it on the circuit principally in deference to the reasoning in *Sweet v. Sweet*, I think on review I have dealt hardly towards Mrs. Wood. Clearly the infants are not liable to costs, nor in my opinion, is their guardian sued before he had committed any breach of trust; still she had the excuse for interposition of saving herself from primary liability. The bill at her instance was premature. She was clearly in fault in refusing to pay over to the guardian the funds demanded in the second suit.

It is ordered and decreed that the order as to the liability of Susan Wood, for costs in the first suit be rescinded, and that the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Appeal dismissed.

9 Rich. Eq. \*203

\*JOHN T. RIVERS v. MARTHA S. RIVERS,  
et al.

(Charleston. Jan. Term, 1857.)

[Wills.  $\hookrightarrow$ 525.]

Testator having a wife, five sons, the eldest of whom only was of age, and three single daughters, who were his three 'younger children,' made his will, by which he directed his tract of two hundred acres of land to be reserved during the life time of his wife 'as a residence for her and any of his daughters who may remain single,' and his executors, when they might deem it necessary 'to divide his property equally among his wife and children;' and by a codicil executed on the same day, he directed certain negroes by name with their families 'to be reserved as the attendants on his wife and younger children.' The negroes directed to be reserved were about seventeen in number at the date of the will in 1840. In 1856, the children had all arrived at age and were living apart from the widow, who resided on the tract of land reserved, and the negroes had increased to twenty-seven:—*Held*, that the widow was entitled to the services of only so many of the negroes as were necessary as attendants upon herself; and that although the children could not demand partition of the rest during her life time, they were entitled to divide the hire equally with her.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1136; Dec. Dig.  $\hookrightarrow$ 525.]

Before Dargan, Ch., at Charleston, June, 1856.

Dargan, Ch. George A. C. Rivers died 6th of August 1840, leaving unrevoked his will, which is in the following words: "I wish the two hundred acres of land purchased from Mr. Benjamin Reynolds, reserved during the natural life-time of my beloved wife, as a residence for her, and any of my daughters who may remain single. When my executors deem it necessary, to divide my property, equally among my wife and children, to share alike. The property which I have already given my son Robert, shall be considered a portion of which he is entitled from my estate. I appoint as my executors, H. Wilson, Jr., John Hanahan, and S. King." On the same day, the testator executed a codicil, in

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\*words as follows: "I desire my servants, James and his family, March and his family, excepting his son Caesar, Binah and her daughter and husband Jemmy, to be reserved as the attendants on my wife and younger children." This is the whole testament. It is brief and obscure, and the testator has left a great deal to implication.

The estate mostly has been divided, according to the directions of the will, equally among his wife and his children. The two hundred acres bought of Benjamin Reynolds have been reserved as a dwelling place for the testator's widow, and is still in her possession. The negroes directed by the testator to be reserved to attend upon his wife and his younger children, were also excluded from the division, and went into the possession of Martha S. Rivers, the widow, where they

still remain. They were domestic servants, and employed as such by the testator in his life-time. They were at the time of the division, eighteen in number; they are now twenty-seven. The family of the testator, at his death, were as follows: his widow, Martha S. Rivers, who was his second wife, and eight children, the issue of his first wife, as follows: Robert Rivers, born 7th February, 1814; Benjamin Rivers, born 23d July, 1820; Cornelius Rivers, born 19th September, 1824; George W. Rivers, born 29th January, 1827; J. Townsend Rivers, born 6th March, 1829; Mary Emily Rivers, born 17th January, 1831; Harriet Rivers, born 20th October, 1832 (who died 13th September, 1840), and Eliza Rivers, born 9th July, 1834. Of these, the first-named, Robert Rivers, was the only child of the testator who was twenty-one years old at his death. The testator's three daughters were his youngest children. For a while after the testator's death, all the children continued to reside at the homestead, which had been given to the widow for her life, except Robert, who was of age, and was settled off to himself; and probably two of the sons, who were at college, or at school. As they advanced in age, and engaged in the active

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duties of life, they one by one left the \*widow's mansion. Mary Emily Rivers married; Harriet died; and Eliza the youngest child, and the only surviving unmarried daughter, being now about twenty-two years of age, has also withdrawn from the widow's residence, and has provided elsewhere a home for herself; and the latter is left entirely alone. The negroes reserved from the division, now twenty-seven in number, being more than she needs, or desires as personal attendants, she employs for the most part in agricultural labor. Such are the circumstances of this case, some of which may be legitimately invoked to aid in the interpretation of this will.

The plaintiff, who is one of the testator's children, the fifth in the order of birth, has filed this bill against the widow, and the other surviving children, for a partition of the said reserved negroes, and their increase, equally among the widow and the said surviving children. His construction is, that "younger children" means children under twenty-one years, and that when the youngest child attained that age, the negroes were subject to partition. The widow, on the contrary, contends that the will gives her a life estate in the negroes, subject to a joint use by such of the younger children who may choose to reside with her. This latter construction I adopt, though I have not that confidence in my judgment that I felt at one time during my investigation of the case.

When a testator says, "I give a negro, or other chattel," without qualification he gives the absolute estate in such negro or chattel. When he gives a negro to his wife, as a per-

sonal attendant upon her, I presume that he means this personal attendance shall continue as long as such attendance can be personal—that is, during life, unless he in some way restricts its duration within a shorter period. I am not authorized by any thing contained in the will, to say that this attendance shall cease at any period during her life. When is the attendance upon the

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widow to cease? The \*complainant says, that it is to cease when the youngest child of the testator attains the age of twenty-one years. But the testator has not said so; nor has he indicated any other period at which the use of the negroes by his wife should cease. Therefore, as it is plain that he did not intend to give her the absolute estate in them, I infer, that he intended her use of them to continue for her life. I do not think that the joint use of the younger children affects her interest as to its duration. The term, "younger children," is vague. It does not necessarily mean children in a state of minority. My construction is, that the testator contemplated a permanent arrangement for his widow during her life, in the use of these negroes thus withdrawn from the division, which were also intended for the joint benefit of such of his younger children as should live with her, and in her family.

Having arrived at the conclusion that the testator's widow takes an interest for life in the use of the negroes, the fact, that they have multiplied beyond what is necessary for personal attendance upon her, has no material bearing upon the construction. That is an accident. The increase must go with the original stock. It was a matter alone for the testator. He overlooked the contingency, and made no provision for it. It was a *casus omissus* on his part, which the Court cannot supply.

Nor can the manner in which the negroes are employed enter into the consideration. They were given to attend upon her and the younger children. The younger children are gone—voluntarily withdrawn from a position in which they can have a joint personal use. The negroes rightfully remain with the widow. If she, like an Oriental princess, should choose to have the twenty-seven negroes (their present number) in attendance upon her person, there is none who has a legal right to question it. And if she chooses to waive this right of personal attendance, and

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more rationally and profitably employs the negroes in agricultural labours, she alone is entitled to the profits of their labor. This is the conclusion at which I have doubtfully arrived.

It is ordered and decreed that the bill be dismissed.

The complainant appealed and moved to reverse the decree on the following grounds:



1. That the reservation of the negroes in the codicil to the will, as "attendants on testator's wife and younger children," conferred upon complainant an equal right to, and interest in, that property with testator's wife; and the exclusive appropriation by her of the services and profits of all the slaves, renders her liable to account to complainant for his interest therein.

2. That the reservation in the said codicil being for the joint benefit of the wife and younger children of testator, the benefit intended becomes impossible, and at an end either upon the children attaining their majority, or upon the dying of the wife; and the property so reserved is therefore subject to distribution.

3. That the decree is in other respects contrary to law and equity.

The defendants, Robert Rivers, Benjamin R. Rivers, G. W. Cooper, assignee of Cornelius A. Rivers, G. W. Rivers, Mary Emily Seabrook, and her husband W. H. Seabrook, and Eliza Smilie Rivers united in the above grounds of appeal.

F. D. Richardson, Cooper and Rivers, for appellants.

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\*The opinion of the Court was delivered by

WARDLAW, Ch. George A. C. Rivers, of Wadmalaw, died August 6, 1840, leaving a will and codicil, both bearing date August 5, 1840, written while he was in extremis—the former by his overseer, and the latter by his attending physician, and attested by these two persons and a third neighbor. The operative words of the will are the following: "I wish the two hundred acres of land, purchased from Mr. Benjamin Reynolds, reserved during the natural lifetime of my beloved wife, as a residence for her and any of my daughters who may remain single. When my executors deem it necessary to divide my property, equally among my wife and children, to share alike, the property I have already given my son Robert shall be considered a portion of which he is entitled from my estate. I appoint, as my executors, H. Wilson, Jr., John Hannah and S. King." And the operative words of the codicil are: "I desire that my servants, James and his family, March and his family, excepting his son Caesar, Binah and her daughter, and husband Jemmy, be reserved as the attendants on my wife and younger children." Upon the death of testator, his immediate family were a widow, Martha S. Rivers, and eight children by a former wife. Of these children, the elder five were sons and the younger three were daughters. All of the children were then under the age of twenty-one years, except the eldest, Robert, who was living on land of his father, in St. Paul's Parish, and to whom his father had given Cesar and three

other slaves. Of the daughters, one is dead, one married, and the youngest of full age and unmarried. The widow still resides on the tract reserved, but none of the children of testator resides with her. It does not appear what was the number of slaves reserved as attendants at the time of testator's death, but in February, 1843, they were eighteen, and in June, 1856, they were twenty-seven. Some of these are employed in agricultural operations.

This bill is instituted by the youngest son

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of testator (this \*son being eleven years and five months old at his father's death), against the widow and surviving children of testator, for partition of the reserved negroes equally among said widow and children. The bill proceeds on the assumption that the will provides for the distribution of these slaves on either of two events, the attainment to full age of the youngest child, or the death of the widow. His brothers and sisters substantially adopt the plaintiff's bill, and concur in its prayer, but the widow insists that, according to the proper interpretation of the testamentary papers, she is entitled to a life estate in these slaves, subject to a joint use with such of the younger children as may reside with her. The Chancellor adopted, doubtingly, the construction suggested in behalf of the widow, and dismissed the bill, and the children of testator appeal from his decision.

Much of the reasoning of the Chancellor is entirely satisfactory to us. Still we prefer a construction of these brief and obscure testamentary instruments somewhat different from that he has adopted.

The testator has effectually expressed his intention to give his estate generally, in equal shares, among his wife and children. His direction to his executors so to divide his estate, plainly amounts to a donation of the fee to the wife and children, as tenants in common with equal interests. *Bankhead v. Carlisle*, 1 Hill, Eq. 357. The executors, however, were directed to divide the property when they might deem it necessary, and this direction, by necessary implication, conferred on them authority to make partial divisions from time to time, always preserving the fundamental principle of equality. Testator chose, however, to make some express reservations for the benefit of his wife and more helpless children, and to this extent to limit the discretion of his executors, for a time, in making division. By the will, he reserved a tract of land as a residence for his wife and for his daughters remaining single, during the life of his wife;

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and by the \*codicil he reserved certain slaves as attendants of his wife and younger children. In neither of these reservations is any estate actually given, and the property reserved is left subject to the gen-

eral disposition in equal shares, although the privilege of using it for specified and temporary purposes is given to favored legatees. There is a difference in the language of the two reservations, which is not surprising, as they were written by different scribes—the former fixing a period for the use, the life of the wife, and naming the unmarried daughters as recipients of the use in common with the wife; the latter fixing no time for enjoyment of the privilege, and mentioning the wife and younger children as the persons to be favored. But it is at least probable that the intention of the testator was identical in both as to time and objects. The codicil may be well considered as a mere appendix to the reservation in the will, and, as intended, adding new subjects for the benefit of the same persons and for the same time. Construing the codicil by its context in the will, we suppose that suit and service of the reserved slaves are inseparably connected with residence on the reserved land. The benefits are to be enjoyed in common and at one place. No advantage of one over the others, the widow or daughters remaining single, is intimated as to residence in the reservation of the will; nor any advantage as to the attendance of the servants between the widow and younger children in the codicil. Naturally the widow, as head of the household, in any contest between herself and the younger children as to residence and attendance, would deserve favorable consideration; still she has no title in these respects absolutely superior. If, for any cause, she should remove from the homestead, her removal would forfeit her right to the attendance of the servants, but not impair the right of the single daughters to residence and attendance. So the removal of the younger children would forfeit their right to attendance, and not affect the widow's claims to both benefits.

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\*We have intimated our opinion that the phrase "younger children," in the codicil, means the daughters of testator; but we reserve the point from judgment, as the daughters, by making common cause with the plaintiff, adopt his construction of the meaning of "younger children." It is suggested, that if we would hear the testimony of the attesting witnesses, as to the parol declarations of the testator at the time these papers were executed, concerning his purposes, all doubt on this point would be removed; but such testimony is palpably incompetent, and in violation as well of the statutes requiring wills to be in writing, as of the principles of common law inhibiting explanation of written instruments by verbal commentaries of the makers. A will must be interpreted by the words used therein, although it is quite proper to ascertain the application and meaning of the words in the light of the circumstances surrounding the testator

when it was executed. Thus, when we find, in this case, that the younger three children of testator were infant and unmarried daughters, and his other children sons; that, in the context, he gives a privilege of residence to these daughters while single, and no such privilege to the sons; and in the text adds, probably in promotion of the comfort of the residents, the attendance of certain servants on his younger children,—it might be legitimate to conclude, that the testator meant his daughters by the phrase "younger children" in the codicil, but it would be altogether against principle to ascertain by extrinsic proof that such was really his meaning. The term "younger" is comparative, and when applied to a class is satisfied in meaning by any division of the class into two parts, with respect to age. The phrase "younger children" has been frequently submitted to judicial interpretation, and the course of decisions demonstrates, that it admits of great latitude of construction. In England it has been held to include children who do not take the family estate, whether younger or not, as in the case of an eldest daughter or an eldest son unprovided for, and

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to \*exclude a child taking the estate, whether elder or not, as in the case of the youngest child, who happens to be a son, entitled to take the estate. In this State, where the law of primogeniture is abolished, and all children are equal distributees of the estate, we should hold generally, according to the natural import of the terms, that younger children are all the children except the eldest, but that the context may easily deflect the import of the terms. 2 Jarm. Wills, 84 (116). But this is enough, and too much, on a matter reserved from absolute judgment.

We agree with the Chancellor, that the widow is entitled to attendance from the slaves reserved so long as she resides at the home reserved by the testator,—during her life, if she continues to reside there. It may be repeated, that no estate is given to her, and no preferable privilege in the use of these slaves over the younger children, except such as may be inferred from her position as head of the house; and that this privilege is to be enjoyed by herself and the children at the homestead. Nor is any exclusive use of the slaves intended to be reserved for her; the younger children have a common right. It seems to us, that the reservation of the slaves was made for a special purpose—attendance upon the persons or in the household of those for whose benefit it was made—and that no title to the slaves for other purposes, such as employment in agricultural pursuits, was intended to be conferred. A stock of slaves was set apart for the purpose of securing this attendance, but there was no bequest of the slaves to those who were to be waited upon. It is analogous to a case where, without gift



of the fund to the children, a fund is provided by a testator, out of which they may be maintained and educated. In *Whilden v. Whilden*, Riley, Eq. 205, we have express authority, that in such case the children are entitled to so much only of the fund as may be necessary for their maintenance and education, to be varied, under the direction of the Court, as the exigencies of the chil-

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dren may \*require. Chancellor Harper says, "A direction for maintenance means, of course, what may be necessary for maintenance." And further: "Suppose the fund were large enough to produce an income more than double what was required for the maintenance of the children, can it be supposed that they would be entitled to divide the whole income, when nothing but maintenance is provided for?" The Chancellor quotes the cases of *Rawlins v. Goldtrap*, 5 Ves. 440, and *Maborly v. Tarton*, 14 Ves. 499, which seem to support his views. The present case is considered to be within the principle of *Whilden v. Whilden*.

It is not meet, however, to grant partition of these slaves, or any of them, in the present posture of affairs. Whenever partition be made, the shares of the wife and children must be equal; and if the widow have no need of all the slaves as attendants, partition of the income arising from the supernumerary slaves must be made on the same principle. The inexpediency of partition of the corpus now, is demonstrable from the fact that the widow is entitled to have so many of these slaves as she needs, as attendants upon her, and her need in this respect will vary according to the change of her circumstances and of the condition of the slaves. It may be that all, or half, or one-fourth, of these slaves are now necessary to proper attendance, and that a greater or smaller portion will be required next year. If a specific number was assigned to her for this purpose, it might happen that, by death of the slaves, or some other casualty, this number would become, in event, quite insufficient.

It is ordered and decreed, that the circuit decree, dismissing the bill, be set aside, and that it be referred to the Master, to inquire and report whether all the slaves in question be necessary as attendants on Martha S. Rivers; and if all be not necessary, whether the surplus should be left in her possession, on reasonable hire, or be otherwise let to hire.

JOHNSTON and DUNKIN, CC., concurred.

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\*DARGAN, Ch., dissenting. I am not satisfied with my own construction of the will of George A. C. Rivers. Such are its obscurity and informality, that I doubt if any construction that can be given would be wholly free from objection. But I feel

myself called on to protest against the interpretation adopted by this Court.

If there is anything clear in the will, it is that the testator intended to make a provision for his wife, and he has designated with great particularity the property, real and personal, which was to constitute this provision. And it is equally clear that this provision (both as to the real and personal estate) was to continue for life. So many negroes (by name) were set apart as "the attendants of" his wife and younger children. These were seventeen in number at the testator's death, including the large and the small. By natural increase they now amount in number to twenty-seven. This number of domestic servants appears out of proportion to the widow's circumstances and situation. And for this reason, and for no other that I can perceive, the Court now orders a reference to the Master, to enquire and report whether a less number of negroes than those given by the testator would not be sufficient for attendance upon the testator's widow. This, I think, is emendation, and not construction, and it will be so considered. I have no doubt that the Court can make a clearer will than that which the testator has made. But the Court has no power to make alterations and additions, and it is better that an unreasonable will should remain intact, than that the power of the testator over the testamentary disposition of his property should be abridged. Of course the Court will disclaim, and does not act upon, any such authority or power; but the effect is precisely the same.

If the provision for the wife had embraced only a few negroes, it would not have been disturbed. But seventeen negroes, for domestic servants, seems to be too large an establishment for this widow; more particu-

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larly, as by natural \*increase the number has been magnified to twenty-seven. The increase is accidental, and is a state of things not anticipated by the testator, and does not constitute any proper ground for the interference of the Court, in reducing the provision made by the testator for his widow.

The testator gave the mansion in which he resided, with two hundred acres of land, as a home for his wife and his daughters as long as they should remain single. The daughters, while unmarried, took an interest, which was to be enjoyed by them as residents at the homestead. If, being still single, they go away and live elsewhere, they have no such estate or interest as will admit of a claim or demand, on their part, for a proportional part thereof for rent. In like manner, when the testator gives his wife the domestic servants as attendants upon her and his younger children, he obviously intended that they should be attendants upon her at the home which he had provided for

her; at least as long as she chose to reside there. The use of these servants was intended for the wife, in common with the younger children. The latter certainly had a right in the use of the negroes, but it was a right which was intended to be enjoyed in common with the widow. When they left the homestead, each pursuing his or her own scheme of life, they had no such interest or estate as could be separated from that of the widow, or which they were entitled to enjoy in severalty. If one had, it is clear that each had. Yet, if I understand it, the present decree of the Court looks to a separation of the interest of the parties in some portion of the property, if the report of the Master should state that the widow did not stand in need of all of these negroes. The testator having given the use of these negroes to his wife, as personal attendants upon her, I do not perceive upon what just principle the Court can proceed to enquire whether there are too many negroes for her needs, and if they should be found to be too many, to decree that she should be deprived

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of some portion of the provision \*which the testator has made for her. Admit that the number of domestic servants is too large for the present establishment of the widow, when was such a circumstance ever known to authorize the Court to trench upon the will? When was such a circumstance known to control the construction of a will? This decree looks to an interference with the provisions of the testator, which to me appears to be in the highest degree improper, and it is for this reason that I have felt it to be my duty in this form to express my disapprobation and dissent.

Decree reversed.

### 9 Rich. Eq. \*217

\*DANIEL E. HUGER, and Others, v. ISABELLA I. HUGER, and Others.

(Charleston. Jan. Term, 1857.)

[*Executors and Administrators* ⚡141.]

Executors having a general power to sell, are not restricted to any particular mode of selling. They may sell either at public or private sale, and without advertising.

[Ed. Note.—Cited in *Rice v. Coleman*, 87 S. C. 349, 69 S. E. 516, Ann. Cas. 1912B, 1016.

For other cases, see *Executors and Administrators*, Cent. Dig. § 576; Dec. Dig. ⚡141.]

[*Executors and Administrators* ⚡144.]

Executors may purchase, at their own sale, either real or personal estate; and the giving of a bond to the Ordinary, as directed by the Act of 1839, is not essential to the validity of the purchase.

[Ed. Note.—Cited in *Anderson v. Butler*, 31 S. C. 196, 9 S. E. 797, 5 L. R. A. 166.

For other cases, see *Executors and Administrators*, Cent. Dig. § 579; Dec. Dig. ⚡144.]

[*Executors and Administrators* ⚡365.]

The Court, when applied to, will not confirm such a purchase, until the directions of the Act are complied with.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1500; Dec. Dig. ⚡365.]

[This case is also cited in *Black v. Childs*, 14 S. C. 321, without specific application.]

Before Dargan, Ch., at Charleston, June Sittings, 1856.

Dargan, Ch. The plaintiffs state that they are the executors of the last will and testament of their father, the Hon. Daniel Elliott Huger, late of Charleston; that the said testator, by his last will and testament, bearing date the 25th of May, A. D. 1850, after devising and bequeathing to the mother of the plaintiffs, and wife of the testator, Mrs. Isabella I. Huger, for life, a house with furniture and contents, and certain negroes, and an annuity during her life of three thousand dollars, in lieu of dower and of all other claims, and after making some other particular dispositions, gave all the residue of his estate to be equally divided into nine parts, among his eight children and his grandson, Joseph Manigault, on the condition, however, that the said shares should be equalized by charging the several devisees with the advancements received in his lifetime, according to an estimate and statement thereof made by himself, and set forth in his will as a part of the same; and that the said testator, by another clause of his will, directed as follows: "If it be thought best by my execu-

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tors \*to sell any, or the whole of my estate, they are hereby authorized to do so;" that the said testator appointed the plaintiffs, by the description of his four sons, the executors of his will; that afterwards, on the 21st August, 1854, the said testator departed this life, leaving the said will, and certain codicils, afterwards executed, not interfering with the general dispositions of his will, in full force; that the plaintiffs have duly proved the said will and codicils, and that they have undertaken the burden and execution thereof.

The plaintiffs further state, that the testator was possessed of two large plantations, one on Savannah River and the other on the Wateree, and of many negro slaves, the greater part on the Savannah River plantation, and owed few debts, besides certain bonds, &c. They state the parties who are interested in the estate under the will, and charge, "that the separation of the testator's estate into so many parts or shares, as to make an equal apportionment among the parties interested, was clearly impracticable, and that the exercise of the power of sale granted to the executors was a necessity that was clearly foreseen by the testator." The plaintiffs state, that for the purpose of making distribution according to the provisions



of the will, they made sale of the whole real and personal estate of the testator, and describe with great minuteness the particulars of the sale, and the manner in which it was conducted. The sale was made on the 8th January, 1856, at public auction, on terms not necessary here to be particularly noted. The Savannah River plantation, with all the negroes thereon (one hundred and forty-two in number), stock, and other things of the nature of personal estate, belonging to the premises, including seed rice, not exceeding four thousand bushels, were sold as a whole ("in the block," as some of the witnesses expressed it) for the sum of one hundred and eighty-eight thousand dollars. This property was sold by Messrs. Capers & Heyward, brokers, and was bid off at the aforesaid sum of one hundred and eighty-eight thousand

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dollars, by \*Allen Smith Izard (who is one of the defendants, and whose wife is one of the devisees), he being at the auction the only bidder. The plaintiffs state, that the said Allen Smith Izard bid for the property in behalf of himself and of the plaintiffs, Joseph Allston Huger and Arthur Middleton Huger, who are willing to become the purchasers of the property at that price, and are ready to comply with the terms of sale, and have taken possession of the property, which could not be left in a state of suspense without great loss. In like manner, the Wateree plantation, negroes, stock, &c., were offered at public auction at the same time, and were bid in by the plaintiffs at sixty thousand dollars, who say that they are willing to account to any of the parties interested, for his or her share, at that price, or to retain the said property for the benefit of such of the parties as may be disposed to unite in waiting for a better sale for the benefit of all interested. The plaintiffs pray for a confirmation of the sales, for an account, &c.

The plaintiffs further state, that between the testator and his wife (Mrs. Isabella I. Huger, one of the defendants) there was a post-nuptial settlement, by which many negroes were conveyed by the testator to the Hon. Henry Middleton, in trust, for husband and wife, during their joint lives, for the use of the survivor for life, and after the death of the survivor, for the issue of the marriage. They further state, that Mrs. Binkey Huger (the testator's mother), by her last will, dated 16th October, 1786, devised all her estate to her mother, Sabina Elliott, and to Col. Lewis Morris, Charles Cotesworth Pinckney and Thomas Pinckney, in trust, to receive the rents and profits during the minority of her children, &c., and to divide the principal among them at the age of twenty-one years, in such proportions and at such times, as she, by instructions in writing, under her own hand, should limit and appoint. That Col. Lewis Morris, Charles Cotesworth Pinckney, and Thomas Pinckney,

survivors of Sabina Elliott, reciting certain instructions of Mrs. Huger to the said trus-

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tees, conveyed \*the moiety of a tract of land called Accabee, and the whole of a plantation called Euhaw, to the said Daniel Elliott Huger, for the term of his natural life, and after his decease to such lawful issue of him, the said Daniel Elliott Huger, as may be living at his death. The plaintiffs further state, that the testator sold the Euhaw plantation, and afterwards, by indenture dated 12th January, 1821, between the testator of the first part, and James R. Pringle of the second part, after reciting the deed of Mrs. Huger's trustees, and the sale of the Euhaw plantation, conveyed to the said James R. Pringle a tract of land containing three hundred and eighty-one acres, being a part of the Savannah River property, in trust, for the same uses as the Euhaw plantation was subject to.

The plaintiffs charge, that the provisions of the testator's will, and of his said deed of post-nuptial settlement, and the will of his mother, Mrs. Binkey Huger, and the deed of the trustees, executing the appointment as to Euhaw plantation, and the testator's own deed, conveying in trust to James R. Pringle a portion of the Savannah River plantation, present a case or cases of election, and that the devisees and legatees of Daniel E. Huger's will cannot take under the provisions thereof, and also under the aforesaid deeds and instruments, which are inconsistent therewith. The plaintiffs further charge, that all the parties interested are willing to take under the provisions of the will, and do elect to take accordingly, and they pray for a decree of the Court to this effect. The last allegation is true. All the defendants have, in fact, elected to take under the will, as appears in their several answers. And there is no difficulty on this point.

As to the validity of the sale (which is the only matter controverted in this case) all the parties in interest acquiesce, and are willing that the sales, made by the executors, should be ratified and confirmed, with the exception of James W. Wilkinson, who acts for himself and his wife, and Joseph Manigault, a devisee, and the grandson of the testator.

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\*These parties object to the validity of the sale, and seek to have it set aside on various grounds, among the most prominent of which are these: that the sale was irregularly and unfairly conducted; that the executors could not become purchasers at their own sales; and that a full and adequate price was not obtained.

The facts relied on, to show that there was irregularity and unfairness in the sale, are these:—1. Because the negroes sold were not advertised for sale at all on that day (day of sale). 2. Because the Savannah River

place was sold as a whole, and not, as advertised, in two lots. 3. Because the lands and negroes were sold together. 4. Because the terms of the sale, as to the credit allowed, varied from those advertised. The facts here assumed as the basis of the objection, are substantially true. The slaves were not present at the sale; they never were advertised for sale at auction. On the 5th December, the lands were advertised to be sold at auction on the 8th January following. A description of the property, with the terms of sale, was set forth, and by way of postscript, was added as follows: "The above may be treated for at private sale, together with about one hundred and forty negroes, now on and accustomed to the plantation." This related to the Savannah River place. The same form of advertisement was published as to the Wateree place, with a similar postscript: "The above may be treated for at private sale, together with about seventy negroes, now on and accustomed to the plantation." From this, and other circumstances, it is sufficiently obvious, that, at the time the sale was first advertised, the executors did not contemplate selling the negroes at public auction. But, in my judgment, neither this, nor the other facts relied on, though true, are sufficient to affect the validity of the sale. The executors were not bound to any form or mode of making the sale. Though they had advertised to sell by auction, they were not bound to carry out that plan, and vice versa. Their authority was full

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and complete as that of the testator himself, or any other proprietor. They were, as to the matter of the sale, the proprietors. There was no restriction of their power, save only a condition implied by law, that they should obtain a fair and full price, or, failing in that, to show that they acted in good faith, and performed their trust as well as they reasonably could have done under the circumstances.

The arrangements which the executors made in respect to the disposition of "Jackey, the Key-keeper," (a faithful and favorite servant of the testator,) gave much offence to some of the parties. This was the source of much of that excitement and intensity of feeling which have pervaded these proceedings. The arrangements that were made on this subject were clearly within the discretion and competency of the executors. They had unlimited power as to the manner of selling this negro, as they had in respect of the other property. And if they sold him for a fair price, and accounted for the same, it was all that could be required of them. They had no other trust or duty to fulfil which the law recognizes.

I come now to consider whether an executor can become a purchaser at his own sale. This is an abstract question of law, and one on which, in times past, there has

been much discussion, and on which the decisions of our Courts have oscillated to a great extent. As a general rule, it is well settled, that a trustee or agent to sell cannot become a purchaser at his own sale; and it is equally well settled, that such sale will be set aside in this Court, on the application of any party whose interest or desire it is to have it vacated. And this will be done without any reference to the question, whether the sale has been fairly conducted, or whether a full and fair price has been obtained. Such was the conclusion of Chancellor Kent, in *Davoue v. Fanning*, 2 John. Ch. 251, upon a review and masterly analysis of the English authorities, and many of the American decisions. The principle was applied with great rigor in this State, in *Ex parte Wiggins*, 1 Hill, Eq. 353. In this case, a bill was filed by the assignees of Baker

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Wiggins, \*against his heirs and creditors, to marshal his assets, and the Court ordered a sale of his real estate by the Commissioner, under the superintendence of the assignees, who were directed to join in the conveyance to the purchaser. At this sale, R. B. Wiggins, one of the assignees, became the purchaser of the whole estate, and afterwards filed his petition for a confirmation of the sale. The Commissioner, to whom it had been referred, reported that the sale was fairly conducted—that the purchase was bona fide, and for an adequate consideration—and that the purchaser was a creditor of Baker Wiggins. The Chancellor who heard the cause dismissed the petition. He held that the purchase could neither be set aside nor confirmed, without a knowledge of the wishes of the other persons interested, who were not parties to the proceeding. That according to decided cases, a trustee to sell cannot purchase, whether he is a party interested or not. If he purchases, the sale will be set aside, or he will be held to the purchase, as of course, at the option of the parties interested; and as the rule forbidding such purchases is one of policy to prevent fraud, when there is no possibility of proving it, the inquiry is never made, whether the sale is advantageous or not. This decree, on appeal, was affirmed at December Term, 1833. It was certainly a stern application of the rule, and it has been followed in many subsequent cases. *Farr v. Sims*, Rich. Eq. Cases, 138 [24 Am. Dec. 396]; *Zimmerman v. Harmon*, 4 Rich. Eq. 165; *Sollee v. Croft*, 7 Rich. Eq. 34. As regards persons coming under the class of technical trustees, or simple agents to sell, I apprehend that there is no principle of law more solemnly and irrevocably settled in South Carolina.

But whether executors and administrators, though in many points of view regarded as trustees, come under the operation of this principle, or constitute an exception, has been a much debated question in our Courts,



and one that has never yet been fully solved or settled, unless it has been by a legislative Act, which will be hereafter referred to and

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commented on. \*From the earliest period of our judicial history, there seems to have been fluctuations in the decisions. But it is somewhat remarkable, that the earliest reported decision on this subject, and the last, strongly support the doctrine, that an executor or administrator may buy at his own sale, under certain conditions as to fairness. In *Drayton v. Drayton*, 1 Desaus. Eq. Rep. 557, 567, decided in 1797, Chancellors Mathews and Rutledge, in speaking of a purchase made by one of the testator's executors, say, "As to G. Drayton's purchase at the sale of the testator's estate, we consider it in the same light as that of any other individual. There is no law which prohibits an executor purchasing (without fraud) any property of his testator at open and public sale."

In *Stallings and wife v. Foreman*, administrator, 2 Hill, Eq. 401 (decided in 1835), the judgment of the Court, after an elaborate review of all the South Carolina cases, is, "that an executor or administrator is not to be regarded as a mere trustee to sell; that his purchase at his own sale, when fairly made in pursuance of the will, or under an order of the Ordinary, in a case of which he has jurisdiction, for the true value of the goods and chattels so sold, is good, and must be supported both in law and equity."

The intermediate cases were decided variously. In *Perry v. Dixon*, 4 Desaus. Eq. Rep. 504, note, the Court was divided on this question in such a manner, that the result could not be regarded as authoritative on either side. In *Edmonds v. Crenshaw*, 1 McC. Eq. 252, 260 (A. D. 1824), the rule against the right of the executor was applied. In *Trimmier v. Trail*, 2 Bail. Rep. 480, the decision was, that an administrator having an interest in the estate, might purchase to the extent of his interest, and a purchase by an administrator not entitled to a share of the estate, is not necessarily void, but may be confirmed or set aside at the option of the parties interested in the estate. In *Britton and wife and Gibson and wife v. Johnson*, executor, [2 Hill, Eq. 430, Dud. Eq. 24] the purchase by the executor of slaves, at his

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\*own sale, was set aside without inquiring as to the fairness of the sale, or the adequacy of the price. From this part of the case there was no appeal.

Thus stood this question at the enactment of the declaratory statute of 1839, 11 Stat. 94. *Stallings v. Foreman* was at that time the latest judicial exposition of the law upon the subject; and the Legislature adopted the principle of that decision, with one additional feature, which is a great improvement, and which, in my judgment, renders the rule com-

plete and perfect. It requires the executor, or administrator, to be charged with the true value of the property, without reference to the manner of the sale or the sufficiency of the bid, and whether he be interested in the sale or not. It takes away the temptation to commit a fraud by rendering its accomplishment impracticable. It thus removes the source of all the objections upon which the inhibition was founded.

There are many cogent reasons why an executor should be allowed to bid, which would have prevailed in favor of the right, but for the stern policy which forbade it. His competition enhances the bidding, which operates to the advantage of the estate. The intimacy of his relations to the property, which, under a different rule, would afford him facilities of obtaining a good bargain and making a profit, at the same time may give him such a knowledge of the true value of the estate, as to induce him to bid more than any other competitor. He may have an interest in the property to the extent, perhaps, of three-fourths, or in a still larger proportion. The property is actually his, to the extent of his share, and a sale only necessary for partition. Must he stand by, and not be allowed to open his mouth in the way of competition in the bidding? Must he see his own property sacrificed without remedy? Shall he not be permitted to buy in his own property, at the same time doing full justice to his co-tenants? An executor not unfrequently might attach an extrinsic value to the property, from motives to which his com-

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petitors in bidding would be strangers. He might place a higher estimate upon it from associations, from its having been the place of his birth and the home of his childhood—from its having been the residence of his ancestors—or simply because it was his father's property, his mother's, his uncle's, or his friend's, as the case may be. This is a natural sentiment, and certainly not one to be rebuked; for no natural feeling or affection is wrong, except in its abuse. A sentiment, so deeply rooted in our common nature, should not be wantonly trampled on or disregarded by the law, but should rather be gratified, or at least be tolerated, where no evil consequences can result. But we have seen that the indulgence of this sentiment, in allowing an executor to purchase at his own sale, under the safe-guards which the law now affords, tends rather to the advantage than to the injury of the estate. Under the rules forbidding an executor to purchase, his position would be one of disadvantage and hardship. He could not acquire, in severalty, property which is already in part his own. He could not protect his own interest by bidding, and thus preventing a sacrifice. These considerations might often induce him to decline the trust reposed in him by the

testator, which would, in such case, have to be committed to strangers.

To illustrate these views, no case can be more apropos than the present. Here is a testator, who has left a large estate, some of which was hereditary, and a large portion acquired by his enterprise and skill in agricultural operations. He left behind him an honorable name, distinguished for his eminent personal worth, by the high stations he had occupied, and by the services he had rendered his country. He left four sons to transmit his name and lineage to future times. Is it not natural that he should desire, or at least have been willing, with his name to transmit his estate, or, at all events, such portions of it as his sons should be entitled to? A cynical philosophy may sneer at this sentiment as an infirmity, but it is a natural feeling, and one founded upon ac-

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companied by \*an honorable ambition. He devises and bequeaths his whole estate to his nine children, and grand-child, in equal shares, a disposition which of itself imports the necessity of a sale. A distribution, on the terms of the will, is otherwise impracticable. He appoints his four sons his executors, and foreseeing the necessity, he clothes them with the most ample authority to sell. The power with which he invests them, in this respect, is only limited by their own discretion. Did he—could he—by appointing them his executors, have intended to deprive them of the power of buying and possessing any portion of his estate in specie, as he had occupied and enjoyed it? Could he have intended that none of his sons should have the right of acquiring the ownership of his hereditary slaves? The question admits of but one answer. He could not so have intended. And if the law imposes such a condition upon the exercise of their power, it would be a case of great hardship. It would be a hardship without a corresponding advantage to the estate. For, as we have seen under the rule established by the Act of 1839, and even on the principle of *Stallings v. Foreman*, there is no possibility of the executors committing a fraud, or obtaining the property at an under value.

It has been doubted, in fact it has been strenuously urged in argument, that the Act of 1839 does not apply to real estate. In the first place, it is to be remarked, that there is not an argument, pro or con, that does not apply as well to a case arising on real as personal estate. The general rule, which inhibits trustees to sell from becoming purchasers at their own sales, under which executors have in some cases been considered to be embraced, relates alike to both species of property. The case of *Davoue v. Fanning*, already cited, was a case of the purchase by an executor of his testator's real estate, when the sale was made under a power to sell given by the will. The mischiefs were

the same, and the remedy was intended to be co-extensive with the mischief.

But it seems to me that the Act itself ad-

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mits of no other \*interpretation. It declares that "it shall be lawful for any executor or executrix, administrator or administratrix, to become a purchaser at the sales of the estate of his or her testator, or intestate, under whatsoever authority the said sales may be made, and the property so purchased shall be vested in him, or her, but he or she shall be liable to the parties interested for the actual value of property at the time of sale, in cases where it shall have been sold at an under price." The executor may become the purchaser of the estate of his testator. Is there anything in the language of the Act, or in reason, which restricts his right of becoming a purchaser to the personal estate. There is significance in the use of the most generic term, and one which embraces every species of property.

And this right to become a purchaser is to exist "under whatsoever authority the sale may be made." Here, too, there is an apparently studied use of terms sufficiently comprehensive to embrace every case, as to the source of authority by which the sale is made. This authority can only emanate from two sources—the decree of a Court of competent jurisdiction, or a power to sell given by the will. In either category, the executor may buy.

The second section of the Act is as follows: "If any executor, or executrix, shall purchase any property at the sales of the estate of his or her testator, he or she shall give bond, with surety, to the Ordinary of the District, conditioned to account for the purchase money of the said property." In this instance, no bond has been given to the Ordinary. It is argued that this is a condition upon which the right of the executor is made to depend, and that by the omission his privilege is forfeited. My construction is different. The latter clause, I think, is directory, and not a condition precedent to the validity of the sale. For this construction there are many analogies in our statute law. The idea that the validity of the sale shall depend upon the

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performance of the duty im\*posed in the second clause, is not expressed in the Act. But it is declared that the property purchased by the executor at the sale shall be vested in him. Upon the purchase, the property vests eo instanti, and would not be afterwards divested by not giving the bond. How long after the purchase would he be allowed to give the bond? After what lapse of time would his privilege be forfeited? Suppose the executor were to die after the purchase, and before he had a reasonable time or opportunity to give the bond?

Nor, do I think, that under a proper interpretation of the Act, it is material to en-



quire, whether the bid by which an executor or administrator has become the purchaser, is adequate or otherwise. The meaning of the Act clearly is, that when he purchases the property, at whatever price, it shall become vested in him, he being accountable "to the parties interested for the actual value at the time of the sale, in cases where it shall have been sold at an under price." It is the obvious implication that the property is to vest, notwithstanding it may have been bid off at a price below its actual value.

Though not germane to the issue here presented, I will say, before I conclude my remarks upon the construction of the Act of 1839, that the purchase, by an executor or administrator, of the property of his testator or intestate, contemplated by this Act, must be made at a public auction. It is scarcely necessary to say, that it would not be competent for him, sitting in his own chimney corner, to say to himself, "I will take this or that property at such a price," and to enter it into his own memorandum book. To become a purchaser under the Act of 1839, he must be the highest bidder at a public auction, with open competition, or under circumstances where competition was invited.

For the foregoing reasons, I am of opinion, that an executor or administrator may become the purchaser of the property, real or personal, of his testator, or intestate, provided he be the highest bidder at a public

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auction fairly conducted, in open \*competition, or under circumstances where competition was invited; that, under the provisions of the Act of 1839, it is not essential to the validity of the sale, that his bid should be the actual value of the property at that time, but he must be charged with and account for the value, as the Act directs; and that the omission to give bond with surety for the amount of such purchase to the Ordinary, as directed by the second section of the Act, does not affect the validity of the sale, if it be otherwise fair and legal. I am further of opinion, that where an executor or administrator has bid for the property of his testator, or intestate, and it has been knocked off to him at public auction, in open competition, at a full and fair price, such purchase may be sustained on the principle of Stalling's Case (which is the last judicial enunciation on this subject prior to the Act, and which I think was correct), though the omission to give bond with surety to the Ordinary, or some other circumstance, might be considered as preventing the case from coming within the operation of the Act of 1839. In other words, a purchase under the circumstances mentioned would be valid, independent of the said Act, on the authority of Stalling's Case.

My next enquiry will be, whether the price at which the plaintiffs bid off their testator's property, on the 8th January, 1856, was full

and adequate? This is a question of fact, and must be determined by the evidence.

As respects the Wateree estate, all parties acquiesce, and there is no controversy. It is ordered and decreed, that the sale of the Wateree estate, as sold by the executors on the 8th January, 1856, on the same terms upon which said sale was made, be confirmed, on the parties who were the purchasers of said property accounting and paying, to the parties who were not concerned or interested in said purchase, for their respective shares and the accruing interest.

I am to consider whether the bid of one hundred and eighty-eight thousand dollars,

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for the Savannah River estate, was \*full and sufficient. Upon a most careful and prolonged examination of the evidence, I think it was. I am strongly impressed, that but for the competition of the executors, so high a price could not have been obtained. Out of the family there was but one actual bid—that of Mr. O. Middleton for one hundred and seventy thousand dollars. This was for the land and negroes, exclusive of the rice, stock, &c. The only other positive bid, except those made in behalf of Mr. Izard and his associates, was that of Mr. Wilkinson for one hundred and seventy-five thousand dollars. This included only the land and negroes. Mr. Burrel Sanders' overture did not amount to a bid; and Mr. Wilkinson's bid of one hundred and eighty-one thousand dollars, made through Mr. Manigault, was retracted, in consequence of the executors still adhering to their condition respecting the negro Jackey. The last named bid of Mr. Wilkinson called forth the bid of Mr. Izard of one hundred and eighty-eight thousand dollars, at which the property was sold.

All the witnesses concur in the opinion that the property was sold at a fair price, with the exception of Mr. Zeigler, the overseer, who testified that since the sale he had expressed the opinion that the property was worth two hundred thousand dollars. I do not perceive how the opinion of this witness is to outweigh the whole tenor of the evidence. Even the amount of his estimate, and that of the sale, considered comparatively, and with reference to the magnitude of the estate, presents no great or startling discrepancy.

In reference to this matter of the value of the property, we should not lose sight of another fact. The whole property was appraised at one hundred and ninety thousand dollars. There were then one hundred and fifty negroes. Between the date of the appraisement and that of the sale, eight of the negroes had died. Making but a moderate estimate for the negroes who had died, the amount of the sale certainly did not fall below the appraised value. In a question of

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this \*character, the appraisement assuredly

would not prevail against positive evidence of a higher value. But, in the absence of such proof, or of sufficient proof to that effect, the appraisal may be relied on to show that the executors have not secured to themselves a profit.

The average price at which the one hundred and forty-two negroes sold, considering the appraised value of the land to have been given, was about five hundred and fourteen dollars. There was evidence that, about that time, gangs of negroes, without being sold with land, had brought an average price as high as six hundred and nineteen dollars. It is perfectly obvious, that negroes sold without being encumbered with land would yield a higher average price than where, as in this case, the sale of the negroes was coupled with the sale of land to the amount of one hundred and thirteen thousand dollars. From the mobility of this species of property, there are more persons seeking to invest capital in negroes than in lands. Mr. Bee was of opinion that these negroes were worth one hundred dollars less in the average with the land, than without it. He said he was offered, at this time, Potter's negroes, with land, at five hundred dollars round.

Upon the whole, I see no reason to doubt that the price for which the Savannah River property was sold, was full and adequate. It is ordered and decreed, that the said sale be confirmed, on the parties who were purchasers paying to the other parties, who were not purchasers, their respective shares, with the accruing interest, according to the terms of the sale. It is further ordered and decreed, that the said Savannah River estate, as also the Wateree estate, stand pledged for the payment of the purchase money of each respectively, and the accruing interest.

It is further ordered and decreed, that the said plaintiffs do account before one of the Masters of this Court, for the purchase money of said estates, and for all other goods and chattels, assets, &c., that have come into

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their hands, and account \*generally for their actings and doings as executors of their said testator.

And whereas, the parties having all submitted, and elected to take under the will of the testator, the election so made by them is confirmed, and the provisions made by the will declared to be a satisfaction of all the claims which any devisee or legatee has against the testator, or against any of the property of which he was in possession at or before his death, or which he assumed by his will to dispose of. It is further ordered and decreed, that the executors, from the assets in their hands, do invest a sum sufficient to yield and secure to Mrs. Isabella I. Huger her annuity of three thousand dollars, in half-yearly or quarterly payments, at her discretion, during her life. It is further ordered and decreed, that the said executors, after

making the said investment, and after paying the debts of the testator, distribute the remainder of the estate among the devisees and legatees, in equal shares, according to the terms of the will, taking in consideration, and into the estimate, the advancements made by the testator, as stated in his will.

It is further ordered, that the costs be paid by the executors out of the assets of the estate.

The defendant, J. W. Wilkinson, appealed on the grounds:

1. It is respectfully submitted, that though, in the language of the decree, the executors of Judge Huger's will "were not bound to any form or mode of making the sale," and "their authority was as full and complete as that of the testator, or any other proprietor," and "they had unlimited power as to the manner of selling," yet this was true only in regard to sales, where the executors were not themselves interested as purchasers, and was inapplicable to the circumstances of the present case, where the executors were themselves the purchasers.

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\*2. The "well settled" "general rule," "that a trustee or agent to sell cannot become a purchaser at his own sale," and that "such sale will be set aside on the application of any party whose interest or desire it is to have it vacated," "without any reference to the question, whether a full price has been obtained," prevails in South Carolina, except as modified in regard to executors and administrators, by the decided cases referred to in the decree, and by the statute of 1839; and these decisions, and this statute, it is respectfully submitted, simply remove disabilities, under which executors and administrators were supposed to labor in regard to becoming purchasers of the estate held in charge, and did not contemplate giving to these trustees advantages, as purchasers, over legatees and distributees having equal interests with themselves.

3. It is respectfully submitted, that the pleadings and evidence show, that previous to the day of sale, as well as on that day, by the "arrangements" as to Jackey, and by the operation of many other circumstances, controlled by themselves, the executors desiring to purchase did possess very decided advantages in competing for the purchase of the Savannah River property, over Messrs. Wilkinson and Manigault, who had equal interests with them as devisees and legatees, under the will of testator.

4. An executor or administrator, it is further submitted, has not only no claim to a position of advantage, but he cannot become the purchaser of the property of his testator or intestate at all, except under the conditions described by his Honor in his decree, to wit: "Provided he be the highest bidder at a public auction, fairly conducted, in open competition, or under circumstances where



competition was invited;" and (as is stated in the decree) the amount of the bid, or fullness of the price, is not the test of compliance with these conditions.

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\*5. It is respectfully submitted, that the sale of the property of the estate of Judge Huger, on the 8th January, 1855, where (as is admitted by the Chancellor in his decree), 1st, the negroes sold were not advertised for sale at auction at all, nor mentioned in the advertisements as any part of the property to be sold on the day of sale, and not present at the place of sale; where, 2d, the Savannah River plantation was sold as a whole, though advertised to be sold in two lots; where, 3d, one hundred and forty negroes, and more than one hundred thousand (\$100,000) dollars worth of land were sold in block, without previous advertisement to that effect; and where, 4th, the terms of sale, as to credit, varied from the advertisement—was not a sale "at public auction, with open competition, or under circumstances where competition was invited," and therefore not a sale at which an executor could become a purchaser under the Act of 1839.

6. Both the decided cases referred to in the decree, and the Act of 1839, it is respectfully submitted, apply only to "executors' and administrators' sales," as these terms are generally understood in South Carolina, to wit: public sales, after the customary notice, disposing in the usual manner of the personal estate of a testator or intestate; and give no sanction to a purchase by an executor or administrator, at an unadvertised sale, in block, of a plantation, negroes, stock, provisions, &c., knocked off to the only bidder, at one hundred and eighty-eight thousand (\$188,000) dollars, gross.

7. That neither the cases, nor the Act, apply to real estate at all.

8. The clearest equity demands, that if trustees to sell are permitted to become purchasers at all of property held in trust by them, upon them should rest the burthen, to show, beyond all question, that adequate

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means have been used to ascertain \*the full market value of the property; or, if this be in any doubt, to show that the intrinsic value is certainly within their own bid; whereas, in this case, it is not clear that the market or exchangeable value has been ascertained, and it is shown that the property yields fourteen and three-quarters per cent. per annum on the sum bid.

9. The Court, it is submitted, should at least have ordered an inquiry into the sufficiency of the price; inasmuch as it appears that, but for an odious condition imposed by the executors who purchased, two of the defendants might themselves have purchased at a higher bid; and it is proved that the property, in a course of six years (omitting 1854), yielded thirteen and a half per cent. per an-

num on two hundred thousand (\$200,000) dollars, the valuation placed on the property by the overseer of complainants, the only witness who speaks from his own knowledge of the place, and its productions.

10. It is respectfully submitted, that his Honor's decree is otherwise contrary to the equity of the case, and not sustained by the evidence.

Hayne, Memminger, for appellant.

Petigru, contra.

The opinion of the Court was delivered by

DARGAN, Ch. It will not be necessary to consider the appellant's ten grounds of appeal seriatim. They may, in substance, be resolved into the several propositions discussed in the circuit decree, and, to most of what has been said by way of argument on this hearing, the reasoning of the Circuit decree is a sufficient answer.

As a matter of fact, and from the evidence

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before us, we \*are of opinion, that the sum of one hundred and eighty-eight thousand dollars, bid by the plaintiffs for the Savannah River plantation of the testator, with the one hundred and forty-two negroes thereon, and the stock, seed-rice, &c., was a full and fair consideration, and the purchase cannot be questioned on that score. If there had been any doubt upon this point, and it had been satisfactorily shown that further and material evidence could have been adduced, bearing upon this question as to the value of the property, and the sufficiency of the bid, the Court would have ordered a reference for further investigation; and the Circuit Court, under like circumstances, would have felt itself called to pursue the same course. But the evidence seems to be full and ample. The Court is satisfied with the decision upon that evidence. And it does not appear that further investigation would elicit further light.

The manner of the sale was unquestionably informal and irregular; and if the executors had, under these circumstances, sold the property to a stranger for less than its value, I doubt not that they would have rendered themselves personally liable for the deficiency, to their co-devisees and co-legatees. But if, at a sale even so informal and irregular as this, they had obtained from a stranger a full and fair price, what more could be required of them? This is the utmost requirement of the law. Therefore, it may be said, that a full price would cure all irregularities in the manner of the sale. And if a sale of this kind was in the highest degree regular, and every usual and appropriate form observed, it is impossible, both by the statute law and the decisions, for the executors to make a profit to themselves by becoming the purchasers. Under any and all circumstances, they, as purchasers, are to be

charged with the true value of the property, and the Court, when its aid is invoked to that end, will impose such conditions upon them as will make the purchase money secure.

It is said, that the sale ought to be set

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aside, because Mr. \*Wilkinson (one of the parties in interest) was excluded from competition at the sale by an odious condition. To understand this objection, an explanation is necessary. The testator had a faithful and favorite slave named Jackey, who was a kind of steward, kept the keys, &c., and was eminently trustworthy. Him the executors wished to favor, and accorded to him the privilege of "choosing his master;" in other words, of electing the person to whom he should be sold. And when the plantation, negroes, &c., were put up for sale in solido, one of the conditions was, that Jackey, with his family, should have the privilege of going with the gang to the purchaser, or of being detached from the purchase; deducting from the bid for the whole the appraised value of Jackey and his family. This was the condition said to be odious, and to exclude Mr. Wilkinson from competing at the sale.

The executors, as I have said, were bound to no form of sale, nor restricted to any specific terms. Their authority was so plenary, that after the property had been put up at auction, and the biddings commenced, they might have withdrawn it from sale at auction, and disposed of it at private contract, on different conditions from those advertised. The only condition annexed to their authority was one implied by law, that they should use judicious means to obtain the value of the property, and to be personally liable if they did not. And so, as to Jackey, the authority of the executors was unlimited. They had the power of a proprietor, and might indulge their discretion, and even their caprice, in selecting their vendee. If they had excluded Mr. Wilkinson expressly and by name from the competition, it might be considered as discourteous and unfriendly; but, a fair price being obtained, I do not perceive how such conduct could be made the ground of setting aside a sale otherwise valid. But whatever may have been the intention, from the evidence it is not to be inferred that this condition was aimed personally at Mr. Wilkinson. It was a condition annexed to

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the sale, and had relation to all \*bidders—the executors themselves, members of the family, and strangers alike. It is perhaps a matter of regret, that the executors had not been more accommodating to the feelings of Mr. W., in this particular, or exercised their undoubted privilege in a manner less offensive to him. But of this they were entitled to judge for themselves. With the private motives (if any there were), the pri-

vate feelings and relations of the parties, the Court has nothing to do.

This condition as to Jackey, so offensive to Mr. W., who considered it as aimed personally at him, was the cause of his withdrawing from private negotiation for the property. The same cause prevailed in preventing him from entering into competition at the public sale. And on the next day when Mr. Izard offered to let him have the property if he would advance upon his bid, he refused to entertain the proposition, unless the condition as to Jackey was withdrawn. Under these circumstances, it is vain to say, taking any view of the case that can be entertained in a court of justice, that this sale is to be opened for anything arising from, or connected with, the condition complained of. I have now done with that part of the case, which may be considered as involving questions of fact.

In addition to what I have said in the circuit decree, I purpose to make a few remarks upon the construction of the Act of 1839. In the argument for the appellants, it is strenuously urged, that this Act does not confer upon executors and administrators the right of purchasing real estate at their own sales. The Act, in declaring the right to purchase, says, "and the property so purchased shall be vested in him or her," &c. It is asked, how can the legal estate pass by such a sale as this?—a sale by an executor to himself. While it is very easy to perceive how personal property might pass by such a sale, it is said that this is a mode of transferring the legal title of real estate unknown to the law, and is incompatible with its general provisions. In the first place

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it may be \*observed, that the Act does not declare that the legal estate shall pass. There are two kinds of title known to the law, namely, legal titles and equitable titles. And a person may be as properly said to be vested with an equitable title, as with one which is purely legal. The language of the Act does not demand, that in its proper interpretation, it should be considered as meaning the legal estate only. But waiving this, as perhaps not the proper ground upon which the interpretation given in the circuit decree is to be sustained, the argument against this interpretation requires, that it should be considered as a principle of law, that the legal estate cannot pass without a deed of conveyance, or a will; whereas, nothing is more common, nor has been from the earliest ages of the common law, than for the legal estate to pass by operation of law, as in all cases of descent. At every session of the Legislature, there is some Act passed vesting the legal title of escheated property in persons supposed to have good equitable claims. And certainly, it is as little absurd for the Legislature, by an Act, to vest the legal title by future con-



ditions to happen, as upon conditions which have already happened. And when the Act of 1839, declares, that the property purchased by an executor, at his own sale, shall be vested in him, there is nothing unreasonable, inconsistent or unusual in it. The legal title to real estate may pass by a decree of this Court; and this is a constant and every day practice. In cases of partition, when the return to the writ is made and confirmed, it is not necessary that all the parties, to whom portions have been allotted, should mutually and interchangeably execute and deliver deeds, to vest each of the distributees in severalty with the title to the separate portion which has been allotted to him. This is effected by a decree, and henceforth each party is seized in severalty of his particular share, and the rest divested of their legal estate in such share, which before the decree they had, as tenants in common. And when the commissioners, as they

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are authorized by the Act to do, \*recommend that the whole estate be assigned to one of the tenants in common, on his paying to the others their share of the price at which the land has been valued, and such distributee consents to accept the land on the terms prescribed, no deed of conveyance from his co-tenants is necessary to vest him with the legal title of their share; but a decree of the Court is sufficient for such purpose. These familiar examples and illustrations show, that the provision of the Act of 1839, which declares that the property of his testator, purchased by an executor at his own sale, shall be vested in him, is no anomaly.

The Act, in declaring the competency of an executor or administrator to purchase on certain conditions, proceeds, in the second section, to provide, that "if any executor or executrix shall purchase any property at the sales of the estate of his or her testator, he or she shall give bond, with surety, to the Ordinary of the district, conditioned for the payment of the purchase money of the said property." I have held, in the circuit decree, that the condition imposed in this section of the Act, is not a condition precedent, or essential to the validity of the purchase. This Court concurs in the correctness of the construction. On the hearing of this appeal, this point has been so earnestly contested, that it will be proper to make a few additional observations. It is remarked that this section requires an executor to give bond to the Ordinary, while an administrator is not so required. From which it is insisted, that as the jurisdiction of the Ordinary only relates to the personal estate, the power of the executor to purchase is restricted to that species of property. That the Ordinary having no power over the real estate, it would be inconsistent and anomalous to require the bond for such

estate to be given to him. That, in the case of an administrator, the administration bond covers all his defalcations as regards the proceeds of the sale of the personal estate, but not of his purchases of real es-

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tate. Hence, it is inferred, that \*an administrator's power to purchase is restricted to personal estate; and as an executor and administrator are, or should reasonably be, put upon the same footing, it is concluded that the power given to an executor to purchase is also confined to the personal estate. The logical sequence of this deduction, to my mind, is not very obvious. A better reason for the difference made between an executor and administrator, as to the requirement of the bond to the Ordinary, can be given—a reason which makes the provisions of the Act perfectly consistent. The administrator gives an administration bond to the Ordinary; an executor does not. The penalty of the administration bond is double the value of the estate to be administered. The powers and duties of an administrator relate wholly to the personal estate. He can never, by any legal possibility, have, as regards real estate, any sale of his own, under his authority as administrator. Therefore, his administration bond, if well taken, is a sufficient protection to the parties in interest against the consequences of his devastavit. Another bond, for the same purpose, would be an unnecessary exaction. Not so with an executor; who, though not required, as executor, to give a bond (because the testator has reposed in him a personal confidence), may, and often does, have power given to him, by the will, to sell both real and personal estate. And when, under this authority, or that of a decree of a Court of competent jurisdiction, he sells, and becomes a purchaser at his own sale, the Act interposes, and declares that he must be charged with the true value, whatever may have been the amount of the bid, and that he must give bond, with surety, to the Ordinary, whether the purchase be of real or personal estate. Surely, under this interpretation, there is no incongruity in the provisions of this Act, and its operation harmonises with the powers, duties and responsibilities of executors and administrators.

The provision of the second section of the Act, that in the case of a purchase by an ex-

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ecutor, a bond shall be given to \*the Ordinary, is not a nullity. The requirement is imperative, though no time is prescribed for its performance. If the executor purchasing were to pay, or to tender payment of the money to the parties entitled to receive it, the requirements of the Act would be satisfied. And so, where the sale is on a credit, and he comes, within a reasonable time, and

executes bond to the Ordinary, as the Act requires, it is sufficient.

The plaintiffs in this case express their willingness, and now offer to comply with the provision of the Act of 1839, as to the giving of a bond to the Ordinary. And, in the opinion of the Court, it is not too late for them to do so. And, though their non-compliance heretofore does not invalidate the sale, it is the duty of the Court, when invoked to confirm it, to impose upon the executors, purchasing at their own sales, all the conditions prescribed by the law. It is therefore ordered, that the said executors, purchasers at their own sales, as in the bill stated, do, within sixty days from the announcement of this decree, execute a bond to the Ordinary of the district where the property is situate, for the purchase money, as required by the Act, the liens given by the circuit decree to remain the same as therein expressed. The circuit decree, in this respect, proceeds upon the doctrine of an equitable mortgage. In all such cases, I incline to think that a lien, in the nature of an equitable mortgage, would be set up. This is my individual opinion, however, and not that of the Court. From that part of the circuit decree no appeal was taken, and it has not been discussed, either at the bar or in the conferences of the Court.

It is ordered and decreed, that, except so far as herein modified, the circuit decree be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.

Appeal dismissed.

#### 9 Rich. Eq. \*244

\*GEORGE M. COFFIN, Ex'or, v. ANNA H. ELLIOTT, and Others.

(Charleston. Jan. Term, 1857.)

[Wills 487.]

The intention of a testatrix, as to the meaning and effect of her codicil, cannot be shown by the oral testimony of the person who drew it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1032; Dec. Dig. 547.]

[Wills 547.]

Testatrix made her will, by which she devised her residence to her niece, C., in fee; and the residue of her estate she devised and bequeathed to her niece, C., and her great nephews, W. and B., in fee, "to be equally divided among them, share and share alike." C. afterwards died, and then testatrix made her codicil, by which she devised her residence to W. and B.:—*Held*, that C.'s share in the residue lapsed, and did not pass to W. and B.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1179; Dec. Dig. 547.]

[Wills 547.]

Where there is a devise or bequest to two or more, as tenants in common, whether it be specific or of the residue, the share of one who

dies before the testator lapses, and does not pass to the surviving tenants in common.

[Ed. Note.—Cited in Logan v. Cassidy, 71 S. C. 192, 50 S. E. 794.

For other cases, see Wills, Cent. Dig. § 1179; Dec. Dig. 547.]

Before Dargan, Ch., at Charleston, June Sittings, 1856.

This bill was filed for instructions, and for construction of the will of Sarah H. Savage, the testatrix of the complainant.

The codicil, mentioned in the decree, was drawn by George M. Coffin, the complainant, and he was offered as a witness for the purpose of showing that the testatrix declared her intention to be, that her nephews should take the share of the residue given by the will to Catharine O. Elliott. This testimony was rejected by his Honor, as wholly inadmissible.

So much of the decree of his Honor, as relates to the questions taken to the Court of Appeals, is as follows:

Dargan, Ch. The testatrix, Miss Sarah H. Savage, by her will, among other things, devised as follows: "I give to my niece, Catharine O. Elliott, my dwelling-house and lot of

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land, \*corner of Broad and Savage streets, my present residence, to her and her heirs and assigns forever." \* \* "The rest, residue and remainder of my estate, real and personal, whatever and wheresoever, I give, devise and bequeath to my niece, Catharine O. Elliott, and to my great nephews, William Savage Elliott and Benjamin Elliott, the sons of the late William S. Elliott, to them, their heirs, executors, administrators and assigns, for ever, to be equally divided among them, share and share alike; the shares of the said residue which I have given to my said great nephews, William S. Elliott and Benjamin Elliott, to be taken and held for them by my friend, George M. Coffin, during their minority, and to be paid over, assigned and conveyed to them respectively, when they shall respectively attain the age of twenty-one years." The said Catharine O. Elliott having died in the lifetime of testatrix, she, by a codicil to her said will, devised as follows: "I further devise, that my residence at the corner of Broad and Savage streets, bequeathed in my will to my niece, Catharine O. Elliott, be now bequeathed to my two nephews, William S. and Benjamin Elliott, upon the same terms as the remainder or residue of my property are left to them in my will."

The first question made by the pleadings is, whether the share of Catharine O. Elliott, in the residue, lapsed by her death in the lifetime of the testatrix?

The authorities are abundant, that where there is a bequest or devise to two or more as tenants in common, as in this case, that upon the death of one of them, in the lifetime



of testator, his share lapses, and is distributable among the next of kin of the testator, according to the statute of distributions. And the same rule is as applicable to a devise or bequest of the residue, as to a specific devise or bequest.

The Court can see nothing in the wording of the codicil to make this case an exception to the general rule, or to sustain the ingenious argument of counsel, that the codicil is a new devise of the entire residue to the

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great nephews of the testa<sup>\*</sup>trix; and is of opinion, that the one-third of the residue of the estate of the testatrix, devised and bequeathed to Catharine O. Elliott, lapsed by her death in the lifetime of testatrix, and is distributable among the next of kin of the testatrix, Sarah H. Savage, according to the statute for the distribution of intestates' estates, and it is so ordered and decreed.

The defendants appealed on the grounds:

1. Because the evidence of the executor, Mr. Coffin, was admissible, as showing the intention of the testatrix as to the meaning and effect of her codicil.

2. Because the codicil, being the republication of the will, showed the construction, by the testatrix herself, of the words "residue and remainder," used in her will; and that under such construction, the defendants, William S. Elliott and Mrs. Anna Elliott, are entitled<sup>a</sup> to the whole of such residue and remainder.

Elliott, Simonton, for appellants.

Hayne, Holmes, contra.

PER CURIAM. This case was submitted without argument, and this Court concurs in the decree, which is hereby affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.  
Appeal dismissed.

#### 9 Rich. Eq. \*247

\*WILLIAM B. RISHER, and Others, v. BENJAMIN B. ADAMS, Executor, and Others.

(Charleston. Jan. Term, 1857.)

[*Deeds*  $\hookrightarrow$ 133; *Trusts*  $\hookrightarrow$ 140.]

By marriage settlement, the intended wife's property was limited to her separate use for life, and after the death of the said J. H., the intended wife, then to the use of her four children (she being a widow) by name, "and also of the issue of the said J. H. by her intended husband, who shall be alive at the time of the death of the said J. H., and who shall live to attain the several and respective ages of twenty-one years, or days of marriage; to hold the said trust estate, upon the attaining the said ages or days of marriage, to such children and issue, if more than one, to them, &c., forever. But in case the said J. H. shall happen to die without leaving either of the above-named children and issue, &c., or such children

and issue should all die in minority and unmarried, then upon the death of the said J. H.," over, &c.:—*Held*, that the interests of all the remainder men, the children named, as well as the issue, were contingent, and depended not only upon their coming of age or marrying, but also upon their surviving J. H.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 371; *Dec. Dig.*  $\hookrightarrow$ 133; *Trusts*, Cent. Dig. § 187; *Dec. Dig.*  $\hookrightarrow$ 140.]

[*Equity*  $\hookrightarrow$ 426.]

Where the bill is dismissed as to the plaintiffs, they being entitled to no relief, the Court will not decree between the defendants.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 1000; *Dec. Dig.*  $\hookrightarrow$ 426.]

Before Johnston, Ch., at Colleton, February, 1857.

Johnston, Ch. This bill is brought for the assertion of interests which the plaintiffs allege they have, in common with the defendants, under a deed of marriage settlement.

The deed bears date the 6th of April, 1805, and was executed in contemplation of a marriage, which was afterwards solemnized, between Jane Hoff, widow, of Colleton, and Godfrey Adams, of Abbeville. By this instrument, Mrs. Hoff, who had, at the time, four children then in their minority, by a former husband, conveyed to Richard Singleton twelve slaves, by name, with a tract of land situate at the Round O, in St. Bartholomew's Parish, and an undivided one-fifth of her former husband's estate, in trust (after the

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approaching \*marriage) for her own separate use and behoof, during her life, "and from and immediately after the death of the said Jane Hoff, then in trust for the use, benefit and behoof of Wm. Hoff, John S. Hoff, David S. Hoff, and Mary E. A. Hoff, present children of the said Jane Hoff, and also of the issue of the said Jane Hoff by her (intended) husband, the said Godfrey Adams, who shall be alive at the time of the death of the said Jane Hoff, and who shall live to attain the several and respective ages of twenty-one years, or days of marriage; to hold the said trust estate, upon the attaining the said ages or days of marriage, to such children and issue, if more than one, to them, their heirs, executors, administrators and assigns forever. But in case the said Jane Hoff shall happen to die without leaving either of the above named children, and issue by her said husband, Godfrey Adams, or such children and issue should all die in minority and unmarried, then upon the death of the said Jane," then over to Adams, &c. There are other trusts in the deed, but they are immaterial to the present cause.

By the marriage with Adams, the grantor had several children, of whom some died during the life of the mother, and others survived her. Of those who died during her life, some left issue. All her issue by Adams are parties defendants in this suit.

The four children of the former marriage all died in the lifetime of their mother, the

life-tenant. Wm. Hoff, the first of them, died in his minority, unmarried, and without issue; John S. Hoff came of age, but died unmarried and without issue; David S. Hoff came of age, and married, and left issue; and Mary E. A. Hoff came of age, was married, and left issue. All these parties are represented in the cause.

Godfrey Adams and Mr. Singleton, the trustee, are long since dead; the life-tenant, Jane Adams, formerly Hoff, died in 1852 or 1853, leaving a will, and her executor is a party.

The plaintiffs of the Hoff family claim an

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account and par\*partition of the trust estate, which is resisted. The defendants, if a partition is ordered, sever among themselves, as to the portions to which they are entitled.

Testimony has been taken to identify the property in the hands of the executor of Jane Adams, with that described in the trust deed. There is a good deal of obscurity in the evidence; but I do not deem it necessary to scrutinize it particularly, because, in my opinion, the case may be disposed of upon the construction of the deed.

If the bill can be sustained, and only in that case, the points between the defendants will arise. Though it is competent to decree between defendants, it must be upon a case arising between plaintiffs and defendants.

Had the contestation between the defendants properly arisen for adjudication, however, I should have felt little difficulty in deciding it. The remainder, so far as the deed creates it, in favor of the second family, differs from that created in favor of the first family, the Hoffs. The remainder, in the former case, is given to the issue by Adams ([*Burleson v. Bowman*] 1 Rich. Eq. p. 112, and 1 Rep. Leg. 127); and according to the case of *Barksdale v. Macbeth* (7 Rich. Eq. 125), all lineal descendants would come in per capita. The interests of the Hoffs, on the other hand, are given them by name, and under the designation of children; and none but those thus named and designated can take, unless the interests are vested by the instrument, so as to be transmissible.

If their interests were vested (while those of the issue are confessedly contingent and shifting), then the case would fall within the principle of *Cole v. Creyon* (1 Hill Eq. 311 [26 Am. Dec. 208]); whereas, if contingent, yet when they came into effect (if that had happened), the case would come under the class of *Perdriau v. Wells* (5 Rich. Eq. 30).

The point upon which I shall decide the case is, that the interests of all the remaindermen (children of the first family and issue of the second), are made expressly by the

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deed, con\*tingent and dependent upon their surviving the life-tenant, as well as their coming of age or marrying. The first words

employed might admit of some hesitation, whether these conditions were intended to be applied to the children, as well as the issue, or to be confined to the issue; but the subsequent words clear this matter from all doubt.

The interests of the Hoffs lapsed by their death before their mother; and being contingent, were not transmissible; and the bill is filed to assert rights which never accrued.

It is ordered that the bill be dismissed.

The complainants appealed from the decree, and prayed that the same may be reversed, for the reasons:

1. Because his Honor erred in deciding, that the Hoff family, named in the deed, did not take vested interests, and the appellants submit, said interests being vested and transmissible, that in the events that have happened in the case, on the death of Jane, their grandmother, they were entitled to shares in the lands and slaves in the controversy.

2. Because his Honor's construction of the deed of marriage settlement defeats the manifest meaning and intention of the grantor.

3. Because the decree is, in other respects, contrary to law.

The defendants, Anna Willis, Jane Hoff, and Benjamin Adams, on behalf of themselves and their children, issue of Jane Adams, also appealed on the ground:

Because they were entitled to a writ for

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a division of the \*property, per capita, and it is respectfully submitted that his Honor erred in refusing the same.

Henderson, for plaintiffs.

Perry, Carn, for defendants.

PER CURIAM. We see no sufficient reason to differ from the decree of the Chancellor; and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

9 Rich. Eq. \*252

\*THOMAS N. GADSDEN v. ELISHA CARSON, CHARLES M. FURMAN, and W. W. HARLEE.

(Charleston. Jan. Term, 1857.)

[*Partnership* ⇨186.]

The individual creditors of a partner have not such exclusive right to be paid out of his individual property, as to render fraudulent an assignment of it for the benefit of the creditors of the firm. *Semble*.

[Ed. Note.—Cited in *Blair v. Black*, 31 S. C. 358, 9 S. E. 1033, 17 Am. St. Rep. 30.

For other cases, see *Partnership*, Cent. Dig. § 339; Dec. Dig. ⇨186.]

[*Partnership* ⇨176.]

Partnership creditors having two funds—the property of the firm and the private prop-



erty of the partners—to which they can resort, and individual creditors of the partners having but one—the private property of the debtor (including any balance which may remain to him from the firm, after its affairs are settled)—such individual creditors have an equity to compel the partnership creditors to resort first to the partnership assets; but after they are exhausted, the partnership creditors have as good right to be paid out of the private property of a partner as his individual creditors.

[Ed. Note.—Cited in *Kuhne v. Law*, 14 Rich. 23, 26; *S. S. Farrar & Bros. v. Haselden*, 9 Rich. Eq. 337; *Adickes v. Lowry*, 15 S. C. 136; *Hutzler Bros. v. Phillips*, 26 S. C. 149, 1 S. E. 502, 4 Am. St. Rep. 687; *Trumbo, Hinson & Co. v. Hamel & Co.*, 29 S. C. 526, 8 S. E. 83.

For other cases, see *Partnership*, Cent. Dig. § 308; Dec. Dig. ☞ 176.]

[*Assignments for Benefit of Creditors* ☞ 39.]

Where a debtor, assigning for the benefit of his creditors, includes but a part of his property, a clause in the assignment, exacting a release from the creditor as a condition of his receiving benefit, is fraudulent, and vitiates the assignment.

[Ed. Note.—Cited in *Stewart v. Kerrison*, 3 S. C. 294; *Trumbo, Hinson & Co. v. Hamel & Co.*, 29 S. C. 532, 8 S. E. 83.

For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 160; Dec. Dig. ☞ 39.]

[*Assignments for Benefit of Creditors* ☞ 39.]

Where one partner assigns, a clause requiring creditors to release to the firm, as well as to himself, is, it seems, unfair and unjust to the creditors.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 159; Dec. Dig. ☞ 39.]

Before Dargan, Ch., at Charleston, June, 1856.

The case will be sufficiently understood from the Circuit decree, which states all the facts, and is as follows:

Dargan, Ch. The plaintiff charges that Elisha Carson is (at the time of filing his bill) indebted to him, and, as he is informed and believes, divers other persons, on his private and individual account, separate and distinct from any partnership agreement into which he may have entered, or for which he may be liable. That he is, or has been, connected in business with his son, James M. Carson, under the name and style of Elisha Carson & Son; and this copartnership is

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\*also indebted to divers persons. That he is, or has been, connected in business with his son, James M. Carson, and Laurence H. Belser, under the name and style of Carson, Belser & Co., and this copartnership is also indebted to divers persons. That the said Elisha Carson is indebted to him, the plaintiff, in his individual and separate capacity, in the sum of nineteen thousand dollars, besides interest; and other sums of money for which he (the plaintiff) is liable, in consequence of his indorsement of certain notes of the said Elisha Carson, for the accommodation of the said Elisha Carson, and which said notes have been protested for non-pay-

ment, and this plaintiff sued at law for the same.

The plaintiff further charges, that the said Elisha Carson is possessed, in his own right, of a considerable estate, real and personal, consisting of one or more plantations, and a considerable number of negroes. He further charges, that the copartnership of Elisha Carson & Son has made an assignment of its assets, for the benefit of the creditors of that copartnership. That the said Elisha Carson has, moreover, by his own deed, bearing date the 15th day of May, A. D. 1855, conveyed and assigned to Charles M. Furman a large amount of property, part only of which is particularly described in the said deed.

The plaintiff further charges, that the said Elisha Carson has, by his said deed to Charles M. Furman, attempted to divert the property from the purposes for which the said property, or its proceeds, should be held by the said Charles M. Furman. That the said Elisha Carson, in his said deed, after providing for the payment of the expenses incident to the execution of the trusts therein created, has set forth as a class numbered one, to be paid from the property so by him transferred and assigned to the said Charles M. Furman, certain claims amounting to seventeen thousand eight hundred and nine dollars of principal, of which the sum of one thousand four hundred and nine dollars is

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alone the private and separate debt of the said Carson; the balance, amounting to over sixteen thousand dollars, being the debt of the partnership of Elisha Carson & Son, or of Carson, Belser & Company. That in class number two, a part of the debts are the private and separate debts of Elisha Carson, and a part are the debts of E. Carson & Son; and in this class are also set forth a number of debts, concerning which there is nothing in the deed to indicate whether they are the separate debts of Elisha Carson, of E. Carson & Son, or of Carson, Belser & Company; and that, in class number three, are set forth certain private and separate debts of the said Elisha Carson to the plaintiff, amounting to the principal sum of fourteen thousand dollars besides interest, costs, and other expenses. None of the facts above stated, as charged in the bill, are denied in the answer of Elisha Carson, nor are they disputed by any of the parties. They must be assumed to be true.

The deed will speak for itself. It bears date 15th May, 1855, and purports to convey to Charles M. Furman all the grantor's "right, title, interest and estate in a certain plantation or tract of land, containing four hundred acres, in Sumter District, having such description," &c.; "also his right, title and interest in a certain plantation near Midway, in Barnwell District, more fully described," &c.: "also, all his right, title and

interest in certain choses in action, in the said schedule set forth and mentioned, and hereunto annexed and made a part of this deed, and also any resulting interest I may have in any other property or estate which may now be under mortgage." The trusts declared are, after discharging costs and expenses incident thereto, that the assignee shall apply the residue of the "trust moneys in and towards the payment and satisfaction of the several debts and sums of money, and to each of the following persons and corporations, for the following causes of indebtedness, that is to say—First, the notes in the Bank of the State of South Carolina, as follows:

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*Drawers.	Indorsers.	Amounts.
Elisha Carson & Son,	W. W. Harlee,	\$12,900 00
Elisha Carson & Son,	W. W. Harlee,	5,000 00
Carson, Belser & Co.,	W. W. Harlee,	5,000 00
Elisha Carson & Son,	Th. R. Waring,	3,500 00
E. Carson,	Cash.,	1,400 90
	Th. R. Waring,	

Second, the following notes, also in the same Bank, to wit:

Drawers.	Indorsers.	Amounts.
E. Carson & Son,	Thos. N. Gadsden,	\$2,000 00
E. Carson,	Thos. N. Gadsden,	5,000 00
E. Carson,	Samuel Cantey,	2,500 00

Peter Carson's two notes, one of twenty-eight hundred dollars, and one of seven hundred dollars.

J. D. Baxley's note of two thousand dollars, and S. D. & J. N. Hays' note of fifteen hundred dollars.

Third, the following notes in the Bank of South Carolina:

Drawers.	Indorsers.	Amounts.
E. Carson,	Thos. N. Gadsden,	\$3,500 00
E. Carson,	Thos. N. Gadsden,	1,500 00

and a note in the Bank of Charleston for nine thousand dollars, whereof E. Carson is the drawer, and Thomas N. Gadsden is indorser. Provided always, nevertheless, and it is the true intent and meaning, and it is made a condition of the same, that the persons named in the foregoing classification, and and for whose benefit this assignment is made, shall, on or before the day of June next, by the hour of two o'clock in the afternoon by the clock of St. Michael's, Charleston, execute a full release to the said Elisha Carson, James M. Carson and Laurence H. Belser; and such as shall not execute the said release and discharge, shall be debarred from all benefit of this assignment; and if the said debts should be paid, and a surplus should be left, pursuant to this agree-

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ment, that then the said Charles M. Furman, his executors or administrators, shall pay the same rateably to all the creditors of the said Elisha Carson, who may prove and

establish their demands to the satisfaction of the said Charles M. Furman," &c.

To this bill, Carson has answered. He denies none of the principal allegations of the bill. Furman, the assignee, has answered. He accepted the trust, was willing to execute its provisions, but has been enjoined by the order of the Court. W. W. Harlee has also answered. He states his claims very much as the defendant, Carson, has stated them in the deed of assignment. He has accepted the terms of the assignment, and has executed a release. He is the only creditor who has done so. His release will be the subject of remark hereafter.

The plaintiff contends, that if the assignment prevails, all the creditors named in the three first classifications come in *pari passu* for a participation of the assigned effects; and that if these be insufficient to satisfy them all, they must be paid rateably. My construction is otherwise. The deed of assignment is, in many respects, very inartistically drawn, but the meaning is sufficiently clear, that the fund arising from the property assigned was intended to be applied, in the first place, to the satisfaction in full of the claims of the persons named in the first class, before any part of the said fund should be applied to the claims of persons named in the second class. And so as respects the second and third class.

The plaintiff, with more of reason and equity on his side, complains that the defendant, Elisha Carson, being insolvent, has, by his deed of assignment, diverted his private and individual estate from its proper application, and has devoted it to his partnership debts, to the exclusion of his private and individual debts. And such is the incontestible and admitted fact.

In equity, it is a clearly established principle,

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that partnership property is first applicable to the payment of partnership debts; and the private property of the several partners is first applicable to their individual debts. If the partnership property is more than sufficient to satisfy the partnership debts, the shares of the different partners will be applied to the satisfaction of their individual debts. So, if the private estate of a partner is more than sufficient to satisfy his individual debts, and the partnership assets should be insufficient to satisfy the demands upon them, the residue of the private estate may be called into requisition. I do not think it necessary to adduce authorities in support of these propositions. This misappropriation by the defendant, Carson, of his private assets, to the payment of his copartnership debts, to the postponement, and practically to the entire exclusion of his individual debts, is in violation of the equitable rights of the plaintiff, who is a large separate creditor. To this extent, if no further, he would be entitled to relief. But



the plaintiff contends further, that the deed itself should be set aside, and vacated in toto, as fraudulent, null, and void, upon the various grounds taken in the bill. Surely no one can doubt that a debtor, in paying his debts, may prefer one creditor to another. The right to do so results necessarily from the absolute dominion which the proprietor has over his estate. If he is permitted to alienate it at his will, why may he not dispose of it to a creditor in satisfaction of a debt? And where is the policy that would forbid this? The right of giving preference, when all cannot be paid, does oftentimes lead to abuses. But an attempt to restrict the privilege, which is not unfrequently exercised in the most conscientious and honorable manner, would lead to greater evils than those intended to be remedied. It is to be exercised subject to the control of the Court. An assignment, giving such preferences, must be fair and bona fide; and if it be otherwise, it will be vacated. "Preferences fairly given are allowable." Nor can it be doubted, since *Niolon v. Douglas*, 2 Hill, Eq. 443, [30 Am. Dec. 368], that a condition inserted in the

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deed of assignment, by which \*a release is exacted from the creditors who accept the benefits of the preferences given them, for any further demands against the debtor, does not, per se, vitiate the assignment and render it illegal and void. If in other respects it be fair and equitable, such a condition would not destroy its efficacy. I apprehend that it would be unwise and unsafe to say that such a condition should be allowed to stand, unless the debtor surrendered and assigned the whole of his estate, as an insolvent debtor is compelled to do, when he obtains his discharge. In this instance, the assignor did not affect to transfer the whole of his estate to the assignee, but only his interest in certain lands, and certain choses in action. He must have had other property. He was a member of the firm of Carson, Belser & Company. They must have had assets. Yet no mention of these is made in the assignment, nor any account or explanation given on the trial. The insolvent debtor, in giving preferences, and exacting releases, should not impose harsh and onerous conditions upon his creditors. In my opinion, the exaction of a release to James M. Carson and Laurence H. Belser, when no part of the assets belonging to the firms of which they were members was included in the assignment, was a harsh and onerous condition on the creditors from whom it was required. The assignment should be explicit. It should contain a fair and intelligible description of the property assigned or set apart for the creditors, so that they may judiciously, and with the proper information, elect to accept or reject the terms of the assignment. In these characteristics, this assignment is especially deficient. The failing debtor, inter alia, as-

signs "any resulting interest he may have in any other property which may now be under mortgage." Can any thing be more vague and unsatisfactory? Is there any thing here to inform the creditors as to the subject matter of this part of the assignment? He does not say that he has any other property or estate, or that it is under mortgage, or that he has a resulting interest in it, (by which, I suppose, is meant the equity of redemption.)

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\*In respect to this property, the assignment, to be fair, should have set forth a particular description of the property—its situation and supposed value, together with the amount, and nature of the liens upon it, and to whom those claims belonged. From all that appears in the assignment, it may have been a large estate, with little or no incumbrances upon it. To the Court who tried the cause, it has not been made to appear of what this estate consists; what is its value; what is the nature and amount of the incumbrances; or whether there be any. I cannot shut my eyes to the fact, that there has been evasion and concealment in regard to this matter. The bill expressly charges, "that the said Elisha Carson, as your orator is informed and believes, is possessed, in his own right, of considerable estate, real and personal, consisting of one or more plantations, and a considerable number of negroes." He is called upon and required "to set forth and discover whether he is not seized and possessed of other property, in addition to that set forth in the deed made by him to Charles M. Furman; and whether such other property is not of great value; and that he may set forth and discover all necessary particulars concerning such property: if land, where located; if negroes, the age, number, and name; and further, in whose name, and under what title such property is now held; and if mortgaged, at what time such mortgages were executed; to whom, and upon what consideration." These interrogatories are all very intelligible, and readily admit of an explicit answer. They were answered as follows: "This defendant, answering, admits that he has in possession lands and negroes in Sumter District, but that the same are under mortgage to divers persons, for loans made at different times; statements of which have been filed with the deed of assignment referred to in the bill, and of which the complainant had notice." This is the whole answer to that important part of the bill, and to those interrogatories that admit of no misconstruction. It is evasive, and shows a disposition for concealment.

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Even now the \*Court is possessed of no information as to the nature, extent, and value of that property; whether it be mortgaged, and to whom, or for what amount. The allegation that a statement of the mort-

gage, or mortgages, affecting this property, was filed with the deed of assignment, was not proved, nor was it pretended at the trial that such a statement was, or had ever been in existence. I have already mentioned that W. W. Harlee was the only creditor who had accepted the terms of the assignment, and affected to give a release. But in my opinion his release is not a compliance with the requirements and condition of the assignment. These were, that before he should be entitled to the benefits therein conferred on him, he should execute "a full release, not only to Elisha Carson," but also to "James M. Carson and Laurence H. Belser." It is declared, "that such as shall not execute said release and discharge, shall be debarred of all benefit of the assignment." How can Harlee come in under the assignment, having failed in the performance of the conditions on which his right depended? If the assignment should stand, there would be no preferred creditor who would be entitled. What is to become of the funds which were appropriated to the preferred creditors, provided they released? The assignment does not provide. It is a *casus omissus*. The deed declares, "if the said debts (meaning the preferred debts) should be paid, and a surplus should be left, pursuant to this agreement, that then the said Charles M. Furman shall pay the same (the surplus) rateably to all the creditors of the said Elisha Carson, who may prove," &c. The assignor did not contemplate and provide for the case of a refusal to accept, on the part of the preferred creditors. It is only the surplus that is left, after the payment of the preferred claims, that the assignee is authorized to apply to the general creditors. What then is to become of the fund which was devoted to the preferred creditors, but which, as the event is, neither they nor the general creditors can claim? A trust must result in favor of the assignor

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himself. This \*reinvests him with the power and control over the fund. This result is accidental, but it places the assignor precisely in that position, and gives a feature to the transaction, for which deeds of assignment have been set aside. It has been repeatedly held, that if the debtor secures to himself any benefit or control, or reserves to himself a power of revocation, and appointment to new uses, the assignment is fraudulent and void.

The answer of Harlee brings to view another assignment, executed by E. Carson, in favor of Robert Harlee, S. F. Gibson, and Wm. W. Harlee, bearing date the 1st April, 1854. The consideration expressed in this deed is, that "Robert Harlee and S. F. Gibson had become liable as guarantors for the copartnership of Elisha Carson, David Carson, and Thomas Harlee, and trading under the name and firm of Carson, Harlee & Company; and W. W. Harlee, liable for the said

Elisha Carson and James M. Carson, trading under the name of Elisha Carson & Son; and for Elisha Carson, Laurence H. Belser, and James M. Carson, trading under the name of Carson, Belser & Company." The deed recites, that it had been agreed "that the said Elisha Carson shall assign all his interests in certain accounts and liabilities due the said partnerships respectively, and the said Elisha Carson individually, a schedule and list of which is particularly set forth, and is hereunto annexed and made a part of these presents, with the signature of the said Elisha Carson thereunto affixed, the said amount of accounts, notes, dues and assets, before referred to as assigned as aforesaid, amounting to the sum of forty-five thousand dollars in the aggregate." The assignor, Elisha Carson, after these and other recitals, assigns to Robert Harlee, S. F. Gibson, and W. W. Harlee, "all his right, title and interest in and to the said debts, notes, dues and accounts, and the several sums of money due thereon, amounting to forty-five thousand dollars, their executors and administrators, so that the whole, or so much thereof as may prove

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necessary, \*shall be applied in full liquidation on, and discharge of, the liability and indebtedness," &c., of the said Harlee, Gibson & Harlee.

At the foot of the deed, under the signatures and seals of the parties, is appended the following statement: "A list of notes and securities above referred to, including the names of parties, the modes of indebtedness, and the amounts respectively:

Date.		Date.	
J. D. Baxley,	\$	W. Webb.	\$
J. D. Foxworth,		W. W. Benbow,	
W. C. Grier,		Est. Hilton,	
J. H. McKnight,		H. L. Benbow,	
W. M. Sanders,		Est. W. C. Guery,	
W. H. Burgess,		J. & R. McCrary,	
Jno. R. Cannon,		Wil. & Man. R. R.	
L. J. Dinkins,		Com'ry,	
W. S. Spann,		Sarah McKnight,	
		R. M. Harrison,	

This is the only schedule or description of the securities assigned, or intended to be assigned. It is obvious that the deed is imperfect and unfinished. It does not appear on its face, nor is it proved, that it was ever delivered; and though it is signed by the parties, it is not witnessed. This assignment, as such, seems to me to be void for uncertainty, and for want of a sufficient description of the securities and choses intended to be assigned. But the defendant, Harlee, does not affect to set it up now. He introduces it for another purpose. He says that the said Carson, afterwards, with his (defendant's) consent, transferred a portion of the said "debts and securities to other persons, and afterwards agreed with the said Harlee to make an assignment of his estate, real and personal, in such way as should secure him against loss or responsibility, by reason of



his said indorsements." There is no proof of this agreement, nor of the circumstances on which it is said to have been founded, save the answer of this defendant. The agree-

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ment to assign is stated to have been made upon a consideration. The defendant, Harlee, assented to the diversion by Carson, to other objects, of a portion of the assets which had been devoted to his indemnification; and Carson "subsequently agreed with the said Harlee, to make an assignment of his estate, real and personal, in such way as should secure him against loss or responsibility, by reason of his said indorsements. If I understand the object for which this deed is introduced on the present trial, it is for the purpose of showing an additional consideration for the deed of assignment to Furman. Carson, with Harlee's consent, had appropriated funds to which the latter was entitled. Subsequently, he promised to assign his real and personal estate for Harlee's indemnity. The deed to Furman is in execution of that promise, which gives it validity. This is the argument. But the deed of assignment is not impeached, nor is it impeachable for want of consideration. The consideration existing, and set forth in the deed itself, is sufficient in law and equity. It has also the sanction of a moral obligation. To the strength of these, I do not perceive that the agreement, recited in the defendant's answer, adds anything.

It is ordered and decreed, that the said deed of assignment, executed by Elisha Carson to Charles M. Furman, bearing date the 15th day of April, A. D. 1855, be set aside and vacated, so far as concerns the disposition of the securities (or their proceeds), therein described and assigned; but that the said Charles M. Furman remain the assignee and receiver thereof, and vested with the legal title or estate, as he is or was intended to be by the said deed of assignment; and that he do account for the proceeds of the said securities and choses, in this Court, as is now or may be hereafter ordered and directed.

It is further ordered and decreed, that so much of the said securities, choses and assets, mentioned in the said deed of assignment, and affected to be assigned for the

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benefit of particular creditors, and which were of the individual estate of the said Elisha Carson, and also the individual estate generally of the said Elisha Carson, are subject, and are hereby declared to be subject to pay the demands of the individual or private creditors of the said Elisha Carson; and so much of the said securities, choses and assets, which were of the copartnerships of Elisha Carson & Son, and of Carson, Belser & Company, and the property generally of those firms, are subject, and are hereby de-

clared to be, subject to pay the copartnership creditors of those firms respectively. And it is ordered, that one of the Masters of this Court do enquire and report how much, and which of the said securities, choses and assets, are or were of the individual estate of the said Elisha Carson; and how much, if any, and which, belonged to the firm of Elisha Carson & Son, and to the firm of Carson, Belser & Co. And it is further ordered and decreed, that the said James M. Carson and Laurence H. Belser be made parties to this suit; and that all their partnership and private estate be made subject to the claims of their creditors, on the principles of this decree. And it is further ordered and decreed, that all the partnership and individual estate of the said Elisha Carson be made subject to the claims of his creditors, on the principles of this decree; including the plantation and negroes in Sumter District, which, in his answer, he admits himself to have in his possession. And it is further ordered and decreed, that the mortgagees of the said plantation and negroes, or the persons who have liens upon the same, be made parties defendants to this bill; and that they set forth in their answer the nature and amount of their demands, and the instruments by which secured. It is further ordered and decreed, that the said Master do advertise for all the creditors of the said Elisha Carson, of Elisha Carson & Son, and of Carson, Belser & Company, to present and prove their demands before him, on or before the first day of January, 1857; and that the said Master do

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report \*thereon, carefully discriminating partnership and individual debts.

It is also ordered and decreed, that the Master do report what funds and estate of the said Elisha Carson, James M. Carson, and of Laurence H. Belser, due, or belonging to them, as partners or individuals, are available for the payment of their debts.

The defendant, W. W. Harlee, appealed on the grounds, and in the following particulars:

1. Because his Honor has decided that a copartner in trade cannot assign his separate assets to pay his copartnership debts, until his own separate debts have been paid. Whereas, it is submitted, that although the copartnership assets must first be applied to copartnership debts, on the ground of intervening equities between the partners, yet that there is no analogous equity to control the general right of the debtor to apply his separate assets as he thinks proper among his creditors, whether, in so doing, he prefers one separate creditor to another, or a copartnership to a separate creditor.

2. Because his Honor has decided, that the assignment is to be regarded as fraudulent, on the ground that it does not convey all the assignor's interest, which he infers from the absence of any general expressions

in the deed to that effect, and from the presumption that he must have had property as a copartner. Whereas, it is submitted, that fraud will never be presumed, and that any fact from which it is to be inferred must be clearly proved.

3. Because his Honor has decided, that although he had a right to exact a release for himself, the stipulation for a release to his copartners, as well as himself, by the assignor, is such a harsh and onerous condition as should prejudice the assignment. Where-

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as, it is submitted, that a release to one \*copartner necessarily operates as a release to all, and therefore such a stipulation is supererogatory and innocuous, and should not affect the assignment.

4. Because his Honor has decided, that inasmuch as the assignor has not discovered other property, besides that assigned, in his answer to the bill, it is to be inferred that he has fraudulently concealed some of his property. Whereas, it is submitted, that no such inference can be drawn, until some proof has been offered of other property.

5. Because his Honor has decided, that none of the preferred creditors are entitled to the benefit of the assignment, on the ground that they have not executed such a release as is stipulated for by the assignor. Whereas, it is submitted, that not only is the release of the defendant, Harlee, a sufficient compliance with the requisition of the deed, inasmuch as a release to one copartner is a release to all, but that, as the complainant in this suit filed his bill for an injunction to arrest any action, under the assignment, immediately upon its execution, and before the period allowed for the execution of releases had expired, the necessity for any act, except in the cause, was superseded; and creditors, consenting by their answer to release, are entitled to all the benefit of the assignment.

6. Because, even if the general assignment were invalid, it is submitted, that the previous special assignment of certain debts, &c., by E. Carson, set up in the defendant's answer, was sufficient to secure him a lien on such debts, which should have been protected by the decree, in providing for the appropriation of the assets.

Mitchell, for appellant.

Magrath, McCrady, for complainant.

Martin, for Furman and Carson.

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\*The opinion of the Court was delivered by

JOHNSTON, Ch. This Court is entirely satisfied with the substance of the decree.

We are not prepared to say that the individual creditors of one who is a partner have such an exclusive right to payment, out of his individual property, as to render it fraudulent for him to appropriate it, or a

portion of it, to the payment of the debts of the firm with which he is connected, and for which he is bound. Our opinion on that subject is, that the right of such creditor extends only thus far, viz:—inasmuch as his claim applies only to the private property of his debtor (including, as such, whatever dry balance may remain to him out of the firm, after its affairs are completely wound up), while a partnership creditor has a right to be paid, not only out of the joint property of the firm, but also out of the property of the individual partners: the private creditor, who has only one fund to resort to, has an equity to compel the partnership creditor, who has two, to resort first to the partnership assets, until he exhausts them. But after this is done, the partnership creditor has as good a right to be paid any balance still remaining unsatisfied, out of the private property of the partner, as any other of his individual creditors. This is in conformity to the case of *Wardlaw v. Gray* (Dud. Eq. 113), with which we see no reason to be dissatisfied.

But it is sufficient to condemn the assignment of Carson, that while he has required a release to himself, and to the firm of Carson, Belser & Company, he has not made a full surrender of his property. A debtor who surrenders only part of his property, has no right to exact a release, as the condition of his creditor's acceptance. What right can he have to exonerate his unassigned assets from his just debts? What right can he have to retain part of his property, and offer another part, and require that the latter be accepted as full satisfaction? Such a preten-

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sion has been too often and \*too explicitly condemned, to leave the law at all doubtful on this point. (a)

It is not necessary to look particularly at the condition imposed, requiring a release to the firm as well as to himself. But it seems to be obvious, that such an exaction is unjust and unfair to the creditors of the assignor. Whatever debts of the firm are paid by the private property assigned, to that amount Carson becomes a creditor of the firm. Though it is said the firm has also made an assignment, it no where appears that there may not remain a balance sufficient to reimburse this partner for his advances. But after he is released, what is to prevent his putting this in his pocket, at the expense of the releasing creditor? And as the partnership is also to be released, is not the creditor deprived of his right, by subrogation, to recover from the firm what his debtor has advanced for its benefit?

It is needless to pursue this subject. The Chancellor was well warranted in his conclusion that the assignment was partial, and

(a) See *Le Prince v. Guillemet*, 1 Rich. Eq. 217-19; *Jacot v. Corbett*, Cheves' Eq. 71.



therefore fraudulent, and in setting it aside as such.

We regard the order, continuing the functions of Mr. Furman, divested of the power to apply the assigned assets to the purposes of the assignment, as an order appointing him receiver. No ground of objection has been taken to this, and therefore we see no reason to interfere with it.

The decree is therefore affirmed; with the modification, indicated in the foregoing opinion, as to the distribution of the individual and partnership assets; and the appeal dismissed accordingly. But we are disposed to enlarge the order, for the benefit of the defendant, Harlee. It is represented, in his answer, that he has some interests in virtue of a prior assignment made by Carson in 1854, or some other time. The Master will, therefore, enquire into the evidence of this,

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\*and include, in his report, the nature and subjects of said prior assignment, and what said Harlee is entitled to under it, with any special matter. And it is so ordered.

WARDLAW, Ch., concurred.

DUNKIN, Ch. In respect to the invalidity of the assignment, I concur in the result; and I concur also in the modification of the decretal order.

Decree modified.

#### 9 Rich. Eq. \*270

\*THE SO. C. A. R. R. COMPANY v. ANTHONY S. TOOMER, and Others.

(Charleston. Jan. Term, 1857.)

[*Courts* ¶244.]

Where the Court of Equity orders an action at law, an appeal lies from the decision of the Circuit Court at Law to the Law Court of Appeals.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 740; Dec. Dig. ¶244.]

[*Appeal and Error* ¶9.]

Where an issue is ordered, no appeal lies from the decision at law to any Court; but, on the return of the issue to the Court from which it emanated, a motion may be made for another issue, or for a new trial.

[Ed. Note.—Cited in *Sloan v. Westfield*, 11 S. C. 450; *Ivy v. Clawson*, 14 S. C. 273; *McCarter v. Caldwell*, 58 S. C. 69, 36 S. E. 507.

For other cases, see *Appeal and Error*, Cent. Dig. § 25; Dec. Dig. ¶9.]

[*Equity* ¶383.]

Where the question is, whether a purchaser is bound to accept the titles, it is not requisite to order an action at law.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 787; Dec. Dig. ¶383.]

[*Executors and Administrators* ¶138.]

Where a testator directed his debts to be paid out of monies due him; "but in case my creditors will not wait a reasonable time, to allow my executors to collect my debts, or to raise the sums I owe from the income of my estate, that then, and in such case, I empower my executors to sell and dispose of such part of my

estate, real and personal, as they shall think most to the advantage of my estate:"—*Held*, that the power was conditional, and could not be exercised unless the necessity therefor existed.

[Ed. Note.—Cited in *Jennings v. League*, 14 S. C. 240.

For other cases, see *Executors and Administrators*, Cent. Dig. § 561; Dec. Dig. ¶138.]

[*Appeal and Error* ¶999.]

The testator died in 1787, and, in 1798, the executors conveyed his land, but made no reference, in the conveyance, to the power. More than fifty years afterwards, it was submitted to the jury to determine whether the condition had been performed, and their verdict, that it had not, was not disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. ¶999.]

Before Dargan, Ch., at Charleston, March, 1856.

Dargan, Ch. This cause was brought up by a bill of interpleader filed by the South Carolina Rail Road Company against these defendants. The bill sets forth, that, the Company had purchased, for the sum of ten thousand dollars, a certain tract of marsh land on Charleston Neck, formerly granted to William Cleland, from A. V. Toomer, one of the defendants. That the said Company were ready and willing to pay the purchase money to the defendant, Toomer, and that he was willing to receive; but that the other defend-

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ants, \*Gadsden, LeBruce, and Tucker, had given them notice not to pay, as they claimed a title to the land in question paramount to the title of the defendant, Toomer, in the first instance; and secondly, if the title of Toomer was good, that they held a concurrent title to one moiety of the premises. The bill prayed that the said Company have leave to pay the money into Court, and that the defendants be enjoined from suing at law. By an order of reference, Master Tupper was directed to report on the conflicting claims of the several defendants. The Master reported in favor of the title of the defendant Toomer, and recommended the purchase money be paid to him. The other defendants filed exceptions to the report, and upon the hearing, two issues at law were directed, to try the question of title to the land in dispute; in both of which the defendant, Toomer, was ordered to be the plaintiff, and his co-defendants, the defendants. One issue was as to the paramount title, and the other as to the concurrent title. The report of the Master, which gives a full abstract of the conflicting titles, as well as a full statement of the evidence taken before him, was ordered to be read as testimony in the cause in the Law Court, with leave to produce other testimony. The issues were tried at March Term of the Common Pleas for this district, 1855, before Judge Withers, and verdicts were rendered by the jury in favor of the defendant, Toomer, in both issues, which have been certified by the Presiding Judge to this Court. Grounds of

appeal were served, and a motion for a new trial made before the Law Court of Appeals; which Court refused to hear the appeal, as contrary to the practice of that Court; see *Mayrant and Moses v. Miller*, 8 Rich. 284; and of this Court, see *Taylor v. Mayrant*, 4 Desaus. Eq. Rep. 514,—where it was held, “that the appeal, in such cases, should be to the Court ordering the issue.” The case came up before me, at this term, on an appeal from the verdicts of the jury, and an error of law in the charge of the Presiding Judge. The charge of the Judge has been submitted

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to me, \*and in this instance the Chancellor fully concurs in the charge of the Law Judge, and the verdicts of the jury. (a)

(a) The report of Judge Withers, and the grounds of appeal, are as follows:

An issue was directed from the Court of Equity, one branch of which raised the question, whether the executors of the will of Vanderhorst had properly executed a power to sell real estate for the payment of debts; upon the due execution of which power the estate of the defendants, as tenants in common, or as holding a concurrent title with Toomer, the plaintiff, depended.

Vanderhorst's will was dated February 27th, 1786; was admitted to probate February 27th, 1787; and the conveyance by the executors was made on the 13th February, 1798. No reference was made, in their title, to the will, or the power given to them therein. The power was expressed in the words following, to wit:

“I order and direct all my just and lawful debts to be settled, paid, and satisfied, with all convenient speed, out of such monies as may be due to me; but in case my creditors will not wait a reasonable time to allow my executors to collect my debts, or to raise the sums I owe from the income of my estate, that then, and in such case, I empower my executors and executrix, or such of them as take upon them the burden and execution of this my will, to sell and dispose of such part of my estate, real and personal, as they shall think most to the advantage of my estate; and I do hereby empower them to make and execute proper titles to the purchasers thereof.”

The qualified executors conveyed (as already stated) a moiety of marsh land (i. e. one-half of forty-three acres) to Philip Gadsden. There was no evidence, other than presumption, that the contingency had arisen, in February, 1798, upon which the direction and authority to sell vested.

I declined to charge the jury that there was no condition, so far as a purchaser was concerned, upon which depended the accrual of the power of the executors to sell. I held the contrary, to wit, the title to the premises in question had vested in the devisee of Vanderhorst, and there remained for the space of very near eleven years before the executors conveyed, and that it could not be divested by those having a naked power, coupled with a condition or contingency, unless the condition be performed, or the contingency occur. That the lapse of eleven years might be viewed in double aspect, or accounted for on two diverse suppositions, as, first, that the executors had struggled long to keep the creditors at bay, and at last had to yield to the pressure, and sell; or, second, that they had satisfied them in the meantime, since it was not usual for creditors of a testator to wait so long, and hence no reference to the power and the contingency which made it ab-

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\*As to the paramount title, it was a mere question of location, which has been settled by the survey and location of the two grants—which do not conflict—and there can be no constructive possession against a grant, without an actual possession within its limits. See *Chappell v. Gibson*, Harp. 28; *Slize v. Derrick*, 2 Rich. 627; *Steedman v. Hilliard*, 3 Rich. 101. As to the concurrent title, it is clear, that the power conferred on the executors of Vanderhorst by his will, to sell, is a naked power, and is to be strictly pursued. The power was expressed in the words following, to wit: “I order and direct all my just and lawful debts to be settled, paid, and

solute, in the deed of the executors. There was no proof of any specific fact, on the part of defendants, to determine, or guide to, the true interpretation.

I declined to charge the jury, it was a presumption of law, that the executors had the power to sell, or, in other words, that the contingency had occurred which made their power absolute. But I did charge them, that their act should be referred to the power, if that had been called into perfect existence, notwithstanding no reference was made to either power, or contingency in their deed; and I assumed,

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\*throughout, that the testator did leave debts to be paid. I moreover charged, that the jury might infer, as matter of fact, the existence of that state of things, in February, 1798, which warranted the act of the executors, provided they were so convinced from any evidence in the cause; and here the jury were duly admonished of the great potency of a long lapse of years in warranting a presumption of fact requisite to sustain a continued state of things, meantime affecting possessions, enjoyment, or right of property.

In opposition to such a presumption, Toomer adduced various circumstances, as that the executors sold to Gadsden on credit; that Gadsden never paid; that judgment was obtained against him as late as 1816; that, in a schedule, under the insolvent debtor's law, in the year 1804, he did not specify this land as part of his estate.

Toomer traced a perfect chain of paper title from himself to a grant, in 1785, to one Cleland.

The jury rendered this verdict: “We find a good title in the plaintiff.”

The attorney for J. H. Tucker, one of the defendants in the above stated issue, gives notice that he will move for a new trial on the issue directed to try the question of concurrent title in the plaintiff, and J. H. Tucker, defendant, on the following grounds:

1. That his Honor erred in charging the jury that the power given to the executors of Vanderhorst, to sell his real estate to meet pressing debts, was a conditional power, and that it was incumbent on parties making out title through the exercise of the power, to prove the existence of such condition; whereas, it is submitted, that this was only to be regarded as the object of conferring a power, not as a necessary condition to render its exercise valid.

2. Because his Honor erred in not charging the jury, that even if the power were conditional, the jury ought, after so great a lapse of time, to presume that the condition had been performed, and that the power had been legally executed.



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\*satisfied, with all convenient speed, out of such monies as may be due to me; but in case my creditors will not wait a reasonable time, to allow my executors to collect my debts, or to raise the sums I owe from the income of my estate, that then and in such case, I empower my executors and executrix, or such of them as take upon them the burden and execution of this my will, to sell and dispose of such part of my estate, real and personal, as they shall think most to the advantage of my estate; and I do hereby empower them to make and execute proper titles to the purchasers thereof." The executors conveyed a moiety of the marsh to Philip Gadsden. There is no evidence, other than presumption, that the contingency had arisen in February, 1798—upon which the direction and authority to sell vested. The title to the premises vested in the devisee of Vanderhorst, and could not be divested by those having a naked power, coupled with a condition, or a contingency, unless the condition be performed, or the contingency occur, and which those claiming under the executors' conveyance were bound to prove, as part of their muniment of title. Such has been the settled rule of law, from the time of Sir William Jones to the present. See Sugden on Powers, 211; *Williams v. Peyton*, 4 Wheaton, 77 [4 L. Ed. 518]; *Minot v. Prescott*, 14 Mass. 496. As to presumption, that question has been settled by the verdict of the jury; but moreover, it could not apply here, as no one was in actual possession of the lands, and a constructive possession is always in him who has the right; and, if the executors' conveyance conveyed nothing, then it can convey nothing now, but was void from the first.

It is therefore ordered and decreed, that the appeal to the Chancellor be dismissed, and the verdict of the jury be sustained.

It is further ordered, that the defendant's exceptions to the Master's report be overruled, and that the report be confirmed.

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\*And that the said Master do deliver to the said A. V. Toomer his bond, taken by the said Master for the fund paid into Court in this case; and that he do satisfy the mortgage on his plantation and negroes in Christ Church Parish, taken to secure the said bond.

And that it be referred to the Master to tax the costs in the case. That the defendant, Toomer, pay half the costs; and Mrs. LeBruce, and Gadsden, and J. H. Tucker, pay the other half.

John H. Tucker, one of the defendants, appealed first from the decretal order directing issues at law to ascertain the title of the conflicting claimants, on the ground that the order should have directed an action, and not an issue; so that any legal questions involved might have been submitted, if neces-

sary, to the appellate legal tribunal for settlement.

He also appealed from the decretal order of Chancellor Dargan, dismissing the application for a new trial, on the grounds:

1. That as the defendant, if asserting a claim to land through the Courts of Law, would have been entitled to a second action of ejectment or trespass to try title, this Court should, by analogy, allow him the same opportunity for a second trial, where it becomes necessary for the Court to rely absolutely upon the conclusions of a jury, in disposing of his title or interest in land.

2. That his Honor, Mr. Justice Withers, erred in charging the jury, that the power given to the executors of Vanderhorst, to sell his real estate to meet pressing debts, was a conditional power; and that it was incumbent on parties making out title through the exercise of the power, to prove the existence of such condition; whereas, it is sub-

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mitted, that this \*was only to be regarded as the object of conferring a power, not as a necessary condition to render its exercise valid.

3. Because his Honor erred in not charging the jury, that even if the power were conditional, the jury ought, after so great a lapse of time, to presume that the condition had been performed, and that the power had been legally executed.

Mitchell, for J. H. Tucker.

W. Whaley, for Toomer.

Yeadon and McBeth, for Gadsden.

Rutledge, for Mrs. LeBruce.

Petigru and King, for So. Ca. R. R. Company.

The opinion of the Court was delivered by

JOHNSTON, Ch. The defendants, though perhaps not amenable under this bill, as a bill of interpleader, submitted to the jurisdiction, and, of course, to the decree proper to be made in such a case.

If an action had been ordered, the appeal would have been to the Law Court of Appeals; from the trial had; otherwise, when the order is of an issue, or an issue in the nature of an action. In such cases the motion must be made, on the return of the issue, in the Court from which it emanated,—not by way of appeal, but for another issue or a new trial,—if that Court is not satisfied with what has been done.<sup>(b)</sup>

We have no doubt, in this case, it was not requisite to order an action. The question

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was similar to what occurs in cases \*of purchase of lands. To ascertain whether the purchaser is bound to accept the titles, the

(b) *Lubé*, Eq. Pl. 161; *Adams' Eq.* 378.

titles are referred, and if a good title is reported, the decree is made for specific execution of the contract.

We would remark, that if an action, and not an issue, had been tried in this case, it would by no means follow, that a provision of law which entitles a plaintiff, who has brought suit and been nonsuited, let fall his action, or had a verdict against him, to bring a second action within a statutory period,

would entitle a defendant, against whom a verdict has been rendered, to turn round and sue the plaintiff.

On the other grounds, we concur with the Chancellor; and his decree is affirmed, and the appeal dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.





# CASES IN EQUITY,

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA—MAY TERM, 1857.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON.  
" BENJ. F. DUNKIN.  
" GEORGE W. DARGAN,  
" F. H. WARDLAW.

9 Rich. Eq. \*279

\*ISABELLA MONK, and Others, v. ELIZABETH PINCKNEY, Executrix.

(Columbia. May Term, 1857.)

[*Executors and Administrators* ⇐104.]

Where an executor or other trustee neglects to obey an order to invest in bank stocks, he will not be exempted from the payment of interest on the ground of laches in the cestui que trusts in demanding payment.

[Ed. Note.—Cited in *Pope v. Mathews*, 18 S. C. 448.

For other cases, see *Executors and Administrators*, Cent. Dig. § 424; Dec. Dig. ⇐104.]

This cause was first heard by Johnston, Ch., at Colleton February, 1856. The following is the decree then pronounced, by his Honor.

Johnston, Ch. This is a bill brought by colored persons formerly slaves of the late James W. Monk, against the executrix of Dr. Cotesworth Pinckney, to enforce a trust undertaken by him for their benefit.

On the 8th of November, 1830, James W. Monk, duly executed a deed, by which, reserv-

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ing a life estate to himself, he \*conveyed to Dr. Pinckney the following slaves, to wit; Bella, (the plaintiff Isabella,) and her children then born, Margaret, Elizabeth and Anna, and also two other slaves, Sophia and Billy, in trust, that Dr. Pinckney on the death of Monk, should, at his own proper charge and expense, convey the said Bella and her children, and all her and their increase and issue, existing at Monk's death, out of this State, to whatever place they

might select within the Atlantic States, and then and here make them "absolutely free and exempt from any civil servitude whatever."

On the 25th of August, 1832, and shortly before his death, Monk made his will; by which he appointed Dr. Pinckney his sole executor and legatee, and after providing for the payment of his debts, declared the legacies thus given to be upon trust, "to afford to the slave Bella, already conveyed by me under certain trusts to the said Dr. Cotesworth Pinckney, a decent support during her life, and also to educate and support such children as she may have living at the time of my death; and after the death of the said slave Bella, then in trust to support each and every one of the said children until they shall severally come to the age of twenty-one years; when an equal lot or portion of the said property, both real and personal, shall be assigned and set over to each of the said children, as they shall severally come to the said age, to be theirs in fee simple forever, free of any trust or charge whatever."

Bella and her children have been in Connecticut (about Middletown) many years, and some, if not all, of her daughters, have married white men there.

Two letters from Dr. Pinckney to Bella, one of them dated the 12th of August, 1840, and the other the 25th of October, 1841, have been put in evidence, from the contents of which, it must necessarily be implied, that this family were there with his privity and consent, and he expressly acknowledges their freedom.



There is also in evidence, a petition filed

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by Dr. Pinckney \*for the sale of Monk's estate, filed the 19th of January, 1835, in which he sets out the will of his testator.

On this there is an order of the same day, followed by reports and orders. Jan. 10, 1837 and 1838. Then on the 19th of Feb. 1845, Dr. Pinckney filed another petition, in which, after reciting the deed and will of Monk, and the order for the sale of the estate (exclusive of this family), &c., he expressly states that "he caused Bella and her children to be conveyed to the town of — in the State of Connecticut, and there made free from all civil servitude." He prays leave to remit the nett balance of the estate to Bella and her children for their maintenance and support, and that he be discharged of his trust. Of course the petition was dismissed.

Mr. Burbidge also testifies, that on two occasions, from 1838 to 1840, he carried about two hundred dollars to Bella from Dr. Pinckney. Dr. Pinckney died in 1847, and the defendant is sued as his executrix.

The defence is:

1. That Dr. Pinckney did not emancipate this family. But I think the evidence, from circumstances, and from his own admissions, is satisfactory and conclusive, that he did.

2. That the plaintiffs' claim is barred by the statute of limitations. But this is a case of express technical and continuing trust, to which the statute does not apply. As to the defence not pleaded, but relied on in argument, that the executrix must be presumed to have distributed her testator's estate, and is therefore, no longer liable out of its assets, it is obvious, that if she would avail herself of the statute applicable to that case, she should have pleaded it. But it appears also, from the testimony of the Ordinary, that the estate has not been closed.

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\*3. That the bill, so far as Bella's children are concerned, is premature. They have no rights until her death, and she is still alive and joins in the bill. Besides, it is objected, that it is not proved that any of them (or which of them) is of age. The answer to this objection is, that Bella has a present right to an account. The children have also, as she has, a right to have the trusts declared and established, and the amount of the trust fund ascertained. The children have, it is true, no right to the corpus until the mother's death; but it is singular if children existing at the death of Monk, in 1832, are not of age in 1856.

It is adjudged and declared that the defendant, as executrix of Cotesworth Pinckney, is liable to execute the trusts created in her testator by the deed and will of James W. Monk, set forth in the pleadings; and it is

referred to the Commissioner to ascertain and report the character and amount of the trust fund, and what is now payable thereout to the plaintiffs severally, or either of them.

Under the above decree the Commissioner submitted the following report:

"The Commissioner was required to report as to the character and amount of the fund, and what is now payable thereout to the plaintiffs severally, or either of them, and reports:

"That in arriving at the amount of fund, two sources of information were examined;

"1st. The report of Mr. A. Campbell, a late Commissioner.

"2nd. The reports of Mr. M. Ford, also a Commissioner of this Court.

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"In the year 1845, Dr. C. Pinckney, the executor of James W. Monk, and trustee to these plaintiffs, filed his petition, stating inter alia, the amount of the trust fund was five hundred and seventeen dollars, and sixteen cents, and prayed to be discharged from the trust. This being referred to Mr. Campbell, the then Commissioner, he reported that the facts as set forth were correct, and the balance, as per Mr. Ford's report and the other evidence before him, was five hundred and seventeen dollars and sixteen cents; at the same time he reported adversely to the prayer to be discharged. If it be true, as contended by the defendant's solicitor, that this report should be respected as a decree of this Court, behind which the Commissioner ought not to go, the amount would be settled. But it is true, as is argued on the other hand, that this petition being ex parte, the present plaintiffs should not be prejudiced thereby, and consequently, the Commissioner has gone behind it.

"In January, 1835, (Equity Journal, b.—p. 791,) an order was had for the sale by the Commissioner, Mr. Ford, of the estate of James W. Monk, for one-third cash, remainder in one and two years; and further, that after the payment of debts, the residue of estate the executor, Dr. Pinckney, was ordered to invest in Bank Stock of the city of Charleston. Again, in January, 1837, Mr. Ford reports in the case of Pinckney, Ex'or., v. Creditors of James W. Monk, that assets of estate were five thousand six hundred and fifty-seven dollars, and twenty-nine cents, and the debts, five thousand and forty-four dollars, and thirteen cents, which would leave according to his statement, five hundred and seventeen dollars and sixteen cents as balance due executor. This is clearly a mistake, since five thousand and forty-four dollars and thirteen cents taken from five thousand six hundred and fifty-seven dollars and twenty-nine cents, leaves as balance six hundred and thirteen dollars and sixteen cents, and not as reported, five hundred and seventeen dollars and sixteen cents. With

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this \*error we can have little to do, since

from a memorandum of a settlement between Mr. Ford and the executor, Pinckney, found among the original papers of record in this office, indeed from the report itself in this case, Mr. Ford seems to have been the disburser of the funds, and consequently, this amount manifestly is what Pinckney received from him. In 1838, Mr. Ford reported that there was three hundred and eighteen dollars and eighty-eight cents further due estate of James W. Monk, from estate of George Monk. But there is no evidence that Pinckney ever received this amount. In the memorandum of settlement between Ford and Pinckney, as above stated, it appears Ford charges himself with the said amount of three hundred and eighteen dollars and eighty-eight cents, with other amounts, and discharges himself by a schedule of debts paid by him for the estate of James W. Monk, and takes Pinckney's receipt, which receipt was also found among the original papers, for the balance in his hands after payment of the debts set forth in that memorandum. This balance is one hundred and ninety-seven dollars, which amount the Commissioner thinks is the true one to be charged against Pinckney as trustee, and not three hundred and eighteen dollars and eighty-eight cents. As it further appears that the debts of the estate were liquidated during the year 1837, January, 1838, would seem to be the starting point in calculating interest on the amounts that were due at that time. This is the information on which this report is based, the meagreness of which, the length of time elapsed since it was done, and the patent error in the report, embarrasses a fair and equitable conclusion. The great correctness of the late Commissioner Campbell, in all matters of a business character, especially as an officer of this Court, almost warrants the conclusion that his report was correct, according to the information received at the time. This, coupled with the sterling character of the late Dr. Cotesworth Pinckney, and his asseverations that but five hundred and seventeen dollars

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and \*sixteen cents ever came into his possession, halts the Commissioner measurably, in recommending any other mode as the basis of the present adjustment, than to consult this report only. It is true that there is evidence sufficient to charge the amount of one hundred and ninety-seven dollars, but as many years have flown since this transaction, and most if not all the individuals who could give us any information on the subject are dead, it may be equally true, if they were now present they could give a different complexion to it. Reluctantly, therefore, the Commissioner recommends that the sum of one hundred and ninety-seven dollars shall be added to the five hundred and seventeen dollars and sixteen cents, and this amount to draw interest from January, 1838, to the present time, without annual rest, because

from the letters of Dr. Pinckney, put in evidence by the plaintiffs, it is certain if they had appointed some one to receive the interest he was ready and anxious to pay it, as indeed the entire corpus. The parties (plaintiffs) consist of a mother and three children, who reside in some free State, whither they were sent, and the mother, Isabella Monk, is the only one at present entitled to anything—she having a life interest in the same, amounting to the annual interest, and the Commissioner so reports.

"The estate fund is as follows, \$517 16 and \$197 91 is.....	\$ 715 01
"Add interest on this amount from January 1st, 1838, to July 17th, 1843, (5 yrs., 6 m., 17 d.).....	277 62
	992 63
"Deduct amount paid by Pinckney, \$200, with interest for the same time, that is 5 yrs., 6 m., 17d., int. \$77 62 .....	277 62
	\$715 01
"Add interest on this amount from June 17th, 1843, to January 17th, 1857, 14 yrs., 6 m.,.....	725 73

"Total amount on January 17th, 1857..\$1,440 74

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"The credits of Pinckney are admitted, though there was some doubt as to the time of payments. Commissioner therefore concludes under all the circumstances, to assume January, 1838, as the starting point for debits and credits: and as it is certain the two hundred dollars he did pay, was more than then due, he has allowed the corpus of estate to make this amount by interest, before he deducted as stated already in figures. The present amount the plaintiff, Isabella Monk, is entitled to, he reports at seven hundred and twenty-five dollars and ninety-two cents, the accumulated interest."

The plaintiffs excepted to the report on the grounds:

1st, Because, by the report of January, 1837, in Pinckney ex'or. Monk v. Creditors of Monk, a balance of six hundred and thirteen dollars and sixteen cents is shown to be due the estate of Monk, after payment of debts, and although from a palpable error in figures, it may be that five hundred and seventeen dollars and sixteen cents was the amount finally agreed on between Commissioner Ford and the executor, as the balance due; yet six hundred and thirteen dollars and sixteen cents should be the amount here charged against executor, because the evidence shows that at least this amount was retained by executor, never paid over to Commissioner, nor yet accounted for by him.

2nd. Because the said sum of six hundred and thirteen dollars and sixteen cents, plus the said sum of one hundred and ninety-seven dollars and ninety-one cents, that is, the amount of eight hundred and eleven dollars and seven cents is the amount establish-



ed, and should bear interest from 1st of January, 1838.

3rd. Because plaintiffs are entitled to annual rests.

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\*4th because the funds received by cestui que trust were, one hundred dollars in the fall of 1838, and the like sum in the fall of 1839; and the Commissioner showed at the end of the first year, that the amount bore interest. Credit the executor by reason of the payment of the first hundred dollars, with the amount of interest then due, and charge the overplus in payment on the interest of the next year, and in like manner showed credit and debit, the interest accruing, and the payment of the second one hundred dollars. And make the interest that may be due on the 1st of January next, after the aforesaid credit of two hundred dollars and thus allowed, together with the principal, the amount for which the said defendant must now account.

The case was heard on the exceptions, in February, 1857, by his Honor Chancellor Wardlaw, who made the following decree:

Wardlaw, Ch. This case is presented for judgment by exceptions of both parties to the Commissioner's report, made under the following decretal order of Chancellor Johnston, in February, 1856:

"The defendant, as executrix of Cotesworth Pinckney, is liable to execute the trust created in her testator by the deed and will of James W. Monk, set forth in the pleadings, and it is referred to the Commissioner to ascertain and report the character and amount of the trust fund, and what is now payable thereout to the plaintiffs severally, or either of them." I refer to the Chancellor's decree and the Commissioner's report, for a general synopsis of the case; but to make my observations on the exceptions more intelligible, some restatement of the facts may be useful. The only trust in the deed, is for the emancipation of the plaintiffs, and as this has been accomplished, the deed has no bearing on the character and amount of the trust fund, the only remaining subject of

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\*controversy. By the will of James W. Monk, bearing date August 25, 1832, shortly before his death, he constitutes C. Pinckney sole executor and legatee in trust after payment of debts, to provide during the life of the said Isabella, for her maintenance and the maintenance and education of her children living at the testator's death, and after the death of the said Isabella, to provide for the maintenance of her said children until they severally attained the age of twenty-one years, and upon the attainment of each to such age, to allot to such mature child, an equal portion of the property in fee, discharged from any trust. Dr. Pinckney assumed the trust of this will, and in 1838 remitted to the plaintiff one hundred dollars,

and in 1839 remitted to her one hundred dollars; and in a letter produced by plaintiffs, of August 12, 1840, acknowledged three hundred and fifty dollars to be then in his hands, as the remnant of Monk's estate, applicable to the trust. Previously, a bill had been filed for marshalling the assets of the estate of James W. Monk, and in January, 1837, the Commissioner reported that the assets of the estate exceeded the liabilities the sum of five hundred and seventeen dollars and sixteen cents; and this report was confirmed by the Court. It is obvious, that in his process, the Commissioner erred in subtracting the sum of liabilities from the assets, and that the balance was six hundred and thirteen dollars and sixteen cents. Afterwards, in 1838, Dr. Pinckney, as executor of James W. Monk, seems to have received from the Commissioner one hundred and ninety-seven dollars and ninety-one cents, as a distributive share of the estate of George Monk. In January, 1845, Dr. Pinckney filed his petition in this Court, setting forth that five hundred and seventeen dollars and sixteen cents, reduced by the sums remitted by him, were in his hands, subject to the trust of Monk's will, and praying leave to remit the balance and be relieved from the duties of trustee. The Commissioner reported, that the statements of the petition, and par-

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ticularly \*as to the balance in trustee's hands were true, but, as no other trustee had been appointed, Dr. Pinckney ought not to be discharged; and this report was confirmed by the Court at the sitting in January, 1845. Dr. Pinckney died May 6, 1847, leaving the defendant sole executrix and legatee, and in the summer of 1853, Mr. Tracy, as attorney of plaintiffs, applied to the defendant for the adjustment of their claims, and so far as appears, no intermediate claim in this behalf, upon testator or executrix, had been made since 1840. The bill was filed February 16, 1856. The letter of Dr. Pinckney and the proceedings in this Court were offered in evidence by plaintiffs. The Commissioner, by his report, charges the defendant with five hundred and seventeen dollars and sixteen cents, and one hundred and ninety-seven dollars and ninety-one cents, making seven hundred and fifteen dollars and seven cents, as the corpus of the estate, with simple interest thereon from January 1, 1838, deducting from the accrued interest the sum of two hundred dollars paid by testator or defendant. Both parties except to the report, and without repeating the exceptions in detail, it is sufficient to remark, that the plaintiffs claim that the corpus of the trust estate is eight hundred and eleven dollars and seven cents, (\$613.16 and \$197.91) and that it should bear interest from January 1, 1838, at annual rests, and defendant insists that the corpus is three hundred and seventeen dollars and sixteen

cents, (\$517.16—\$200) and bears no interest. Upon all the information before me, but with some distrust as to the justness of the result in the particular case, I sustain the plaintiffs' view as to the extent of the corpus. The Commissioner reports that Dr. Pinckney was of "sterling character," and that Commissioner Campbell, who made the report of 1845, was of great correctness as an officer of the Court in all matters of business, still, it is manifest that Commissioner Ford committed a clerical error in subtraction in his report of 1837, and that the true

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balance of the assets and liabilities \*of the estate of James W. Monk, not including one hundred and ninety-seven dollars and ninety-one cents afterwards received from George Monk's estate, was six hundred and thirteen dollars in the hands of the executor, and it is quite probable that Commissioner Campbell adopted the report of 1837 without reviewing its calculations or advertising to the report of 1838, which states the additional sum of one hundred and ninety-seven dollars and ninety-one cents. The plaintiffs were not formal parties in these proceedings, and they have the right to use them as establishing the basis and substance of their claim without being committed to formal errors. They were so far represented by the executor in the suit with creditors concerning the administration of Monk's estate, that they probably would have been concluded by actual payments of the executor to creditors lawfully entitled, of the sum however deficiently reported and adjudged to be in his hands; but this sum, in money, has been retained by the executor and his representative, and I do not consider the plaintiffs estopped from showing that sums not included in the judgment, were actually in the hands of the executor. It is plain enough that the plaintiffs are not bound by the report of 1845, but it is more doubtful whether they can surcharge the sum of five hundred and seventeen dollars and sixteen cents decreed in 1837. With some misgiving I recognise their right thus to surcharge; but this surcharge upon the honest settlement of the trustee, will have some influence on my judicial discretion in the allowance of interest. As the plaintiff, Isabella, was only entitled to the income for life, of the trust estate, the payment of the capital to her by the executor would be a breach of trust, for the consequences of which, his estate would be bound to indemnify the remaindermen. Consequently, the payment of two hundred dollars to Isabella can be treated only as of the interest accrued to her with the right in the trustee to retain for reimbursement any excess from the interest

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that might subsequently accrue to \*her. It is the law of this case, adjudged by the former decree, that the statute of limita-

tions does not bar the demand of the plaintiffs for account, as the trust involved is technical and continuing. To this extent I have neither authority nor reason to dispute the judgment. But I do not understand the Chancellor to decide, nor the doctrine of Equity to be, that the defendant is a technical trustee, and that the statute does not save the defendant from payment of arrears of interest. A general account is decreed, but nothing is adjudged as to particulars. Dr. C. Pinckney, by making probate of the will of Monk and assuming to execute it, became a technical trustee, and his estate, in the hands of his representative, became liable for any breach of his trust prosecuted within a reasonable time; but, his executrix, who never assumed to execute Monk's will is no representative of that estate, nor trustee for its beneficiaries. The remainder-men should not suffer on account of the laches of the tenant for life, but it is reasonable that she should suffer within the extent of her interest. The trust fund which came to the hands of defendant constitutes, as to her, a mere debt of her testator. Allowance of interest or income, is within the judicial discretion of the Chancellor,—not his caprice, but discretion governed by the rules and doctrines of the Court. In the present case, the beneficiaries are colored persons residing in a remote State, and I doubt if their trustee was bound to do more than pay the interest when demanded of him here; and I am confident that the representative of the trustee was not obliged to incur the expense and hazard of remitting the income to Connecticut. On the whole, my opinion is, that interest should not be calculated before demand made by the attorney in fact, of plaintiffs. In my judgment, the account should be stated as follows:

Capital of trust fund.....	\$811 07
Interest thereon from middle of summer 1853 until February 6, 1857, (three and a half years).....	170 32

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\*with interest on capital until distributed. In reply to a suggestion from the bar, I venture a professional opinion, which, however, is no judgment, that the defendant might relieve herself from further responsibility, by paying to the plaintiff, Isabella, the interest accrued, and investing the capital in a safe public stock, on trust, that the interest should be paid to the said Isabella during life, and the capital be distributed on the death of the said Isabella, equally among the children living at the death of James W. Monk. It is ordered and decreed, That the defendant pay to Isabella Monk the sum of one hundred and seventy dollars and thirty-two cents, and all interest accruing annually from February 6, 1857, on the capital, eight hundred and eleven dollars and seven cents, during the life of the said



Isabella, and that upon the death of the said Isabella, defendant distribute the said capital equally among the children of the said Isabella, living at the death of Jas. W. Monk; the representatives of any deceased child talking the share of such deceased child. It is further ordered, That the costs of this case be paid from the income of the trust fund, so far as it may extend, and that as to any excess, each party pay his own costs.

The plaintiff, Isabella Monk, appealed on the grounds:

1. That she is entitled on general principles of law, to interest as is claimed in her third and fourth exceptions to the commissioner's report.

2. That by the decree of Chancellor Johnston, February 20th, 1856, "the defendant as executrix of Cotesworth Pinckney, is liable to execute the trust created in her testator by the deed and will of James W. Monk," and can now derive no benefit of any defence not open to him.

3. That the costs should be paid by defendant.

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\*The opinion of the Court was delivered by

JOHNSTON, Ch. There are several grounds on which full interest should have been decreed in this case; but it is necessary only to mention one. If Dr. Pinckney had vested the fund, as he was ordered to do, in Charleston bank stocks the dividends accruing would have been forthcoming at all times for the benefit of his cestui que trusts. Failing to do this, he could not, by his neglect, deprive them of these profits; and his estate is justly chargeable with interest as an equivalent.

It is ordered, that so much of the decree as declares that interest on the fund is to be computed only from demand, be reversed; and that interest be allowed as in other cases. Let the report be reformed accordingly.

DUNKIN and DARGAN, CC., concurred.  
Decree reformed.

## 9 Rich. Eq. \*294

\*MANSEL HALL, et al., v. CHRISTINA W. FAUST, et al.

(Columbia. May Term, 1857.)

[*Husband and Wife* ⇨151, 162.]

Bill by creditors of a married woman to subject her separate estate to their demands. The husband of defendant had deserted her for more than fifteen years, and was residing in another State. The defendant herself had also recently removed to Georgia, and had there obtained a divorce. Bill sustained but the recovery restricted to demands for necessities.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 595, 596; Dec. Dig. ⇨151, 162.]

[*Husband and Wife* ⇨151.]

Where a husband deserts his wife absolutely and completely, by a continued absence from the State, with intent to renounce de facto the marital relation, she, the wife, may, it seems, bind her separate estate by her contracts for necessities.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 584; Dec. Dig. ⇨151.]

Before Wardlaw, Ch., at Fairfield, July, 1855.

Wardlaw, Ch. This is a creditors' bill whereby the plaintiffs seek to subject to the payment of their demands the distributive share of the defendant, Christina W. Faust, in the estate of her father, the late Dr. William Bratton, who died intestate on the 1st December, 1850.

The defendant Christina, intermarried on the 12th April, 1837, with Clement C. Faust, in this State. After living together about three years, Clement C. Faust abandoned his wife, removed first to Georgia and subsequently to Mississippi, where, it is said, he has married another woman and now resides. Since he deserted his wife, he has made no provision for her support, and she has contracted sundry debts with the plaintiffs, holding out to them, as they allege in their bill, in the first instance, that she would cause her debts to be provided for through her father, the said Dr. William Bratton, and since his death, through her distributive interest in his estate. The demands of the plaintiffs consist of accounts for goods sold and delivered, and notes; proof of which was made at the hearing. It was stated in argu-

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ment by plaintiffs' \*counsel, that since the filing of the bill, other demands, besides those set forth, have been entrusted to his charge.

The distributive share of Mrs. Faust in her father's estate consists of slaves and funds in the hands of the commissioner, together amounting in value to upwards of twelve thousand dollars. Proceedings for the partition of Dr. Bratton's estate were filed in this Court, February, 1851, in which Mrs. Faust was a party, plaintiff, and her husband a party, defendant. She set forth her ill-treatment by her husband, his abandonment and desertion of her, and prayed a settlement of her share, free from the control, interference, and liability of said Clement C. Faust: and until such settlement could be perfected, and the said share be allotted and assigned to her next friend, until further order. An order for a writ of partition was granted by Chancellor Dargan at Chambers, 25th February, 1851, in which it is recited that Mrs. Faust had made application for a settlement, and her husband, though a defendant named in the proceedings had not then been made a party by service of process or publication, whereupon it was ordered, with a view of preventing the

marital rights from attaching, that the said land and slaves which shall be allotted to the said Christina Faust, in said partition, be delivered into the possession of her said next friend, William M. Bratton, who shall stand seized and possessed of the same as trustee, until the further order of this Court, and who shall, from the income of said shares of said lands and slaves, pay to her in the meantime a sum sufficient for her support and maintenance. On 7th July, 1851, Clement C. Faust filed an answer, whereby he disclaimed all right, title and interest, in, and to the estate, real and personal, of the late Dr. William Bratton, mentioned in the bill, and voluntarily consented and agreed that his wife's share should be settled upon her to her sole and separate use, upon such terms, conditions and trusts, as she and her solicitors, and the Court might deem right and proper.

The return of the Commissioners in parti-

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tion as to the real \*estate, was heard before Chancellor Dargan, at Chambers, 7th December, 1852, and in the order made therein, it was "directed that until the further order of this Court, that the distributive share of Mrs. Christina Faust be held by William M. Bratton, as her trustee, to secure the same against all claims or liabilities of her husband, Clement C. Faust."

In 1851 Mrs. Faust removed to DeKalb County, Georgia, and instituted proceedings for a divorce, and at October term, 1852, of the Superior Court for that County, a divorce, a vinculo, was duly granted.

At July Term, 1853, of this Court, Mrs. Faust filed a petition setting forth that she had removed to Georgia, and obtained a divorce from Clement C. Faust, and prayed that her trustee, William M. Bratton, might deliver to her certain of the slaves, in Georgia, and that he might be authorized to sell the remainder of the slaves and pay over to her the proceeds, with her share of the funds arising from the sale of the real estate, and other funds to which she was entitled. The petition states "that the sale is necessary to raise funds to purchase a residence, for the payment of just debts and for other purposes." The Chancellor declined to grant the prayer of the petition, but directed that it might be retained, that such further proceedings might be instituted as she might be advised.

On 1st November, 1853, Mrs. Faust intermarried with William W. Eaton, in Georgia, where they still reside. The parties defendant to the present proceeding, are the said Christina W. Faust, (or Eaton,) Clement C. Faust, William W. Eaton, and William M. Bratton—as to all of these, the bill is ordered pro confesso, except the defendant, William M. Bratton. His answer admits the principal allegations of the bill, his belief that she is indebted to various persons, but

that he is not informed as to the particulars of such indebtedness. He submits to the

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judgment of the Court, but suggests \*that she was sufficiently provided for by her father in his life time, and that she is improvident and extravagant.

It was proved at the hearing that Mrs. Faust had said she was desirous of having her creditors paid, and would do so as soon as she could obtain control of her property. The trustee has already permitted her to take a few of the slaves to Georgia. There was no proof of the extravagance of Mrs. Faust, nor of provision having been made for her by her father in his life time, as suggested in the trustee's answer.

In the consideration of this case, two difficulties in the way of authority arise, one from the circumstance that the Courts of this State do not recognize the validity of a divorce of a South Carolina marriage by a foreign tribunal, otherwise the confirmation of these claims by Mrs. Faust since her divorce in Georgia, might authorize proceedings against her alone; nor are we aided by analogy in cases of separate estates, because we do not recognize (as in England and most of the States) the authority of the wife to charge her separate estate.

At law, the general rule is, that the wife cannot contract, nor sue and be sued, as a feme sole. But an exception to this was established very early, in cases where the husband was banished or had abjured the realm. (Belknap's case, Co. Litt. 132, b. and 133, a; Wright v. Wright, 2 DeS. 244; Deery v. Duchess of Mazarine, 1 Ld. Raym. 147; 1 Salk. 116.) The reason of this exception was also held to apply if the husband were an alien, always living abroad, and in such case the wife was sueable as a feme sole, in like manner as if the husband had abjured the realm. In Walford v. Duchess DePienne, (2 Esp. R. 554,) Lord Kenyon said, if the wife was not to be personally chargeable for debts contracted under such circumstances, she would be without credit and might starve. The same doctrine was held in DeGailloud v. L'Aigle, (1 B. & P. 357,) that a feme covert was chargeable with her contracts when the husband, being a foreigner, had voluntarily abandoned her and resided abroad, and that

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it was for her benefit, \*that she should be liable in order to enable her to obtain a credit and secure a livelihood. But it was at the same time said that there was no instance in which the wife was held personally liable on her contracts on the ground of her husband residing abroad, when he was an Englishman born. But it is said by Chancellor Kent, (2 Kent, 157,) in commenting upon these cases, it is probable that the distinction between husbands who are aliens and who are not aliens, cannot long be maintained in practice,



because there is no solid foundation in principle for the distinction. And accordingly we find that the distinction has been disregarded in several American Courts. In *Rhea v. Rhenner*, (1 Peters, 105 [7 L. Ed. 72],) it was said that the law seems to be settled that when the wife is left by the husband, has traded as a feme sole, and has obtained credit as such, she ought to be liable for her debts, and the law is the same, whether the husband is banished for his crimes or has voluntarily abandoned the wife. Where the wife of an alien had been deserted in a foreign country by her husband and had been domiciled in Massachusetts for five years and maintained herself without any provision from her husband, it was held that she was competent to take a legacy and sue and be sued as a feme sole and discharge any judgment she might recover; and the case was the same if the husband had been a native citizen and had deserted his wife and become a subject of a foreign State. (*Gregory v. Paul*, 15 Mass. 31.) Residence in another State is equivalent to residence in a foreign State. (*Abbott v. Bayley*, 6 Pick. 89.) In *Gregory v. Pierce*, (4 Mete. 478,) it was held that if the husband deserts his wife absolutely and completely by a continued absence from the State and with an intent to renounce de facto the marital relation, the wife may sue and be sued as a feme sole, and this was considered to be an application of an old rule of the common law and equivalent to an abjuration of the realm.

These are cases at law where the great

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difficulty seems to \*be one of form after the plea of coverture, and is probably insisted on in England, because the Court of Chancery there will grant relief in cases where the wife has a separate estate and she contracts.

In the present case the formal difficulty of the husband not being joined is obviated, and both husbands are made parties; the husband who could object by law [Faust] disclaims any interest in his wife's estate and no relief is sought as to him, which is another important distinction between this and many of the reported cases where it was sought to charge the husband with the wife's contracts. This is not the case of a separate estate. Since Faust's disclaimer was filed, no further steps have been taken in this Court for a settlement. The estate is vested in the next friend of the wife, temporarily, without any trust being created, and simply to prevent the marital rights of Faust from attaching. The application to this Court in 1853 was to deliver the property to her control, and that being refused, her estate remains as left by the provisional orders of 1851 and 1852.

As far as the Court can perceive from the evidence, and by the default in answering, this application is not disapproved by the defendant herself, but that circumstance is not

regarded as material. I conclude that it is for the benefit of the wife that she should be liable under such circumstances, in order to enable her to obtain a credit and secure a livelihood, (1 B. & P. 257,) and that the plaintiffs are entitled to the relief they seek, and it is so decreed.

I was at first inclined to restrict the recovery of the creditors to necessities. But that view has been modified on reflection. This is not like the case of infants, nor does the reason of the application in such case apply. The defendant was of full age when these contracts were entered into, and if liable at all, she is liable for the full amount of her contracts.

It was suggested at the hearing that other

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claims exist \*besides those of the present plaintiffs, upon which separate proceedings had not been instituted, because this was a bill filed on behalf of all creditors. This is in accordance with the practice of the Court and if the creditors had proceeded separately they would have been ordered to consolidate.

It is ordered and decreed, that the claims of the plaintiffs as set forth in the bill be adjudged to be established, and that the other creditors of Christina W. Faust or Eaton be authorized to present and prove their demands before the Commissioner on or before the first day of May next, and that he report thereon, and also as to what estate of C. W. Faust is in his hands and in the hands of her trustee. Costs to be paid out of the funds.

The defendant, Christina W. Faust, appealed and now moved this Court to reverse or modify the Circuit decree, upon the grounds:

1. That the said Christina W. Faust being, according to the statement of the bill, a married woman whose husband was, at the time of their marriage, a citizen of this State, and is still living, was not capable of binding herself by the contracts set forth in the said bill.

2. That if bound at all, it could only be for articles necessary and proper for her maintenance.

3. That if she was liable, the demands were not sufficiently proved, and a reference should have been ordered thereon.

Gregg, for appellant.

1. According to the well settled law in England, a married woman can only be sued as a feme sole when her husband, living apart from her and beyond the seas, is an alien; or being a subject, has been banished.

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\*2. By the English law, if the husband, being an English subject, deserts his wife, and voluntarily goes abroad, she cannot be sued as a feme sole.

Such has been recognized to be the law in South Carolina. See, besides cases cited in

decree, *Bogget v. Frier*, 11 East, 301; *Marshall v. Rutton*, 8 T. R., 545; *Boyce v. Owens*, 1 Hill, 8; *Beane v. Morgan*, 4 M'C., 148; *Comyn's Dig. Tit. Abjuration*; 4 Blackst. Comm. 332.

3. There has been no decision in South Carolina altering the English law. The decisions to that effect in some courts of the United States ought not to outweigh the English authorities.

4. The Court of Equity holds Mrs. Faust's property for her protection, and has refused to let her take it in her own hands, for fear she may lose it. To allow her to waste the whole of it by her contracts would involve an inconsistency. Therefore, while making her its ward, the Court ought at least to protect her from any contracts except such as may be beneficial to her; and her liability should be confined to articles necessary for her maintenance.

Boylston, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The decree of the Circuit Court has given relief to the plaintiffs against the separate estate of the defendant, Christina W. Faust. By the law of Westminster Hall, she had authority to bind her separate estate; but, according to the now settled law of South Carolina, a married woman has no authority over her separate estate, except as derived from the express provisions of the settlement. Deserted by her husband, as the defendant has been, for

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more \*than fifteen years, divorced from him by the laws of a sister state, she is still regarded as his wife by the law of South Carolina. Although the owner of a competent estate, with which her husband has no authority, (nor, according to his answer, any inclination) to interfere, she has no legal power to bind that estate. Without the ordinary recommendation to credit which attaches to proprietorship, she might thus frequently be subjected to many of the inconveniences of destitution. Under such circumstances it is the peculiar province of this Court to interfere as well for the benefit of the married woman as for the protection of those who have supplied her necessities. But we are of opinion that, the plaintiffs asking the aid of this Court, their recovery may properly be restricted to such articles as were necessary and proper for the defendant in the condition in society which she occupied. The decretal order of the Circuit Court is modified accordingly.

JOHNSTON and WARDLAW, CC., concurred.

Decree modified.

9 Rich. Eq. \*303

\*GEORGE W. FOLK, et al., v. LITTLE-BERRY VARN, et al.

(Columbia. May Term, 1857.)

[Wills  $\hookrightarrow$  88.]

An instrument in form a deed, but using the word "bequeath" in addition to "give, grant, deed, bargain, and sell," by which the donor conveyed certain slaves to his son, J. H., to have and to hold them absolutely, with a proviso, (1) that the donor should "keep and enjoy the use" for life, and (2) that if J. H. "die without leaving issue, or in minority, then one half to go to the lawful issue of A. V., and L. V., the other half to the children of my brothers," *held*, to be a deed and not a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 210; Dec. Dig.  $\hookrightarrow$  88.]

[Deeds  $\hookrightarrow$  105.]

The limitation to the lawful issue of A. V., and L. V., and to the children of brothers, *held*, good—the issue and children living at the death of J. H., being the parties entitled.

[Ed. Note.—Cited in *Adams v. Verner*, 102 S. C. 11, 86 S. E. 212.

For other cases, see Deeds, Cent. Dig. § 278; Dec. Dig.  $\hookrightarrow$  105.]

[Deeds  $\hookrightarrow$  208.]

J. H., was a minor living with his father when the deed was executed, and it was recorded two days afterwards in the Register's office:—*Held*, that this was sufficient proof of delivery.

[Ed. Note.—Cited in *Cloud v. Calhoun*, 10 Rich. Eq. 363.

For other cases, see Deeds, Cent. Dig. § 628; Dec. Dig.  $\hookrightarrow$  208.]

[Deeds  $\hookrightarrow$  57.]

Where the first taker's estate is defeasible upon an event upon the happening of which the estate is to go over to others, a delivery of the deed to the first taker is sufficient for all who take interest under it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 126; Dec. Dig.  $\hookrightarrow$  57.]

[Deeds  $\hookrightarrow$  36.]

Where the deed declares that in a certain event the property shall "go to" others, this is a sufficient conveyance to them upon the happening of the event.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 56; Dec. Dig.  $\hookrightarrow$  36.]

Before Wardlaw, Ch., at Colleton, February, 1856.

The circuit decree, from which this case will be sufficiently understood, is as follows:

Wardlaw, Ch. This is a bill for partition and settlement of the estate of John Snider, late of St. Bartholomew's parish. He died intestate March 14, 1855, seized and possessed of real and personal estate, and leaving as his distributees, brothers, sisters, nephews and nieces. George W. Folk has been appointed administrator of his chattels and credits. On May 10, 1847, the said John Snider signed and sealed a written instrument, attested by Henry Ulmer, scrivener of the instrument, in the following words:

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"\*South Carolina, Colleton District. Know all men by these presents, that I, John Snider, of the district and State aforesaid, for, and in consideration of one dollar, to me in hand paid, the receipt whereof I do hereby



acknowledge, have given, granted, deeded, bargained, and sold, and by these presents, do give, grant, bargain, sell and bequeath, unto my son, John Hext Snider, of the district and State aforesaid, the following named negro slaves, to wit; Sally, Jim, Bill, Lucy, Solomon, Lewis, Harriet, Doll, Patrick, Chaney and Charles, together with all their future increase; to have and to hold all and singular, the said negro slaves, with all their future increase, unto the said John H. Snider, only with this proviso, that I keep and enjoy the use of said property unto myself, so long as I live, and after my decease, then to the said John H. Snider, his heirs and assigns forever. Provided, nevertheless, if the said John H. Snider die without leaving lawful issue, or in minority, then one-half of the above property to go to the lawful issue of Mrs. Ann Varn and Mrs. Laura Varn, the other half to the children of my brothers. In witness whereof, I do hereunto set my hand and seal, this tenth day of May, in the year of our Lord, one thousand eight hundred and forty-seven.

"John Snider. [L. S.]

"Signed and sealed in the presence of

"Henry Ulmer."

On May 11, 1847, Henry Ulmer deposed before Eugene McTeer, then a magistrate for Colleton, that "he saw John Snider sign and seal the within deed, for all the purposes therein set forth;" and on May 12, 1847, the instrument was recorded in the office of Register of Mesne Conveyances, of Colleton district. On the copy from that office, is endorsed, "delivered to Snider, Esqr., March 3, 1848," and the original is now produced from the papers of John Snider, in the custody of the defendants Varn. Ulmer is dead. John

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Hext \*Snider, the donee, in life was an inmate of his father's family, and died in his minority, and without leaving lawful issue, and before January 17, 1851. At the date last mentioned, the said John Snider, by deed, nominally in consideration of one hundred dollars gave to his two stepdaughters, Ann and Laura, wives of Littleberry and James G. Varn, after reserving a life estate to himself, the same negroes named in the former instrument, except that Patrick, probably dead, is omitted, and that Frank, another child of Sally, is mentioned. This gift is, upon certain limitations and restrictions, not important in the consideration of this case.

The principal question submitted for judgment, is whether the instrument of May 10, 1847, is a deed or inchoate testament? Since the case of *Jaggers v. Estes*, 2 Strob. Eq. 343 [49 Am. Dec. 674], subordinate judges in South Carolina cannot dispute, that by deed duly delivered, one may give the remainder of a chattel to another, after reserving a life estate for himself, if upon construction of the whole instrument, it be manifest he intended to do an irrevocable act, and pass

present title to the donee, postponing the enjoyment only. A provision for enjoyment by the donee after the death of the donor, although testamentary in its bearing, is not conclusive that the instrument of gift is not a deed. In the present case, the instrument in question has throughout the form of a deed; beginning "know all men by these presents," reciting a valuable consideration as paid, containing the technical words of grant "give, grant, deed, bargain and sell," having the clause, "to have and to hold," concluding with the usual clause as to signing and sealing, actually signed and sealed, and attested in the usual form as to signing and sealing by a witness, and then registered. These circumstances seem to me to settle the character of the instrument as a deed. *Alexander v. Burnet*, 5 Rich. 190. Nothing in the paper itself contravenes its character as a deed, except that it employs the word "bequeath," and lacks internal evi-

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dence of delivery, and these seem to be \*insufficient. Bequeath is certainly a word appropriate to a testament only, but it is not so inaptly used in a deed, where the donor reserves the enjoyment of the estate for his life, as to control the words grant, bargain and sell, proper only in a deed. So, too, the instrument does not profess to be delivered is a fact of some weight, but readily overcome by proof, actual or presumptive, that the instrument was in fact delivered. *Wheeler v. Durant*, 3 Rich. Eq. 452; *Harrison ads. Babb*, M. S. Col. Dec. 1856, ante 111 [70 Am. Dec. 203].

I am satisfied by the evidence, that this deed was delivered. Not that it was put into the hands of the child who was the donee, for that would have been a farcical formality, but that it was delivered to the witness for probate, and to the register for recording; (which probate and recording occurred within two days after the signing and sealing,) and was afterwards retaken from the register by the donor, as the natural guardian of his child, and kept among his papers. *Ingram v. Porter*, 4 McC. 198; *Dawson v. Dawson*, Rice, Eq. 244.

It is argued that this deed is void on account of the uncertainty of the description of those who were to take contingently, upon the death of John Hext Snider, infant without leaving issue; namely the lawful issue of the Mistresses Varn as to one-half of the estate, and the children of John Snider's brothers as to the other half. The principal donee, John H. Snider, took a vested and absolute remainder, to be enjoyed on the death of his father, and defeasible if he died in infancy without leaving issue; this event, certainly not liable to the vice of remoteness, actually occurred, and eo instanti, the estate vested in title, although still postponed in enjoyment, in moieties in such of the issue of the Mistresses Varn and children of the

brothers of the donor, as were living at the death of John H. Snider. I perceive no uncertainty in the description of the ultimate

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donees. The issue of Ann Varn \*and Laura Varn, in whatever degree, take among them per capita, one-half of the estate, excluding predeceased and after born issue, except as possibly the after born might be among the distributees of issue living at the death of John H. and dying afterwards. And the children of brothers of donor take per capita the other half, excluding grandchildren and remoter descendants of brothers, and even children of sisters, except as they might be distributees of a brother's child who died after the vesting of the estate. *Perdriau v. Wells*, 5 Rich. Eq. 20; *Barksdale v. Macbeth*, 7 Rich. Eq. 125; *Corbett v. Laurens*, 5 Rich. Eq. 301; *Seibels v. Whatley*, 2 Hill Eq. 605; *Ruff v. Rutherford*, Bail. Eq. 7.

It was further suggested that there were no words of conveyance to the contingent remaindermen. It is a foregone conclusion, that a deed may serve as a testament to limit an estate in remainder in a chattel after a life estate therein, and when this point has been attained, it is too late to stickle about terms of conveyance. I suppose the words "to go," to be sufficiently explicit to express the donor's intention to transfer the estate according to the limitation over. In my judgment, the instrument of May 10, 1847, is a valid deed of gift, and renders inoperative the deed of January 17, 1851, purporting to convey the same property.

Another point submitted for determination, relates to the hire of the slaves named in the former deed for the year 1855.

The life tenant, John Snider, died after the first of March of that year, but the slaves were not employed by him in making a crop on lands in his occupation, and in fact were hired out; so that the case does not come within the provision of the Act of 1789, 4 Stat. 111, making the crop and emblements, under certain circumstances, assets in the hands of the representatives of the life tenant, and does come within another provision of the same Act, that the hirer from the life tenant shall secure the payment of the hire when due, meaning to the remaindermen. *Clifford v. Read*, 3 Rich.

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Eq. 218. \*In the present case, one-half of the hire of the negroes belongs to the issue of Ann Varn, and of Laura Varn, living at the death of John H. Snider, and the other half to the children of the brothers of John Snider, who were living at the death of said John H.

No dispute is made as to the right of the distributees of John Snider to partition of the land and slaves of which he died seized and possessed; and it is ordered that the parties have leave to issue a writ of parti-

tion under the supervision of the Commissioner.

It is further ordered, That the Commissioner inquire and report who were the issue of Ann Varn and Laura Varn, and the children of John Snider's brothers, at the date of John H. Snider's death.

And it is ordered and decreed, that the Commissioner take and state the accounts between the parties, on the principles of this opinion.

The defendants, the Varns, appealed on the grounds:

1. That the instrument of May 10, 1847, is not in form, and was not in intent, irrevocable.

2. That if a deed, yet a donor cannot by deed, without the intervention of a trustee, create a contingent remainder in a chattel after a life estate reserved therein to himself; and the limitation "to the lawful issue of Mrs. Ann Varn, and of Mrs. Laura Varn," and to the children of donor's brother, is a contingent remainder.

3. That if a contingent remainder can be so created, it must be by due words of conveyance, and that "to go" are not such.

Tracy, for appellants.

The opinion of the Court was delivered by

JOHNSTON, Ch. This Court is satisfied,

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upon the reasoning \*of the Chancellor, that the instrument is a deed. As to the fact of its delivery, his conclusion, must, according to our practice, have a decisive influence, unless gross error appears. But so far from this, it appears to us that no other conclusion could be drawn, in this case, than that to which the Chancellor came. Two days after the execution of the paper, we find it in the hands of the recording officer, for registration. Now it could have been delivered to him only by the grantor or some other person to whom the grantor transferred the possession of it. In either case, it was a delivery which the Court would make use of for the benefit of the infant grantee.

We concur also with the Chancellor in so much of his decree as is questioned by the 2nd and 3rd grounds of appeal.

Subject to an enjoyment by himself during his life, the grantor conveyed the property indefinitely to his son. Throwing out of view, for the present, the provision in favor of the children of Ann and Laura Varn, and of the grantor's brothers; this conferred upon John H. Snider a present vested title in remainder to the fee in the property. The delivery of the deed was sufficient to make this good to him. But instead of leaving the fee in him, unconditionally, the deed makes his title defeasible on the contingency of his dying in his minority without issue; and provides that the property shall go over to the children of the persons mentioned. I suppose the deed was sufficient



to pass the whole property in remainder out of the grantor, and into his son, with or without conditions; and a delivery of it to the son was good to vest the title in him subject to the conditions mentioned. If the conditions failed, the only consequence was that the title of the son became indefeasible. There was no reverter.(a) If the condition happened, the grantee became a trustee for the persons to whom the contingency worked a benefit. The question of interest, arising from the contingency, must be one purely

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among these \*parties. But, apart from this view which regards the grantee, John H. Snider a trustee for the ulterior remaindermen, and regarding the interest of the latter as legal and not merely equitable, I am of opinion, that where a deed conveys property indefinitely, defeasible in favor of other persons on a contingency, the deed is sufficient for all who take an interest under it, and its delivery to the first taker is a delivery to all.(b)

We are of opinion with the Chancellor, that the declaration in the deed, that in the event of John H. Snider's dying in minority and without issue, the property is "to go" to the ulterior remaindermen, is a sufficient conveyance to them, in that event, and we concur in his conclusions as to the children who became entitled.

It is ordered that the decree be affirmed and the appeal dismissed.

DUNKIN, DARGAN, and WARDLAW, CC., concurred.

Appeal dismissed.

(a) *Kersh v. Yongue*, 7 Rich. Eq. 100; *Shands v. Rogers*, id. 424.

(b) *Hill v. Hill*, Dud. Eq. 71.

### 9 Rich. Eq. \*311

\*JOHN MOORE and MARY MOORE v.  
THOMAS S. HOOD, Guardian,  
and JOHN H. HOOD.  
(Columbia. May Term, 1857.)

[*Guardian and Ward* ⇨144.]

Bill for account will lie in this State, against a guardian appointed in North Carolina, and his surety, they having removed to this State.

[Ed. Note.—Cited in *Stallings v. Barrett*, 26 S. C. 477, 478, 479, 2 S. E. 483.

For other cases, see *Guardian and Ward*, Cent. Dig. § 488; Dec. Dig. ⇨144.]

[*Guardian and Ward* ⇨42, 83.]

Without legal authority from a Court of competent jurisdiction, a guardian cannot sell the property of his ward; and to any application to a Court for such authority, the ward is a necessary party.

[Ed. Note.—Cited in *McDuffie v. McIntyre*, 11 S. C. 560, 561, 562, 32 Am. Rep. 500.

For other cases, see *Guardian and Ward*, Cent. Dig. §§ 175, 338; Dec. Dig. ⇨42, 83.]

[*Guardian and Ward* ⇨172.]

A guardian, appointed in North Carolina, filed an ex parte petition, in his own name, in

the proper Court of that State, for leave to sell his wards' negroes. Leave was granted, and the sale made. On bill afterwards filed in this State, against the guardian and his surety for account, *held*, in the absence of proof that the proceeding for leave to sell, in the name of the guardian alone, was proper according to the law of North Carolina, that the wards were not bound by the order for sale, and that the guardian was liable to account for the full and true value of the negroes.

[Ed. Note.—Cited in *Cathcart v. Sugenheim*, 18 S. C. 128; *Barnwell v. Marion*, 54 S. C. 230, 32 S. E. 313.

For other cases, see *Guardian and Ward*, Cent. Dig. § 575; Dec. Dig. ⇨172.]

[This case is also cited in *Barnwell v. Marion*, 54 S. C. 223, 32 S. E. 313, and distinguished therefrom, and in *Moseley v. Hankinson*, 22 S. C. 332; *Stallings v. Barrett*, 26 S. C. 477, 2 S. E. 483; *Moore v. Scott*, 66 S. C. 292, 44 S. E. 737, as to parties.]

Before Wardlaw, Ch., at Lancaster, June, 1855.

This case was heard on exceptions to the report of the commissioner. The report is as follows:

The complainants are the grand-children of John Harris, Sr., who departed this life testate in Mecklenburgh County, N. C., in the year 1840. The second clause of his will is as follows:

"I give and bequeath to my dearly beloved daughter, Sophia S. Moore, and her bodily heirs, all that property which I have let her have, viz: One horse and saddle, two cows and calves, household and kitchen furniture, valuation in all amounting to one hundred and fifty-three dollars; likewise, one negro girl, seven hundred dollars, to be in no wise the property of Moses Moore, her husband, but said Daphna, and her increase,

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to go to said Sophia's children at \*her death." A subsequent clause is as follows: "This is to make known that each one that is left or named over four hundred dollars has given their receipts for the overplush, which receipts stands good against them, and to be throwed into the balance or common stock of my property, and to be divided as follows, viz: Each one that has not been named four hundred dollars to be made up to that amount."

The will bears date February 17th, 1840, on the same day Exhibit D. is dated, and reads as follows:

"This is to certify that I, Sophia S. Moore, have received four hundred and fifty-three dollars, which I promise to pay back to the common stock over an equal division, as witness my hand and seal, February 17th, 1840."

Sophia S. Moore.

Mrs. Sophia S. Moore was then the wife of Moses Moore: she departed this life shortly after her father, the testator. The defendants were appointed executors, both of whom qualified. On the 28th of October, 1841, shortly after the death of Mrs. Moore, the defendant, Thomas O. Hood, was appointed

ed by the Court of Pleas and Quarter Sessions, for Mecklinburg County the guardian of the complainants and their sister Louisa and brothers William and Richard, and entered into bond with the defendant, John H. Hood, as surety. He took possession of the slave Daphna, and hired her out for the years 1842, 1843, 1844, and 1845, inclusive. In that time she had five children, three of whom had died; at the October term, 1845, of the Court for said county, he applied for a sale of Daphna and her two surviving children, Hannah and Mosely, stating that "it is difficult to hire at any profit but have been an expense to the owners; that to keep said negroes and be compelled to hire them out would be an injury to the said infants and be the worse for keeping, and that the interests of the infants would be materially and essentially promoted by the sale of said negroes and the money loaned out at inter-

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est." An order of sale was \*made that the guardian sell on a credit of six months with bond and approved security. At the next term, January, 1846, the sale was reported to have been made 10th December, 1845, viz:

Daphna and her infant child for.....	\$350 00
Hannah, a small girl child, (child of Daphna) .....	160 00

Making total sales .....\$510 00

which report was confirmed.

On the 17th January, 1848, the final return of the executors of the testator was made to the county Court of Mecklinburgh, or rather a settlement of the estate of testator with his executor, so termed by the paper itself, Exhibit F., of defendants' answer, was made by two magistrates of the county, appointed by the Court; and this, according to the testimony of F. H. Maxwell before the commissioner, and who was one of the magistrates composing the committee (so termed) who made the settlement in question, is the mode of settling estates and the accounts of executors in North Carolina. In that settlement the receipt of Sophia S. Moore, of the 17th February, 1840, for four hundred and fifty-three dollars is included among the assets of the estate and regarded as a debt due to testator. The executors are charged with the same including the interest amounting to six hundred and forty-five dollars and fifty-two cents. On the 3rd November, 1848, Thomas O. Hood, guardian, paid to John H. Hood, executor, six hundred and one dollars. The receipt is as follows: "Received of T. O. Hood, guardian of the minor heirs of Sophia S. Moore, six hundred and one dollars, it being her receipt in her father's estate, or an overplus specified by his will." This latter sum is no doubt the sales of the negroes, five hundred and ten dollars and interest, for the testimony of Maxwell is that the defendant, Thomas O. Hood, under advice of counsel, paid over the five hundred

and ten dollars and interest, proceeds of sale,

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to John H. \*Hood; at first he refused, but consulted counsel, who advised him he had it to do, that he Thomas O. Hood, as one of the executors, was bound to account for it, as it was in his hands as guardian. This, Mr. Maxwell states, did not pay the six hundred and forty-five dollars and fifty-two cents (the receipt of Mrs. Moore four hundred and fifty-three dollars and interest) charged as assets of estate by seventy-one dollars and seventy-one cents, which the committee gave credit to executors for, and styled as error in Sophia S. Moore's receipt in estate. He further states all the legatees did not receive four hundred dollars; one of them, Narcissa's share, was three hundred and eighty-six dollars, and the seventy-one dollars was taken therefrom, leaving three hundred and fifteen dollars as her net share of the estate of her father; she died, and defendant, Thomas O. Hood, administered upon her estate; her next of kin were the children of testator, and entitled to her estate.

At June term, 1854, it was referred to the commissioner to inquire and report the amount of the estate of the wards, John Moore and Mary Moore, in the hands of their guardians; and to state the accounts between them and report any special matter he may deem necessary, all equities between the parties being reserved.

Exhibit A. accompanying this report shows the manner in which the commissioner has stated the account. The hire of the negroes to 1st January, 1846, does not meet the expenses of the negroes and the payments made by the guardian on their account, and the shares of complainants in the estate of their deceased aunt Narcissa Hood, is so small that there will still be a small balance due the guardian after deducting the expenses and payments on account of the negroes, and the payment by the guardian to the complainants.

Whatever estate the plaintiffs may have, arises from the sale of the negroes, Daphna and her two children. The sale by the guardian has been impeached, but not in

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my opinion \*successfully, so far as regards the legal authority of the guardian to sell. The result shows it was a most unfortunate and injudicious sale for the wards of the guardian. It occurred at a time when property was extremely low, so much depreciated that the aggregate sales of Daphna and her two children did not near equal the valuation placed on Daphna alone in 1840 by the testator, neither did the sales equal the excess and interest for which Sophia Moore had given her accountable receipt to testator. The consequence is, that if the guardian was authorized in paying that sum and interest, the wards have no estate whatever; their estate has been absorbed by the depreciation



in value of the negroes from February, 1840, to December, 1845, the time of sale; the difference between the valuation of the property given by testator to Mrs. Moore, and the sale by the guardian, is all the estate the wards have and is wholly imaginary and ideal. However injudicious I may regard the sale, in my judgment, it cannot be set aside. The authority to sell emanated from a Court of competent jurisdiction. It was made by the guardian under that authority at public outcry after four weeks' notice, at a public place, and for the highest bid that could be had, when several were bidders. The negroes were bought by a speculator in that kind of property, there being three of that class of persons at the sale. The conduct of the defendant, Thomas O. Hood, too on that occasion was fair; for the witness,

— Philips, who was the auctioneer, states that the woman and infant were sold together, and the oldest child by itself, and some persons thought they ought not to be separated; the guardian replied, "he must sell so as to git the most." It was alleged as a reason for the sale, that the guardian was pressed by his creditors, and needed the money; the testimony will not sustain the charge; the purchaser, (Hamilton) was a stranger, and could not give the security, and paid the money, which Hood at first refused to receive, but upon the advice of Alex-

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ander, his father-in-law, and Mr. Phillips, the auctioneer, he took the cash, deducting the interest. The testimony of R. L. Hood, Perry Bails, W. J. Culp, Potts B. A. Culp, and M. Culp, some of whom were familiar with his affairs, is that he never was pressed by judgment creditors. Messrs. Sembler & Moore speak of rumors that he was pressed for money about the time of sale and his relief afterwards.

The negroes at the sale brought \$510; in the opinion of Mr. Phillips, the auctioneer, R. L. Hood and Perry, it was their value. Phillips and R. L. Hood's description of the negroes, and their character, make them very unsaleable; the woman had bad teeth, feet cracked-open, frost bitten, sleepy and sluggish; the infant sickly, and looked as if it would not live. The two Messrs. Semblers, and Mr. Moore, (the father) who had the negroes in possession several years, testify to none of these unsaleable qualities, in their opinion they were worth at the sale from one thousand dollars to eleven hundred dollars.

The complainants, John Moore and his sister Eliza, one of the wards, and not a plaintiff, and Moses Moore, the father, were present at the sale, and, unfortunately, forbid it, because they were unwilling that the negroes should be sold, and because they thought the guardian had no legal authority to sell. I have no doubt this contributed in some degree to chill the bidding and injure

the sale, notwithstanding the guardian said he had "an order from Court and would give a good right." My experience is that any objection, however trivial, injures a sale, unless explained by some person in whom the bidders have confidence; the probability of purchasing a law-suit is a bug-bear to many, and has a decided tendency to chill competition with persons who attend a sale to buy for their own uses; but whatever effect it may have had, it was the indiscretion of complainants, and not the fault of the guardian. The result shows the sale a very injudicious one, and had the guardian acquired

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any benefit beyond the \*price for which the negroes sold, five hundred and ten dollars, I should hold him accountable; but for the reasons already assigned, I am of opinion the sale must stand, and the guardian's account accordingly, provided that the Court upon the equities reserved, should hold he was not authorized in paying the proceeds of said sale, upon the accountable receipt of Sophia Moore to executors of John Harris Hood. If the Court should so decide the guardian, Thomas O. Hood, and surety, John H. Hood, should pay to John Moore the one-fifth thereof, one hundred and two dollars, with interest at six per cent. from 10th June, 1846, with a credit of one dollar and six cents, February 3rd, 1851, and to Mary Moore the like and same amounts, with like interest, with a credit of four dollars and eighteen cents, January 17, 1851. Assuming that the guardian is liable to account in this jurisdiction, the inquiry, in the opinion of the Commissioner, depends entirely upon the question whether or not the guardian was authorized to pay the four hundred and fifty-three dollars receipt given by Sophia Moore, 17th February, 1840, to the testator, and the interest thereon to his executors. If he was, it absorbs the whole estate in his hands, as guardian.

Mrs. Moore at the time she gave the receipt was a feme covert, and it was objected to on the reference, and nearly all the Exhibits with defendant's answer, were office copies of papers relating to the estate of the testator, and the sales of negroes, which were objected to on the reference by complainants as ex parte, and not legally certified; they were certified by the Clerk of the County Court and presiding magistrate, and their signatures, as such, proved by T. H. Maxwell, who was examined before the Commissioner. In making this report I have overruled the objection and received the same in evidence, believing, as this case comes from another jurisdiction, that the papers were sufficiently authenticated, and believing too that they must be received to a proper and correct investigation of the cause.

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\*The "equities between the parties" are reserved, one of which the Commissioner re-

gards as the legal effect of the payment by the guardian of the receipt of four hundred and fifty-three dollars and interest, of Mrs. Sophia Moore, dated 17th February, 1849; when that point is decided, he believes his statement of the accounts will enable the Court to make its decree between the parties.

It may be that the Commissioner has trespassed upon some of the "reserved equities," but he respectfully submits that to make a report which would be intelligible upon the accounts, he could not do less than decide the questions herein reported. It was assuredly not his desire to travel into the province of the Court and interfere with questions not referred.

The defendants excepted to the report of the Commissioner on the ground:

Because the pleadings raise the question, whether the Court can entertain jurisdiction of the matters in dispute, and assuming that the guardian is liable to account in this jurisdiction, the Commissioner has erred, in encroaching upon the prerogative of the Chancellor, and trespassing upon the equities reserved, in reporting that he is of opinion that the guardian, Thomas O. Hood, and surety, John H. Hood should account and pay to John Moore, the one-fifth of the proceeds of sale of negroes, one hundred and two dollars, with interest at six per cent., from 10th June, 1846, with a credit of one dollar and six cents, February 3, 1851; and to Mary Moore, the like and same amount, with like interest, with a credit of four dollars and eighteen cents, January 17, 1851. Whereas he should have reported—the guardian is not liable to account, having no estate of the wards in his hands, it having all been absorbed in payment of a debt of four hundred and fifty-three dollars, and interest due the estate of John Harris Hood, deceased.

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\*The Complainants also excepted to the Commissioner's report;

1. Because the Commissioner should have reported in favor of the complainants, the value of the slaves at the time of the sale, without reference to the order to sell, as that was ex parte and extra-judicial.

2. Because the negroes sold far below their intrinsic value, and as the complainants were minors, the defendant, Thomas O. Hood, as guardian, should have stopped the sale, or bid in the negroes, for the benefit of his wards, the complainants.

Wardlaw, Ch. This case is presented for judgment on exceptions to the Commissioner's report.

That report sufficiently states the pleadings and facts, and is referred to as a substitute for any statement by the Court.

The exception of the defendants repeats the objection raised in the answer to the jurisdiction of the Court in the case. The bill is filed by wards for account against their guardian and his surety, and the objection

implies that because the guardian was appointed and gave bond in North Carolina, there is no remedy against him without the jurisdiction of that State. If this objection should be sustained, defaulting trustees might always secure immunity for their misconduct by fleeing from the territorial jurisdiction within which they assumed their trusts. A doctrine cannot be true which is followed by such erroneous results. Nothing is perceived in this case to restrict the general jurisdiction of the Court in matters of account. The exception further complains that the Commissioner exceeded his authority in expressing opinions on the equities reserved for the determination of the Court; but the Commissioner has not wandered from the course of his duty, and the Chancellor is thankful for all the light he has shed upon the case.

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\*The plaintiffs' exceptions insist that the defendants should be held liable for the full value of the slaves, with interest from the date of sale. The Commissioner affirms the sale "although most injudicious and unfortunate in its results to the wards," on the grounds, that the personal conduct of the guardian about the sale was fair and that he made the sale by authority of a Court of competent jurisdiction. The conclusion of validity of the sale does not follow from these premises when properly understood. The evidence justifies the Commissioner in saying that the guardian acted fairly in making the sale, and that the Court of Pleas and Quarter Sessions for Mecklinburg County, North Carolina, which granted the order for sale, had jurisdiction of the subject. But the application for sale was ex parte, the guardian, without bringing his wards as parties before the Court. With all respect and comity for this foreign inferior tribunal, I cannot give superior efficacy to its orders over that which should be given in like case to the orders of this Court of general jurisdiction. Yet in *Sollee v. Croft*, 7 Rich. Eq. 43, it was adjudged that orders obtained from the Court of Equity on the ex parte petitions of a trustee for the sale of his infant beneficiary's estate, did not estop the beneficiary and had little other effect than the private sale of the trustee would have. The private sale by a guardian of a slave belonging to his ward is voidable at the option of the ward.—(*Bailey v. Patterson*, 3 Rich. Eq. 156.) And a sale made by him under a judicial proceeding in which his ward was not represented is in the same category.—*Sto. Eq. Pl.* 207, 208. In the present case the Commissioner reports that the slaves brought an inadequate price, because the friends of the wards forbade the sale and denied the guardian's right to sell; and I think those friends did not interpose improperly, and that the guardian must be held to have taken the risk on himself that the slaves would bring a



full price under the circumstances of sale, and that he is accountable for their full

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value. The negroes were \*sold to a negro trader, and have been eloiigned, so that it is now impossible for the plaintiffs to pursue the property itself.

There is another point in the case of some difficulty. The grandfather of plaintiffs, under whom they claim, gave by his will the slaves in question, and other property of the aggregate value as assessed by him of eight hundred and fifty-three dollars, to the mother of plaintiffs for life, and at her death to her children; and after bequests to other children of unequal values, as appraised by testator, asserted that his legatees had given to him receipts respectively for so much of the value of their legacies as exceed four hundred dollars, and prescribed that these receipts should stand good and the surplus be carried into hotchpot that all of his legatees might each receive four hundred dollars. I state the substance and not the words of the will. Sophia S. Moore, mother of plaintiffs, and then the wife of Moses Moore, acknowledged in writing that she had received four hundred and fifty-three dollars, above her equal share of four hundred dollars, and promised to pay it to the common stock, for the purpose of producing equality among the legatees. In the settlement of the affairs of the estate it was found necessary that this sum of four hundred and fifty-three dollars, should be paid, in order to make the share of each legatee equal to four hundred dollars, and the guardian of the plaintiffs, the mother being dead, did pay a portion of this sum to the executors of testator, under the advice of counsel, from the proceeds of the sale of the slaves, for equality of partition. Was this payment proper? It is objected that the accountable receipt of Sophia S. Moore, like her promissory note, is void, because she was a married woman; but this as a narrow and inconclusive view of the subject. The receipt is offered not as evidence of a contract on her part, but merely as corroborating the statement in the will that such receipts had been given, and exhibiting the sum for which the legacy to her and to her children was encumbered. Undoubtedly a testator may

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charge the estate given to one \*legatee with a sum of money to be paid to another; and this is the whole substance of the transaction in question. He might refer, if he chose, to the declaration of an idiot, or any other person incapable of contracting as ascertaining the sum to be charged. Besides this legacy was accepted, and this receipt was given, with the knowledge and without the dissent of the husband of the married woman. I consider this payment by the guardian to be valid. It is ordered and decreed that the report be re-committed to the Commissioner,

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and that he correct the same by charging the defendants with the true and full value of the slaves at the time of sale, and interest thereon, from the day of sale (instead of the price bid), and allowing credit to the guardian, for the sum paid to the executors of J. H. Hood, for equalizing the share of Mrs. Moore and children; and that in other respects the report be confirmed.

The defendants appealed.

1. Because the Chancellor erred in charging defendants with the true and full value of the slaves, at the time of sale, and interest thereon, from the day of sale, instead of the price bid.

2. Because the order for sale of the slaves was granted by a Court which had jurisdiction of the subject; and the sale was made in accordance with the laws of that jurisdiction; and the Chancellor should have decreed it to be a good and valid sale.

3. Because it is respectfully submitted, this Court cannot entertain jurisdiction of the subject; and that defendants are not liable to account herein.

Williams, for appellants.

Clinton, contra.

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\*The opinion of the Court was delivered by

WARDLAW, Ch. The objection to the jurisdiction of the Court, presented by the third ground of appeal, lacks even plausibility. The suit is for account by wards against their guardian and his surety, who had also been executors of the estate from which the property of the plaintiffs now in controversy was derived; and account is one of the most general heads of jurisdiction in this Court, and most commonly exercised, as in the present instance, in suits by beneficiaries against trustees. It is immaterial that the trustee here was invested with his powers and duties by a foreign tribunal; for surely his fiduciary relation is not terminated by removal of himself and the trust funds beyond the limits of the State in which he was appointed. It would disgrace the Courts of any civilized country to afford immunity to a trustee who fled to their jurisdiction that he might embezzle the funds committed to his trust. This suit is not on the bond of defendants as the git, such as an action of debt which can be prosecuted only in the Court of Common Pleas: it is a bill for account, in which the bond is used merely as collateral evidence of the defendant's liability.

The second ground of appeal affirms that the order for sale of the slaves was granted by a Court in North Carolina which had jurisdiction of the subject according to the laws of that State; and that the sale was made according to these laws, and should be treated as valid by foreign tribunals.

It sufficiently appears, that the Court of

Pleas and Quarter Sessions which granted this order has jurisdiction of the subject under the law of North Carolina; but no proof is offered that by the procedure of that Court a guardian on his single petition can obtain lawful authority to sell the slaves of his ward, nor indeed that the law of that State affecting the questions of this case differs from the law of South Carolina. If such proof had been made, we might have recognized and followed the law and procedure

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loci contractus, but \*in the absence of such proof we are left to the lights within our territory, and must decide the case as if the order had been granted by a Court of this State of competent jurisdiction. It is fairly presumed that States deriving their institutions from a common origin proceed on the same principles of adjudication and attain the same conclusions, unless changes by legislation or decisions be shown. *Reid v. Lamar*, 1 Strob. Eq. 38-9. Putting aside this fact of common origin, every Court necessarily pursues its own rules and doctrines for the interpretation and execution of contracts and judgments, although made or pronounced in a foreign country, where the evidence exhibits no difference concerning the subject in the law of the foreign country. No other mode of decision is rational and practicable.

In equity the general rule is that all persons, whether adults or infants, shall be made parties to a suit who are materially interested in the object of the suit and the questions to be therein decided. As between trustees and beneficiaries all of both classes are necessary parties generally, although an exception is tolerated in suits by beneficiaries where one of several trustees is pursued for his particular breach of trust; and exceptions are allowed in suits by trustees, first where the object of the suit is merely to obtain from some third person possession of the trust property, and it is indifferent to the equitable claimants whether the trustees succeed or fail, and secondly, where the trustees fully represent the beneficiaries. The last exception is the only one requiring consideration in this case. The most familiar instance of this exception is in suits by or against executors and administrators concerning the personalty, as to which they are by law the owners and the representatives of the legatees and distributees; and usually in such suits the rights of the beneficiaries are held to be sufficiently represented and their interests protected in the names and persons of their said trustees: *Sto. Eq. Pl.* sec. 207, 208; *Calvert on Part.* 8, 20, 207, 315.

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\*The rule requiring beneficiaries to be parties where they are interested in the questions for adjudication is applicable although the trustees have the legal title, for trustees

are not the real owners of the trust estate, and are rather agents of the beneficiaries for the execution of certain trusts, and it is among their duties to require the real owners to be brought before the Court. *Holland v. Baker*, 2 Hare, 624; 3 Hare, 68. Of course the rule is more vigorously exacted where trustees have not the legal title of the trust estate. It was adjudged in *Bailey v. Patterson*, 3 Rich. Eq. 156, and recognized in *Long v. Cason*, 4 Rich. Eq. 60, that a guardian has not the legal title of his ward's chattels and that his sale of them is voidable at the option of the ward. Long ago it was decided in *Inwood v. Twyne*, Amb. 41; 2 Eden 148, that a guardian could not change the character of his ward's estate, without the authority or sanction of the Court; and this doctrine was recognized in *Capehart v. Huey*, 1 Hill, Eq., 409. In my opinion alienation by a guardian of his ward's chattels, under an order obtained on his ex parte application, is not materially distinguishable from his private, self-moved alienation. On such application the Court does not properly pronounce any judgment, and simply expresses a professional opinion, assuming the truth of a one-sided statement of facts which may mislead. Suppose one formerly guardian should obtain an improvident order from the Court on his single petition for the sale of his late ward's chattels, after the ward had obtained full age, upon some showing, apparently strong, that a sale was necessary for the convenience of settlement, or other reason, none would contend that the owner would be barred by the plea of *res judicata*; and surely infants, a class peculiarly within the protection of the Court, are entitled to as benignant relief as adults in the same circumstances. In the case supposed, the fiduciary relation would not be terminated until full and fair settlement between the

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guardian and \*adult ward; and the case of an infant seems to be stronger where trust and disability concur in his behalf.

It is argued that the order of the Court in this case is in effect a mere direction to a trustee concerning the management of his trust, and that in such applications for direction and advice guardians sufficiently represent their wards. This reasoning proceeds on misapprehension of the facts. Management of an estate implies its administration in its existing state; but the order here affected the corpus of the estate and a change of its nature. Authorities have already been cited to show that a guardian is not legal owner and cannot change the nature of his ward's estate without judicial leave obtained in a regular suit where the real owner may be heard. Again, the Court owes the duty of determining the rights of litigants when presented by regular pleading, and has the power of compelling parties to execute its decrees; but it is under no obligation to be-



stow professional counsel on those who may solicit advice, however earnestly, in violation of the rules of practice, and cannot enforce its opinions upon persons unrepresented in a controversy. Trustees of charities perhaps may obtain directions from the Court without much nicety in their forms of application: but ordinary trustees have no privilege not belonging to suitors generally.

The practice of this Court in South Carolina, on this subject of parties to suits, was not formerly so strict as that which now prevails. In *Spencer v. Bank*, Bail. Eq. 468, land had been sold for payment of the debts of an intestate, under a decree of this Court obtained on the ex parte petition of the widow of intestate, she being a distributee, and the administratrix; and it was held that infant distributees were bound by this decree so far as the title of the purchaser of the land was involved. There were other important issues in this case, and the judgment has always been followed and approved so far as it decided that a master or commissioner is a proper substitute for the parties to make

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conveyances in partition, \*(which was the great point in controversy,) and so far as it decided that infants equally with adults are bound by a decree until it be reversed or vacated. It is very questionable however, whether, in the stricter procedure now pursued, an administrator would be recognized in this Court as adequately representing the heirs in a suit concerning the lands. As to personalty, he being the legal owner may be treated as representative of the distributees; but as to real estate he is representative only because the statute 5 Geo. II., c. 7, (2 Stat. 570,) makes lands like personalty liable in this State to the satisfaction of the demands of general creditors. In the construction of this statute, the Law Court determined (*Martin v. Latta*, 4 McC. 129; *D'Urphey v. Nielson*, Ib. n.) that the lands of a testator or intestate may be sold for his debts under a *fi. fa.* against his executor or administrator without making devisees or heirs parties to the proceeding by notice or otherwise, and although there might be personal assets sufficient to satisfy the debts. The doctrine of these cases has been much disparaged in subsequent cases, (*Hull v. Hull*, 3 Rich. Eq. 87, and cases there cited,) but not overruled; and it afforded the principal ground for the decision in *Spencer v. Bank*, on the point in question. This last case, rightly or wrongly decided, does not conclude the one under consideration, for the reasons, that there is a great difference, already discussed, in the power over the estate between an administrator and a guardian, that there and not here the controversy was with an innocent purchaser, and that more recent cases support the doctrine of the circuit decree now in question.

It is not intended to be intimated, that

the purchaser in this case could not have been successfully pursued if he and the slaves had been found within the jurisdiction. The sound view as to the protection of purchasers in judicial sales, is well expressed by Lord Redesdale, in *Bennett v. Hamill*, 2 Sch. & Lef. 577-8. "A purchaser may rightfully presume that the Court, before

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its order for sale, used the \*proper measures for the investigation of the rights of parties, and on such investigation properly decreed a sale, but he must see that the decree binds the parties claiming the estate, or in other terms that all parties to be bound are before the Court."

In *Boggs v. Adger*, 4 Rich. Eq. 408, it appears by the circuit decree, most of which is suppressed in the report, that Chancellor Harper, who delivered the opinion of the Court of Appeals in *Spencer v. Bank*, refused to make any order on the petition of an administrator to change the investment of infants' funds, although confessedly judicious, on the ground that the infants were not parties to the proceeding.

In *Sollée v. Croft*, 7 Rich. Eq. 43, it was held that orders for sale of the trust estate of infants, obtained on the ex parte petition of the trustee do not operate as estoppels of the infants. The reasoning on which the decree proceeds is, that it is plainly unjust and against equity that any claimant, legal or equitable, should be barred by the judgment in a controversy where he was not fully represented, nor permitted to assert his rights before the Court, and that infants should be represented by responsible next friends who have no adversary interests which might obstruct the full hearing of the infants' claims. This is a direct authority on the question. No distinction between that case and the present has been suggested except that there the trustee was himself the purchaser of the slaves sold. The slave Jim, and the hire of the slaves while in Pearson's possession, for which the trustee was charged, are not within this distinction; but passing by this, the purchases of the trustee had been expressly confirmed by the Court on his petitions, and the practical question of the case was whether the infants were so represented by the trustee as to be barred by the decrees and it was adjudged that they were not.

Judge Evans, speaking for the Law Court in *Wadsworth v. Letson*, 2 Hill, 277, says:

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"The decisions fully establish \*that where effect is attempted to be given to the judgments of another State, they are examinable so far at least as to inquire whether the defendant was a party to the proceeding; for by the laws of all civilized countries, no man is bound by a judicial proceeding where he was no party, had no notice and no opportunity of making his defence." See *Miller*

v. Miller, 1 Bail. 242; 6 Wend. 449. If the foreign Court recognized as a party the person sought to be charged here, effect would be given to that recognition although he may not have been made a party according to our procedure.

The second ground of appeal is dismissed.

On the first ground it is deemed unnecessary to make additional remarks.

It is ordered and decreed that the circuit decree be affirmed, and the appeal dismissed.

JOHNSTON and DARGAN, CC., concurred.

DUNKIN, C., dissentiente.—I have not been able to concur in so much of this judgment as renders the defendant liable on account of the sale made in 1845. It is not a question of title. The plaintiffs do not proceed against the purchasers of the property. The defendant is made liable for breach of duty as guardian. Being of opinion that it would be for the benefit of his wards to change the investment of their property, but conscious that this could not be properly done without the sanction of the Court, he made application to the appropriate tribunal for that purpose. An order of the Court was made in October Term, 1845, that the guardian sell the slaves (a woman and two children) on a credit of six months, &c., and report his sales. The guardian, at January Term, 1846, reported his sales which was confirmed by the Court, and the fund has been properly accounted for. The Commissioner, to whom this cause was referred, has reported that the sale was in all re-

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spects fair and open, and that, if \*the negroes brought less than their value (about which there is much discrepancy in the evidence,) it was from causes with which the guardian had no connection. He is made liable by the decree solely on the ground that the minors do not appear to have been parties in the petition.

Until within a few years past it was not the practice when a guardian applied to the Court either for instruction, or for a change of his ward's personal estate, to make his ward a formal party before the Court. Latterly he is usually made a party; and this is done by appointing the crier of the Court, or some other such person, his guardian ad litem, who signs his formal answer submitting his rights. The appointment is commonly made by the Commissioner, and it is very difficult for the Court to do more. After all, the proceeding is necessarily very much under the direction of the guardian. The Court, and its officer, is presumed to examine the evidence as to the expediency of the proposed change of investment,—and this is equally done whether the proceeding be in the name of the guardian

alone, or of the guardian and the minor suing by his prochein ami (the guardian), or by the guardian against a formal defendant, the guardian ad litem. As I have said, the case before us is not a question of antagonistic title, but simply whether the guardian committed a breach of duty in changing the investment of his ward's property under the sanction of a Court of competent jurisdiction because it does not appear that his ward was otherwise a party than as represented by his guardian in chief. In the absence of any proof of negligence, or want of good faith, or of improper advantage to himself, on the part of guardian I am not aware of any case in which he has been held responsible where he has sought and obtained the previous sanction of the proper Court, and I am not willing, against the recommendation of the Commissioner, to render him the victim of what I regard as a very pardonable omission of a merely formal act.

Appeal dismissed.

#### 9 Rich. Eq. \*331

\*S. S. FARRAR & BROTHERS v. H. G. HASELDEN and Others.

(Columbia. May Term, 1857.)

[Partnership ⚡187.]

H. G. being member of a firm, removed from the State, and, after his removal, the creditors of the firm brought suits against it, making H. G. a party under the Act of 1792. Judgments were recovered, but the partnership and the members in this State being insolvent, the fi. fas. were returned nulla bona:—*Held*, that the creditors of the firm might file a bill to subject to their claims certain funds in the hands of administrators and the Commissioner in Equity, to which H. G. was entitled as a distributee, and also certain other funds in the hands of his attorney in fact.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 340, 342; Dec. Dig. ⚡187.]

[Creditors' Suit ⚡11; Descent and Distribution ⚡157.]

Where an absent debtor is entitled as distributee to funds in the hands of an administrator or the Commissioner in Equity, as such funds cannot be reached by process at law, a bill in equity will lie to subject them to the claims of his creditors.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. § 49; Dec. Dig. ⚡11; Descent and Distribution, Cent. Dig. § 530; Dec. Dig. ⚡157.]

[Partnership ⚡187.]

Where one of several members of a firm removes from the State, equity has jurisdiction to subject his individual estate to the claims of the creditors of the firm—such estate not being bound by any judgment at law which the creditors might recover against the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 340; Dec. Dig. ⚡187.]

[Creditors' Suit ⚡30.]

Where a bill is filed to subject the estate of an absent debtor to the claims of his creditors, all the creditors should be called in by notice.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. § 126; Dec. Dig. ⚡30.]



Before Dargan, Ch., at Marion, February 1857.

This case will be understood from the decree of his Honor, the Circuit Chancellor, which is as follows:

Dargan, Ch. The bill in this case was filed to subject certain funds of defendant, Hugh G. Haselden, in the hands of defendant, C. D. Evans, as Commissioner in Equity for Marion District, arising from sales made under the order of this Court, of the estate of the late Mrs. Sarah Godbold, of whom the defendant, William Evans, was administrator; and also of the estate of the late William Haselden, of which the defendant, H. G. Haselden, was distributee in right of his deceased father, John Haselden, of whom

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the defendant, \*James Haselden, was administrator; and also to subject any funds in the hands of either administrator to which H. G. Haselden was entitled, as well as certain funds and choses in action which were in the hands of the said defendant, C. D. Evans, as attorney in fact of the said H. G. Haselden, who had removed from, and resided out of the State, at the filing of the complainants' bill.

The complainants are judgment creditors (and were so at the filing of the bill in July, 1855,) of the firm of Moody, Finklea & Co. The firm of Moody, Finklea & Co., consisted of Josiah W. Moody, H. G. Finklea and H. G. Haselden, the defendant. After the dissolution of the firm, and after the said H. G. Haselden had left the State, actions were commenced in the Court of Common Pleas for Marion District, against the firm, by complainants, on notes of the same, in which the parties, Moody and Finklea, were served with process, and the defendant made a party by a suggestion on the record, under the Act of the Legislature passed in 1823, that he was out of the State. Judgments were obtained against the firm in this way, upon which writs of fieri facias were issued, and returned by the sheriff "nulla bona."

J. W. Moody and H. G. Finklea were made parties, defendants, to the bill, and an order pro confesso had been taken against them, as well as the two administrators, Wm. Evans and James Haselden.

The bill charged the recovery of their judgments as above mentioned, the total insolvency of J. W. Moody and H. G. Finklea, as members of the firm in this State, as well as of the firm of Moody, Finklea & Co., and that the assets of defendant, H. G. Haselden, were only available to satisfy their debt, and that as to any part of said assets, the complainants had no remedy at law, nor could they reach the same by any process of the Court of Common Pleas, and prayed that the funds respectively named be paid over to

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\*them, unless funds of the partnership should

be discovered by the firm of Moody, Finklea & Co., to pay their debt.

The answers of C. D. Evans and H. G. Haselden denied the jurisdiction of the Court until complainants had exhausted their remedy at law, by taking the persons of Moody and Finklea into custody—the defendant, Haselden, alleging that there was, or ought to be, enough realized from the partnership to pay the debts of the firm, and that defendant, Moody, was in possession of a tract of land.

The answer of C. D. Evans stated that in respect to the funds in his hands, as attorney, the complainants had their remedy at law; that the same were already attached in his hands by individual creditors of said Haselden, &c.

It was proven satisfactorily to the Court that both Moody and Finklea were utterly insolvent—judgments to a large amount were recovered against them, and many executions older than complainants' had been returned nulla bona by the sheriff. Finklea had taken the benefit of the prison bounds Act in the spring of 1856, and had left the State, and Moody is now an applicant for the benefit of the insolvent debtor's Act. He had been sold out by the sheriff, and the land he lived on had been bought by one Joan H. Moody, without reaching complainants' judgments. It further appeared that the attachment, on which the defendant, C. D. Evans, was made garnishee of H. G. Haselden, had been dissolved by Haselden on putting in special bail to the action since the filing of the bill; that Haselden returned from Florida, where he had removed with his family, and lived at the filing of the bill, and had lived in the District of Marion since the fall of 1855.

The Court is of opinion that complainants have made out a case for relief in this Court.

As to the funds in the hands of the Commissioner in Equity, or in the hands of the administrators, Wm. Evans and James Haselden, they could not proceed by attachment at law, and could reach it by no process of a Court of law.

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\*As to the funds in the hands of C. D. Evans, as attorney of said Haselden, it does not appear how the complainants are in a better situation by the process of the Court of Common Pleas.

The firm, of which he was an absent partner, was sued to judgment under the provisions of the Act of 1823, which provides that in a case like this, the judgment shall be effectual against the parties resident in the State, who had been served, and against the partnership property, but shall not be binding upon the absent partner, who has not been served. It was a partnership debt, and the Court is at a loss to perceive how the complainants could reach the funds of the absent partner by attachment or other process of the Court of Common Pleas.

It is, therefore, adjudged and decreed that complainants are entitled to be paid out of the funds which were in the hands of defendant, C. D. Evans, as Commissioner in Equity, and as attorney for said Haselden, at the time of filing said bill, but that the said Evans is entitled to retain for any sums due him by said Haselden at that time, for advancements or otherwise, but that he is not so entitled for payments made to him or his use after the filing of the bill, as he was then fixed by notice. It is also adjudged that complainants are entitled to any amounts due the defendant, H. G. Haselden, in the hands, power, or control of the said Wm. Evans, administrator of Sarah Godbold, and James Haselden, administrator of John Haselden, at the filing of the bill, to which said H. G. Haselden was entitled as distributee, or otherwise as grandson of Sarah Godbold, or son of John Haselden, deceased.

It is, therefore, ordered and decreed, that it be referred to C. W. Miller, Esq., special referee, to inquire and report the amount of funds and choses in action in the hands of the defendant, C. D. Evans, both as Commissioner in Equity, from the proceeds of sales of

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property made under the order \*of this Court, as described in the pleadings, and also as attorney of defendant, Hugh G. Haselden which were coming to and due said Haselden at the time of filing of complainants' bill, allowing said Evans all discounts and payments prior to the filing of the bill. That the special referee also report the amount due the said H. G. Haselden by the defendant, Wm. Evans, administrator of Sarah Godbold, and James Haselden, administrator of John Haselden, deceased, at the time of filing of complainants' bill or service, or the amounts coming to the said H. G. Haselden from either of said administrators.

It is further ordered that the said special referee do report the amounts due upon the judgments of complainants, and of James Hazlit and C. C. Morse against Moody, Finklea & Co.

The defendants, Hugh G. Haselden and C. D. Evans, appealed and moved this Court to reverse or modify the decree for error in the following particulars, to wit:

1. That, upon an issue made by the pleadings, between the complainants and this defendant, Haselden, as to the ascertained insolvency of the resident partners in the firm of Moody, Finklea & Co., his Honor admitted in evidence the schedule of Josiah W. Moody, filed upon his application for the benefit of the insolvent laws.

2. That before the complainants were entitled to the aid of the Court, in order to subject the equitable estate of this defendant, Haselden, to the payment of the debts of the firm of Moody, Finklea & Co., they ought to have exhausted all remedies furnished by the process of the law courts against the part-

ners who were resident within the State, by service upon whom judgment had been obtained against the firm at law.

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\*3. That the complainants were not entitled to the aid of the Court, in order to subject to the payment of their claims against the firm of Moody, Finklea & Co., the choses in action of the defendant, Haselden, which had been deposited with the defendant, Evans, as his attorney for collection.

4. That a part of the funds of the defendant, Haselden, in the hands of defendant, Evans, as his attorney, having been by Haselden appropriated to the payment of his individual creditors, who had a superior equity to be satisfied thereout, the decree should have protected the defendant, Evans, to that extent, against the claims of the creditors of the firm on the funds in his hands as attorney.

Inglis, for appellants.

Harilee, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. Where a debtor is absent from this State, having property within the State which cannot be reached by the ordinary process of law, it has been a practice, much older than *Kinloch v. Meyer*, (Speer Eq. 427), to grant relief in this Court as against such property, to the creditors of such absent debtor. In such case he may have taken no steps to recover, or establish, his demand at law, because the law afforded no process by which he could make his debtor a party in Court. Attachment will not lie against executors or administrators in possession of funds of the absent debtor; and, in *Bank of the United States v. Broadfoot*, 4 McC. 30, it was ruled that attachment could not be maintained where any member of the co-partnership was resident within the State and amenable to the ordinary process. In such case the Act of 1792, had provided a

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legal remedy; and the Act \*of 1823, referred to in the decree, was to give a remedy against joint contractors, who were not partners, and, therefore, not within the purview of the Act of 1792.

In the recent case of *Gadsden v. Carson*, (MSS. Charleston, January, 1857 [9 Rich. Eq. 252, 70 Am. Dec. 207]), the Court had occasion to consider the relative rights of individual and co-partnership creditors. The prior right of the co-partnership creditor to be paid out of the co-partnership assets was there recognized, and it was declared that the right of the individual creditor extended only to his debtor's interest in the balance after the adjustment of the co-partnership accounts. It was further held that the co-partnership creditor was also a creditor of each member of the firm. Under such circumstances it may well be, that, upon the



familiar principles of this Court, one, who is only an individual creditor, might require the co-partnership creditor to look first to the co-partnership assets. The plaintiffs have prosecuted their demand to judgment at law against the co-partnership, and their execution has been returned nulla bona. This is prima facie evidence of a want of assets. The defendants do not aver that any co-partnership assets exist. The schedule of Moody, (one of the partners,) when arrested on a ca. sa. was only cumulative proof, and corroborating the presumption arising from the sheriff's return on the execution against the co-partnership.

Under the fourth ground of the defendant's appeal the Court is of opinion that the appellant is entitled to a modification and enlargement of the decretal order. In all the recent decisions upon this subject, viz: *Heath v. Bishop*, 4 Rich. Eq. 46 [55 Am. Dec. 654]; *Carlton v. Felder*, 6 Rich. Eq. 58, and *Brenan v. Burke*, Id. 200, the Court determined that in a fund, thus brought under the control of the Court, all the creditors of the absent debtor should be permitted to participate, and should have an opportunity to present and establish their demands. In both the latter cases it was held that the

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form \*of the original proceedings was not material, provided a proper notice was given to creditors prior to a final decree.

It is ordered and decreed that notice be published in the *Marion Star*, to the creditors of Hugh G. Haselden to present and establish their demands before the special referee, appointed in this case, within three months from the publication of said notice, and that the special referee report upon such claims or demands, (including that of defendant, C. D. Evans, for debts paid by him,) with leave to report any special matter; the decretal order of the Circuit Court is enlarged and modified accordingly, and in all other respects, the same is confirmed.

JOHNSTON and WARDLAW, CC., concurred.

DARGAN, Ch., absent at the hearing.  
Decree modified.

#### 9 Rich. Eq. \*339

\*REDDICK MOSELY v. JOHN M. CROCKETT, Administrator of T. W. HUEY.

(Columbia. May Term, 1857.)

[*Chattel Mortgages* ⇐6.]

M. gave H. a bill of sale of five negroes, and H. gave M. a bond, by which, reciting that he had taken from M. the bill of sale and hired the negroes back to him for twelve months, he bound himself to return "said negroes to M. whenever he pays me the true amount due me

as notes and receipts will show:"—*Held*, that this was a mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 35; Dec. Dig. ⇐6.]

[*Chattel Mortgages* ⇐296.]

The negroes were afterwards levied on in H.'s possession under a fi. fa. against M. younger than the mortgage, and purchased by H. who remained in possession about four years:—*Held*, that M.'s right to redeem was barred by the 15th section of the Act of 1712, 2 Stat. 587.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 583; Dec. Dig. ⇐296.]

Before Johnston, Ch., at Lancaster, June, 1856.

The facts of this case are stated in the opinion delivered in the Court of Appeals. The Circuit decree is as follows:

Johnston, Ch. This cause was heard on the Commissioner's report, and exceptions thereto on the part of the plaintiff, and the defendant, J. M. Crockett, and on the general equities of the parties which had been reserved.

The first exception of plaintiff is well answered by the report of the Commissioner, and is overruled. The plaintiff's second exception will be considered when I come to decide upon the general equities.

Defendant's first exception is overruled. The testimony well warrants the Commissioner in making the charge to which exception is taken.

Defendant's second exception is sustained. There was no satisfactory evidence that the plaintiff was entitled to a credit for the notes on Miller, either on the execution or the twelve hundred dollar note. The receipt which Huey gave for one of the notes expressly says the note was received in part

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\*payment of goods in Mosely's hands for sale. I must conclude these notes were transferred to Huey in payment of demands and liabilities, not connected with the execution or Mosely's note of twelve hundred dollars.

Defendant's third exception is sustained. There was no evidence that the notes given by Mosely—one for twelve hundred dollars, and the other for four hundred and ninety-four dollars and fifty-six cents, were connected together. On their face they appear to be separate and distinct demands; and each contains an acknowledgment of Mosely that he owed the amounts specified in them to Huey. Huey, by his assignment to Chamberlain & Bancroft, incurred no liability.

Defendant's fourth exception is sustained. There was no evidence to show what the consideration was of the note for twelve hundred dollars. By that note Mosely promised to pay the sum of money mentioned in it; and in the absence of all proof to the contrary, I must conclude he meant what he said. If any proof, or explanation, could have been given, as to the consideration of said note, it was the business of the plaintiff to have furnished it.

On consideration of the general equities of the parties, I am satisfied the plaintiff is barred under the Act of 1712 (2 Statutes at Large 587, § 15) from the redemption of the negroes, and an account for their hire. The two papers executed 22d January, 1846—the one by Reddick Mosely, and the other by T. W. Huey, must be construed together, and constitute a mortgage on the negroes therein mentioned, to secure the payment of fifteen hundred dollars, then due by the plaintiff to Thos. W. Huey. After condition broken, the negroes went into the actual possession of T. W. Huey, the mortgagee, and so remained for more than two years before the filing of the plaintiff's bill. Under the provision of the Act of 1712, the negroes vested in Huey, and the plaintiff is barred from their re-

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demption, and any account for their hire, and it is so adjudged and decreed. From the view which I have taken of the equities of the case, it follows that it is wholly unnecessary to go into any enquiry as to the value of the mortgaged negroes and their hire. The second exception of the plaintiff is therefore overruled.

The amount of the mortgage debt was included in and made part of the judgment for two thousand, two hundred and sixty-one dollars. The mortgage debt being satisfied by the vesting of the mortgaged negroes in Huey, Mosely is entitled to a credit on the judgment for said sum of fifteen hundred dollars, and interest thereon from 22d January, 1846, and it is so decreed.

The plaintiff, according to the principles of this decree, being entitled to credit on the judgment for the amount as stated, asks for an account of the balance due by him on the judgment, and of payments made by him thereon, and it is ordered that the Commissioner take an account of the amount due on said judgment after deducting the mortgage debt, and of the payments made thereon by plaintiff. Under this order the Commissioner is to inquire and report whether any payments that may have been made, were made on account of the mortgage debt included in said judgment or the other debt, part thereof, and how said payments should be applied.

The administrator of T. W. Huey claims an account from the plaintiff for the note of twelve hundred dollars mentioned in the pleadings. The Commissioner may inquire and report as to the amount of said note, any payment made thereon by plaintiff and the amount now due by plaintiff thereon. I conclude nothing as to the right of the representative of Huey to such accounting for said note, and equities of the parties as to this matter are reserved until the coming in of said report.

It is therefore ordered and decreed that the report be recommitted to the Commis-

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sioner, and that he restate the accounts be-

tween the parties according to the principles of this decree.

The plaintiff appealed.

Clinton, for appellant.

Moore, contra.

The opinion of the Court was delivered by Dargan, Ch. But little need be said in explanation of the judgment of the Court in this case, and that little will have relation to the character of the instrument, which is the subject matter of the controversy.

In the Commissioner's report, it is stated, that on the 22d January, 1846, the plaintiff executed to Thomas W. Huey, defendant's intestate, a bill of sale for five negroes, viz: Nelly and her four children, Grace, George, Carey, and Ransom, in consideration of the sum of fifteen hundred dollars. On the same day Huey executed to the plaintiff, an instrument called a bond, reciting, that he had the same day "taken from R. Mosely, a bill of sale for five negroes, viz: Nelly, Grace, George, Carey, and Ransom and hired the same to said Mosely for twelve months, binding himself, his heirs, executors and administrators, to return said five negroes, (if alive when called for,) to the said Mosely, his heirs or assigns, whenever said Mosely, or his heirs, or assigns, pays me the true amount due me, as notes and receipts will show."

The Chancellor who heard this cause on the circuit, held this instrument to be a mortgage; as it is, to all intents and purposes. Any conveyance of property to be held as a security for the payment of a debt, or the performance of any other contract, or covenant, is a mortgage whatever may be its form; whether the defeasance be expressed in the conveyance, or in another instru-

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ment collateral thereto; and in this Court, even though the defeasance or condition should rest entirely in parol. Whenever this distinguishing and predominant feature is stamped upon the instrument, either by internal evidence, or evidence derived aliunde, all the legal consequences follow, and all the doctrines of this Court apply to it as a mortgage. Subject to the essential principle that a conveyance of property to be held as a security, is a mortgage; transactions of this nature in other and subordinate respects admit of infinite modifications, as the parties may contract. In all cases, the right of redemption exists. In most cases, it is stipulated, that the mortgagor is to retain possession until a breach of the condition. In some instances, as in the present case, the mortgagee is to have the possession. The parties may, (as they do often) variously stipulate as to the application of the mesne rents and profits. And numberless minor conditions and covenants may be introduced into the agreement, and become binding upon the parties, as the law of the contract.

The possession of the property by the mortgagor, being consistent with the rights of



the mortgagee, is never a bar to his claim to have satisfaction of his debt out of it. But the possession of the mortgagee is sometimes a bar to the mortgagor's equity of redemption.

In this case, by the contract of the parties, the mortgagee was to have possession of the negroes, until called for by the mortgagor: when on paying the "true amount" of the debt, for which the negroes were mortgaged, the mortgagor was to have restitution of his negroes. The mortgagee then hired the negroes to the mortgagor at stipulated sums for their annual hire. Under arrangements like this, the negroes continued in the possession of the mortgagor for more than two years subsequent to the date of the mortgage.

In the meantime, Mosely the mortgagor had given to Huey, (the mortgagee,) a note for two thousand, two hundred and sixty-one dollars, bearing date 4th February, 1847,

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payable one day after date; and on 5th February, 1847, he confessed a judgment to Huey for the amount due upon this note: upon which confession, an execution was issued, and lodged with the sheriff, on 1st March, 1847. Also, one Laban Ferguson had instituted a suit against Mosely, recovered a judgment, and sued out an execution against him, which execution was lodged with the sheriff on the 25th April, 1848.

These negroes had come into the possession of Huey, in what manner, and at what time, does not clearly appear. While in his possession, they were levied upon by the sheriff under Ferguson's junior execution; and two of them, Nelly and Merit (one of Nelly's children after the mortgage,) were sold by the sheriff to Huey, on the 5th of February, 1849; and Grace, Carey, and Ransom, were sold by the sheriff to Huey on the 6th March, 1849; all at nominal prices. George, one of the original number, was not sold by the sheriff, but at, or before the sale, had passed into the possession of Huey by virtue of a bill of sale from the plaintiff to Huey, dated the 18th February, 1848. By virtue of such a title as the foregoing facts will make out, and establish, Thos. W. Huey, the defendant's intestate was in possession of the negroes, the subject matter of this litigation, for at least four years; from 6th March, 1849, to the time of his death which occurred in 1854.

The Chancellor who tried the cause on circuit, considering the instrument of 22d January, 1846, as a mortgage, held, that the equity of redemption was barred by the Act of 1712, 15 section, 2 Stat. 587. That Act provides, that two years possession by the mortgagee of a chattel, after a breach of the condition, should operate as a bar to the equity of redemption. This Court concurs in that view. The statute was applied in the

case of *Hogan v. Hall*, 1 Strob. Eq. 323. In this case, the bill of sale was absolute on its face, and the condition which made it a mortgage was proven by parol.

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\*In the case before the Court, if the equity of redemption was gone, the negroes were the property of the defendant's intestate at the filing of the bill, and the claim for their hire was unfounded.

Besides the claim for the equity of redemption, the bill prayed for an account generally, between the plaintiff and the defendant's intestate. This was ordered, and the Commissioner has reported. The other grounds of appeal in this case relate to matters of account, and questions of fact raised on the report. As to these, we see no reasons for disturbing the circuit decree.

It is ordered and decreed, that the circuit decree be affirmed, and that the appeal be dismissed.

JOHNSTON and WARDLAW, CC., concurred.

Appeal dismissed.

#### 9 Rich. Eq. \*346

\*DAVID S. HENRY, et al., v. CORNELIUS GRAHAM, Administrator, et al.

(Columbia. May Term, 1857.)

[*Executors and Administrators* ⇨ 118.]

An administrator who hired slaves to the Wilmington and Manchester Railroad Company to be employed upon their road in North Carolina, as track hands:—*Held*, not to be liable for the slaves—they having been killed without fault on the part either of the Company or the administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 474; Dec. Dig. ⇨ 118.]

Before Dargan, Ch., at Marion, February, 1857.

This case came before the Court on exceptions to the report of the Commissioner, under an order of reference as to the accounts of the defendant, administrator of R. J. Scarborough. So much of the report as relates to the only question which was taken to the Court of Appeals, is as follows:

"It was proposed to charge the administrator with the value of two slaves, viz: Guinea Jack, appraised at six hundred dollars, and Tinker Jack, appraised at eight hundred dollars, under the following circumstances: In 1855 the administrator hired these negroes to the Wilmington and Manchester Railroad as track hands, and during the course of the year they were both killed. Guinea Jack, it is supposed, placed himself in the rear of the mail car, without the knowledge of the conductor, and in jumping off, while the train was in motion, fractured his skull; he was found near shanties shortly after the passing of the train in such posi-

tion as would indicate that it occurred by his jumping off the train while in full speed. Tinker Jack was probably run over while asleep on the track; of the manner of his death there is no evidence, but the fact of his being killed seemed to be conceded.

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\*When the negroes were hired out they were located by the Company in that portion of the road that lies in North Carolina. The road is divided into sections of eight to twelve miles, and on each of these sections there are employed from six to ten hands, as track hands, under the charge of an overseer. Tinker Jack was assigned to section No. 1, near Wilmington, extending to eight or ten miles. Guinea Jack was assigned to Section No. 5, extending west from Whitesville to Grice's station. The usual employment of track hands is to remove obstructions, raise up the cross ties, straighten track, spike down track, and clear out the ditches. They do not go upon the train, except upon some exigency, such as an accident or collision, &c., when they are transported to the scene of the disaster under the care of an overseer. They are also, when allowed to visit their wives, carried on the train, but on such occasions a ticket is required from the overseer.

"There were two points relied up by the complainants to charge the administrator with a breach of trust.

"1. That by hiring these negroes to the railroad they were removed out of the limits of the State, and loss having occurred to the estate by this unlawful act, he should pay the loss. *Ex parte Smith*, 1 Hill Eq. 140. The cases relied upon to support this doctrine: *Ex parte Copeland*, Rice Eq. 69; and *ex parte Heard*, 2 Hill Eq. 55, may be distinguished from this. These were applications by trustees, residing out of the limits of the State, to remove trust funds out of the jurisdiction Chancellor Dunkin, in *ex parte Copeland*, says: 'The presumption should be always against the removal of funds beyond the jurisdiction of the Court.' In this case no permanent removal was contemplated, and the Court was not ousted of its jurisdiction. The trustee was within the jurisdiction of the Court, and it is said by Mr. Justice Story, sec. 1291, 'If the proper par-

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ties are within reach of the process \*of the Court, it will be sufficient to justify the assertion of full jurisdiction over the subject matter in controversy.'

"The second point made by the complainants was, that there was greater risk in hiring negroes to the railroad than on a plantation, and that prudent and cautious trustees should not endanger the property of the estate by subjecting it to such risk.

"Many of the witnesses on the reference were of the opinion that there was greater risk in hiring negroes to the railroad than on a plantation, and one of them, R. H.

Reeves, a prudent and cautious trustee, testified that in his hirings out, he had excepted the railroad. On the other hand, one or two owners of slaves, and Mr. Cameron, who sustains the character of a diligent and faithful trustee, expressed a preference for the railroad, and thought the negroes better treated, and the danger equal. It was not asserted by any that there was danger or risk in the peculiar employment of a track hand, but the principal danger lay in the proximity to the railroad. It was testified to also by several of the witnesses, who had been employed on the railroad, that of the one hundred and thirty track hands that are employed by the Company, these were the only instances that they had heard of any being killed.

"Assuming that it is the practice of the Court of Equity not to deal hardly with a trustee, it might be conceded that the danger was greater on a railroad than on a plantation, and yet it would not be made a case of crassa negligentia. The administrator only did what a number of owners, considered prudent, did with their own slaves, and with the honest intent to make a large income for his testator's estate. My conviction is that he has not stepped out of the rule laid down by Mr. Justice Story, sec. 1272, 'When a trustee has acted with good faith, in the exercise of a fair discretion, and in the same manner

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as he would ordinarily do \*in regard to his own property, he ought not to be held responsible for any losses accruing in the management of the trust property.' I have, therefore, refused to charge the administrator with the price of Guinea Jack and Tinker Jack."

Dargan, Ch. On hearing the report of the Commissioner upon the accounts of the administrator, Cornelius Graham, the exceptions of the complainants thereto, the evidence and argument of counsel,

It is ordered that the exceptions be overruled, and the report of the Commissioner be confirmed, and stand as the judgment of this Court in the premises.

The complainants appealed, and moved this Court to reverse the circuit decree on the grounds,

1. That C. Graham having hired the slaves to the Wilmington and Manchester Railroad Company, and allowed them to be carried beyond the State, committed a breach of trust, and is responsible for the loss of the slaves.

2. That hiring slaves by a trustee to be worked on a railroad puts them in an extra hazardous situation, and he is responsible if loss ensues.

Miller, for appellants, referred to *Mikell v. Mikell*, 5 Rich. Eq. 224, as to liability of administrator to account for loss of slaves.

Suppose it to be said that the administrator hired the negroes to the railroad in good faith to make higher wages; then it might



be said that an administrator would be justified for high wages, in hiring a negro of the estate, to one who cultivated a malarious swamp; or who wanted a servant to attend him in war; or who might have a fancy to give extraordinary wages for a slave to ascend with him in a balloon.

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\*Suppose a Court of Chancery were asked by the petition of the administrator to allow him to make large profits from such risks, would the Court grant an order that he should hire the slaves for such purposes? Would not the Court rather say to the administrator, "No, you had better be content with smaller profits and more safety."

If the administrator would risk the slaves on the railroad, he should have insured them. But suppose the administrator should say that the insurers of life could not be induced to insure at a reasonable rate on a railroad. This would show that the administrator had exceeded the bounds of prudence, and had placed the property in reckless jeopardy.

Where an executor or administrator departs from a course sanctioned and adopted by the Court he will be liable for loss. In 2 Wm's on Ex. 1288, the rule is thus illustrated. "The rule is that if an executor lays out the testator's money in three per cents (3 per cent. consuls being the fund adopted by the Court) he is not liable for the fall of stocks," (citing in note f, Peat v. Crane, 2 Dick. 499, note; Franklin v. Frith, 3 Bro. Ch. Cas. 434; Howe v. Lord Dartmouth, 7 Ves. 150, 4 Madd. 306,) "but if he invests it in any other fund which afterwards sinks in value, the loss will be thrown on him, although there be no mala fides on his part." (Citing in note ff, Hancom & Allen, 2 Dick. 498; Howe v. Lord Dartmouth, 7 Ves. 150.) See also Gordon v. Bowden, Madd. and Geld. 342.

"And it seems that if the testator dies, having stock in other funds than the three per cents, it is the duty of the executor to transfer such stocks into the latter fund." *Ib.* 1289, (7 Ves. 151 and 152; 16 Ves. 114, cited in note h.)

So even if the intestate, R. J. Scarborough, and his father, had been in the habit of hiring their slaves in hazardous situations (which was not the case) the administrator ought to have taken them away as soon as possible, consistently with the contracts, and have followed the course sanctioned by the Court of Equity. "The principle in general

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(2 Wm's. on \*Ex'rs, 1309, citing in note g, Piety v. Stace, 4 Ves. 622,) that an executor, if he will take upon himself to act with regard to the testator's property in any other manner than his trust requires, puts himself in this situation; that if there be any loss he must replace it; but he cannot be a

gainer; any gain must be for the benefit of the cestui que trust."

Proved the value of the negroes, by Elly Godbold, and also that the railroad is a situation of risk. *Ex parte Copeland*, Rice Eq. 70, decides that a trustee will not be allowed to carry trust property out of the State, without the order of the Court, and if the trustee should violate this rule, and damage or loss should result, "he will be liable for his misconduct." Graham was a wrong doer in hiring the slaves, so that they should go out of the State. See to this effect the cases cited in *Ex parte Copeland*. See *Morrison v. Toomer* cited therein.

The case of *Boggs v. Adger*, in 4 Rich. Eq. 408, a late case, defines the duty and liability of a guardian. *Hext v. Porcher* in 1 Strob. Eq. 170. Every case stands upon its own circumstances. Rule of *Cooper v. Day*, 1 Rich. Eq. 26. Prudence is the test.

It is cruelty to slave and violation of prudence to expose him to risk of life for gain. *Hughson v. Wallace*, 1 Rich. Eq. 1.

"If the hirer of a slave uses him in a way different from that for which he was hired, and a loss occurs, although by the voluntary act of the slave, the hirer will be liable therefor." *Duncan v. S. C. Railroad Company*, 2 Rich. 613.

This is on the principle of the law of bailment. In this case a slave was hired to work on the railroad, and the slave, with the knowledge of the conductor, being on the train, and being carried beyond his destination, jumped off the car while in motion and was killed. Railroad held liable for his loss. *Jones v. Cole*, 2 Bail. 330; *Youmans v. Beckner*, 3 Hill, 218.

A trustee of personal property is a mere bailee. Administrator is a bailee for hire,

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as he is allowed commissions, and \*is bound to exercise the highest care and diligence. To same effect is *Strawbridge v. Turner*, 9 Louis. Rep. 213, (*Wheeler's Law of Slavery*, 447.) See *Butler v. Walker*, Rice, 782.

In *McDaniel v. Emanuel*, 2 Rich. 455, held, "When the captain of a boat uses a slave as a boat hand without the consent of the master, the owners of the boat will be liable for his loss, even though it happen without any misconduct or negligence on the part of the captain."

"Strict accountability applies to unauthorized use of slaves." *Ib.* 459, citing *Wright v. Gray*, 2 Bay, 464.

All these cases are on the principle that loss of property, arising from misconduct in a bailee or trustee, makes him liable therefor, even without negligence on his part.

Trustees will be responsible for any accidental loss their negligence may occasion, though without any corrupt motive on their part, although it is an established rule that the laches of a trustee will not prejudice the trust. *Willis on Trustees*, 8 Law Lib. 184,

citing in note page 125, *supra*: see also *Caffrey v. Darby*, 6 Ves. 488. and 1 Sand. on Uses and Trusts, 305, as to laches. See 1 *Hovenden on Fraud*, 486. How much more reason for liability where accidental loss ensues for wilful violation of the trust in allowing trust property to be removed out of the State.

When doubts or difficulties arise as to the proper execution of the trust, the trustee should apply to the Court of Equity by bill for directions. 2 Fonb. Eq. 172, note c. That he may file his bill, see *Ld. Redesdale's Ch. Prac.*, p. 108, and see chap. 6 of *Willis on Trustees*, above referred to.

Would the Court have granted Graham the right to hire negroes out of the State, and on the railroad?

A too tender regard for the errors of trustees may involve the beneficiary in disaster, and bring hopeless ruin and destitution to the cradle of infancy.

*Inglis, contra.*

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\*The opinion of the Court was delivered by

WARDLAW, Ch. The reasoning of the Commissioner adopted by the Chancellor, is satisfactory to this Court, and few observations will be added.

The first ground of appeal assumes that the act of the trustee in permitting the slaves to be removed temporarily from the State, is such a violation of the rules of equity, and breach of trust as to make him liable for the loss of the slaves. The trustee living near the line which divides North Carolina and South Carolina, hired the slaves for a year to a company which owned a railroad running through parts of both these States, and although it does not distinctly appear that he hired them with a view to their employment for the term without this State, it may be conceded that he contemplated the probability of their being so employed at least occasionally. The procedure of the Court discourages the permanent amotion of trust funds beyond its custody and control, especially if it created the trust or appointed the trustee; but the reason of the rule is inapplicable to a temporary bailment, where se-

curity for the fulfilment of the contract is retained within the jurisdiction. It would hardly be pretended that an executor or administrator, who is legal owner under trust, became insurer against all risks of the life of a slave that he hired to a planter to be employed as a wagoner in transporting crops to a market beyond the State. A trustee cannot be regarded as unfaithful to his duty in such case, if he has adequate security here that the bailee will perform the duties on his part, and if the slave be exposed to no extraordinary peril from the policy and sentiments of the foreign State, or from the nature of the employment.

It is stated, however, in the second ground of appeal, that work on a railroad is extra hazardous to the laborers, and that a trustee becomes responsible for the loss of slaves under his charge, exposed with his assent to

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such hazard. Possibly the situation of hands worked about the steam engines may be extra hazardous, but the employment of the slaves in question as track hands to remove obstructions from the road, clear out ditches &c., is little, if at all, more dangerous than that of laborers in any field through which the road runs, and their treatment likely to be better. Unfortunately in this instance the slaves happened to be killed, but this sad result was owing probably to their own wilful incautiousness, and not naturally connected with any act of the trustee. Slaves are not only chattels, but headstrong and improvident persons, who sometimes by their recklessness defeat the highest degree of care on the part of those who superintend them. *Mikell v. Mikell*, 5 Rich. Eq. 226. The administrator here has managed the estate entrusted to him as a prudent man might manage his own, and to measure his responsibility by a stricter rule would tend to deter the fittest men from assuming the necessary, but often thankless and unprofitable, office of trustees.

It is ordered and decreed, that the appeal be dismissed.

JOHNSTON, DUNKIN, and DARGAN, CC., concurred.

Motion dismissed.





# CASES IN EQUITY

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA—NOVEMBER AND DECEMBER TERM, 1857.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,

" BENJ. F. DUNKIN,

" GEORGE W. DARGAN,

" F. H. WARDLAW.

9 Rich. Eq. \*355

\*JOHN SNODDY v. JOHN S. FINCH.

(Columbia. Nov. and Dec. Term, 1857.)

[*Deposits in Court* ⇨1.]

F., as attorney in fact of one absent from the State, sold and conveyed land to S., but retained the power of attorney under which he acted and refused to deliver it to S.—On bill filed by S., F. was ordered to deposit the power of attorney with the Register of the Court for the use of all interested.

[Ed. Note.—For other cases, see *Deposits in Court*, Cent. Dig. § 1; Dec. Dig. ⇨1.]

[*Equity* ⇨17.]

A person properly entitled to the custody of the title deeds of his estate may obtain a decree for a specific delivery of them, if they be wrongfully withheld or detained from him.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 38-42, 45; Dec. Dig. ⇨17.]

[*Equity* ⇨141.]

A bill for such purpose ought to allege danger of loss or destruction of the deeds in the keeping of him who withholds them—semble.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 323-330, 333; Dec. Dig. ⇨141.]

Before Dunkin, Ch., at Spartanburg, June, 1857.

A full statement of this case will be found in the opinion delivered in the Court of Appeals.

Bobo, for appellant.

Dawkins, contra.

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\*The opinion of the Court was delivered by

WARDLAW, Ch. The plaintiff, John Snoddy, received a conveyance for a tract of land in Spartanburg District, November 16, 1853,

which was executed in the name of Harvey Finch, by the defendant, John S. Finch, as attorney in fact. The defendant acted under a regular power of attorney attested by two witnesses, but these witnesses reside in Alabama, and neither of them has made probate of the execution of the instrument, nor has the instrument been recorded. The plaintiff, justly regarding the power of attorney as an integral part of his conveyance, sought its delivery from defendant, and at one time the latter, while the plaintiff held the paper in his hands, promised to deliver it to plaintiff, if he would pay the price of the land; whereupon the plaintiff laid the paper on a table, paid a portion of the purchase money, and drew his note for the balance, and the defendant picked up the power, saying he should keep it for his own protection, as he had sold some personalty under the same authority. Mr. Edwards, one of the counsel of plaintiff testifies, that he too applied to defendant for the power, and proposed that it should be sent to Alabama for probate, at the joint expense of the parties, but defendant declined this proposal, as the paper might be lost by the way, and offered on his part to give a copy. The pecuniary means of the defendant are ample. The plaintiff is in possession of the land, and no special jeopardy of his title is alleged. Defendant admitted he had a receipt from his principal, ratifying his acts as agent.

The bill was filed to obtain possession of the power of attorney, or to have it placed in safe custody. The Chancellor on circuit dismissed the bill for want of equity, and the plaintiff appeals.



A person properly entitled to the custody of the title-deeds of his estate, may obtain a decree for a specific delivery of them, if they be wrongfully withheld or detained from

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him. \*This is a very old head of equity jurisdiction, for it has been traced back to the reign of Edward IV. Mitford's Pl. by Jeremy 117, n. 1.; 2 Story, E. J. 703; Armitage v. Wadsworth, 1 Mad. R. 192. (110 Am. Ed.) Some remedy in such case might be afforded in a Court of law by action of trover or detinue, but as damages only are recoverable there the relief is much less adequate and complete than by a decree for specific delivery. A bill for such purpose ought to allege danger of loss or destruction of the deeds in the keeping of him who withholds them, but the defendant here does not complain of the omission of this allegation, and his misconduct in regaining possession of the letter of attorney justifies apprehension of the safety of the paper in his custody. He does not need it for his own protection, as the receipt of his principal secures him against the disavowal of the agency; and it is an essential part of the conveyance to plaintiff, and without the adduction and proof of it, he could not demonstrate in any suit his title to the land. It might be held without straining that the defendant delivered it to the plaintiff, and then retook it by artifice.

It is possible that defendant or other purchasers from him as agent may find occasion for the use of this instrument in establishing the agency; and this may constitute a sufficient reason for not placing the power in the exclusive possession of plaintiff, when full relief may be administered to him in another form.

It is ordered and decreed that the circuit decree be reversed, and that defendant deposit said power of attorney in the office of the register of this Court for Spartanburg District, with leave to any party having an interest in it to apply to the Court for an order for its use. Let the defendant pay the costs.


JOHNSTON, DUNKIN, and DARGAN, CC., concurred.

Decree reversed.

#### 9 Rich. Eq. \*358

\*SAMUEL C. SCOTT, Admr., v. FRANCIS BURT et al.


(Columbia. Nov. and Dec. Term, 1857.)

[Wills  616.]

A bequest for life, expressly, with a general power of disposition superadded, confers only a

life estate with power of appointment, which to be effectual must be exercised.

[Ed. Note.—Cited in *Bilderback v. Boyce*, 14 S. C. 541; *Canedy v. Jones*, 19 S. C. 307, 45 Am. Rep. 777; *Humphrey v. Campbell*, 59 S. C. 43, 47, 37 S. E. 26.

For other cases, see Wills, Cent. Dig. § 1418; Dec. Dig.  616.]

[This case is also cited in *Humphrey v. Campbell*, 59 S. C. 39, 37 S. E. 26, and distinguished therefrom.]

Before Wardlaw, Ch., at Edgefield, August, 1857.

The will of Elizabeth Scott bore date the 28th October, 1831, and was admitted to probate the 6th February, 1832. The disposing clauses are as follows:

"1st. As regards such worldly goods as it has pleased Almighty God to bless me with, it is my will and desire that it should be distributed in the following manner, viz: I give to my mother, Mary Burt, during her natural life, my tract of land known by the Scott's Ferry tract and one negro girl Jane, and at her death the said land to be divided between my brothers Samuel C. Scott and John Scott's children, viz: to my brother John Scott's two sons, William T. Scott and John Scott, Jr., one half, and my brother Samuel C. Scott's son, Oliver P. Scott, the other half.

"2nd. I will and bequeath to my three half brothers, Frank, Henry, and Armstead Burt, one hundred dollars each.

"3rd. I will and bequeath to my three nephews above named, viz: William T. Scott and John Scott, sons of my brother, John Scott, and Oliver P. Scott, son of my brother Samuel C. Scott, all the residue of my estate of every description whatever, to be divided between them as above directed, viz: to John Scott's two children one half, and to Samuel C. Scott's son the other half.

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"4th. I do hereby appoint my brother, Samuel C. Scott, executor of this my last will, investing him with full power and authority to execute the same, revoking and making null and void all other wills by me made, ratifying and confirming this as my only last and true will.

"N. B. The negro girl Jane, which I will my mother above, is for her to will and dispose of as she thinks proper."

Mary Burt was, at the date of the will, the wife of Armstead Burt, Sen., and so continued until the year 1839, when he died. She survived until 1857, and then died having made no disposition, by will or otherwise, of Jane and her issue. The bill claimed that upon the death of Mary Burt, Jane and her issue became the property of the residuary legatees of Elizabeth Scott; and the defendant contended that Mary Burt took an absolute estate in Jane upon which the marital rights of her husband had attached.

The circuit decree of his Honor, the pre-  
siding Chancellor, is as follows:

Wardlaw, Ch. The leading question in this case is, whether Mrs. Mary Burt, under the will of her daughter, Elizabeth Scott, took an absolute estate in the slave Jane, or only an estate for life with a power of disposition annexed.

The slave Jane since the death of Elizabeth Scott, has given birth to five children whose names appear in the pleadings. After the filing of the bill, to wit, on the 11th of February, 1857, the said slaves were sold by the defendant, Francis Burt, on a credit until the 25th December next, with interest from the day of sale, for the aggregate sum of five thousand six hundred and fifteen dollars. The parties claiming adversely to the defendant, Francis Burt, are not dissatisfied at the prices for which the slaves were sold,

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and are content \*if their claim prevail to have the proceeds of the sale of the slaves in lieu of the slaves themselves.

The distinction is completely established between a gift to a person indefinitely with a general power of disposition, and a gift for life with like power superadded; in the former case an absolute estate passes to the donee, in the latter an estate for life only, with a power of appointment, which to be effectual must be exercised. Such is undoubtedly the general doctrine. *Bradley v. Wescott*, 13 Vesey, 453; 1 Sug. Powers, 119, 128; *Pulliam v. Byrd*, 2 Strob. Eq. 141; *Reith v. Seymour*, 4 Russell, 263; *Archebold v. Wright*, 9 Sim. 161. Words of implication do not merge or destroy an express estate for life unless it becomes absolutely necessary to uphold some manifest general intent—4 Kent's Com. 319, and authorities there cited.

In my judgment Mrs. Mary Burt, under the will of Elizabeth Scott, took an estate for life only in the slaves, Jane and her issue, with a mere power of disposition superadded, and she having died without any exercise of such power, those slaves thereupon passed under the third clause of the said will to the residuary legatees, the defendants, William T. Scott, and Oliver P. Scott, and the plaintiff, Samuel C. Scott, as the legal representative of John Scott, Jr., deceased.

And it is further ordered that the defendant Francis Burt deliver and pay to the plaintiff, Samuel C. Scott, administrator, and to the defendant, William T. Scott, each the one fourth part, and to the defendant, Oliver P. Scott, the residue of the securities representing the proceeds of the said sale of the slaves Jane and her children above referred to, if such securities shall be acceptable to them respectively, and if not, then that the defendant, Francis Burt, immediately after the 25th day of December next pay to the plaintiff, Samuel C. Scott, administrator, as aforesaid, and to the defendant, William T. Scott,

each the one fourth part, and to the defendant, Oliver P. Scott, the residue of the said

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sum of five thousand six \*hundred and fifteen dollars, with interest from and after that date, and that the parties to whom the proceeds of said sale are directed to be paid, have leave to sue out the necessary final process against the defendant, Francis Burt, to compel such payment.

The defendant, Francis Burt, appealed, and now moved this Court to reverse the circuit decree on the grounds:

1. Because his Honor erred in decreeing that Mrs. Mary Burt, under the will of Elizabeth Scott, her daughter, took an estate for life only in the slave Jane and her issue, with a mere power of disposition superadded.

2. Because his Honor should have decreed that Mary Burt took under said will an absolute estate in the slave Jane and her issue, and she, Mary Burt, being a married woman, (at the death of Elizabeth Scott,) her husband's marital rights attached thereon, and the said property passed under his will to this defendant as his executor.

Bellinger, for appellant.

Carroll, contra.

PER CURIAM. This Court concurs in the decree of the circuit Court. The appeal is dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

#### 9 Rich. Eq. \*362

\*THOMAS H. WADE, Jr., and Others, v.  
FISHER and AGNEW.

(Columbia. Nov. and Dec. Term, 1857.)

[*Husband and Wife* ⚭47.]

A husband before having issue executed a deed by which he gave to his wife "and her heirs" by him, certain slaves "to have and to hold for her and their special use and benefit" forever, with a proviso, that, in the event of his death and her marrying again, the slaves and their increase should be equally divided between her and the heirs aforesaid. "But should there be no lawful heirs of her body" by him, then the said slaves and their increase, shall be hers forever:—*Held*, that the deed was inoperative—it amounting to nothing more than a gift to himself.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 236; Dec. Dig. ⚭47.]

[*Husband and Wife* ⚭31.]

If operative, then it was a marriage settlement and was void as to creditors because not recorded in the Register's office for Richland where the parties resided.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 178–195, 883, 884; Dec. Dig. ⚭31.]

Before Wardlaw, Ch., at Richland, June Sittings, 1856.

The circuit decree, which contains a sufficient statement of the case, is as follows:



Wardlaw, Ch. Thomas H. Wade, Sen., after his intermarriage with Rebecca Moore, executed a deed, dated September 12, 1826, whereby in consideration of affection for his wife, he gave and granted to her and "her heirs by me" (him) certain slaves, "to have and to hold for her and their special use and benefit from this time henceforth and forever: Provided, that in the event of my death, and the said Rebecca should again marry, then the aforesaid named negroes, their issue and increase, shall be equally divided between her and the aforesaid heirs begotten of her by me. But should there be no lawful heirs of her body begotten by me, then the whole, sole right and title of the said negroes, their issue and increase, shall be the said Rebecca Wade's forever and ever." The deed was recorded the day after its date, in the office

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of \*Secretary of State, but has not been recorded in the registry of mesne conveyances for Richland district, in which the parties resided. Most of the slaves named in the deed were acquired through the wife. She died July 8, 1846, leaving her husband, and the plaintiffs, who are the issue of the marriage. None of the plaintiffs was born at the time of the execution of the deed. This deed was drawn by one, who is entitled by courtesy, to be styled learned in the law. The defendants are judgment creditors of the husband, and were proceeding to execute their judgment by levying on some of these slaves, when the plaintiffs claiming title to them under said deed filed their bill for injunction and relief.

This deed is a voluntary conveyance by the husband to his wife, and her unborn heirs by him. All that follows the proviso refers to an event which has not occurred, the survivorship of the wife. But the construction would not be different, if all the limitations of the deed were held to be applicable in the actual state of facts. At most the instrument cannot be interpreted as extending beyond a gift to the wife and the heirs of her body, begotten by her existing husband, and such gift from any other donor would confer the absolute estate on the first taker. *Myers v. Pickett*, 1 Hill Eq. 37. In fact, however, the attempted gift is from the husband to the wife generally, not to her separate use, and has no more operation than a gift to himself. *Raines v. Woodward*, 4 Rich. Eq. 403. A gift even by way of trust to the wife's own or special use and benefit, is not a gift for her separate use, so as to obstruct marital rights. *Beales v. Spencer*, 2 You. & Col. 651; *Wilson v. Bailer*, 3 Strob. Eq. 258 [51 Am. Dec. 678].

Another view may be presented which is likewise fatal to the plaintiffs' suit. The deed in question, being a voluntary conveyance from husband to wife, is in legal con-

templation a marriage settlement. *Price v.*

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*White*, Car. L. J. 297; *Head v. Halford*, 5 Rich. Eq. 139, 140. And as it was not recorded in the registry for Richland district, as required by our statutes, it is void as to creditors. *Barsh v. Riols*, 6 Rich. 162.

It is ordered and decreed that the bill be dismissed.

The complainants appealed and now moved this Court to reverse the decree, on the grounds:

1. That the deed, although by a husband to his wife, and without the intervention of a trustee, is nevertheless a good and valid instrument in this jurisdiction to sustain the rights claimed by the complainants, the issue of the marriage, notwithstanding the provision of a life estate for the wife may have been void by the rules of the common law.

2. It is respectfully submitted that the said deed, not having been made in consideration of marriage, nor in performance of antenuptial articles, is not a marriage settlement in the meaning of the Acts of Assembly prescribing the manner of recording such instruments.

Bauskett, for appellants.

Backman, contra.

PER CURIAM. This Court is satisfied with the conclusion to which the Chancellor has come; and it is ordered that his decree be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

9 Rich. Eq. \*365

\*MASTON RIPPY and Wife v. DANIEL GILMORE and Others.

(Columbia. Nov. and Dec. Term, 1857.)

[*Life Estates* ⇨ 23.]

Where a tenant for life sells a negro which is afterwards carried out of the State, on bill by the remainder-men for recovery of the value, the estate of the tenant for life is first liable—the purchaser only secondarily.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 43, 44; Dec. Dig. ⇨ 23.]

This case was first heard at June Sittings, 1856, for Spartanburg, by Johnston, Ch. His Honor pronounced the following decree:

Johnston, Ch. This is a bill on behalf of legatees of Roderick Arndell (Arundell?) for the construction and enforcement of the will of the testator. This will was executed the 1st of August, 1826, and contains, among other things, the following:

1. "I bequeath to my beloved wife, Rhody, the land and plantation whereon I now live, during her natural life or widowhood, and then to be divided as hereinafter directed; also, one negro woman named Eliza, and one

negro boy, Wiley, in the same manner; also, one half of the value of the chattel property; also, all the crop that is now on the plantation; and that she shall pay all my just debts out of the latter, if sufficient, and if not, the balance to be paid out of the value of the other half of the chattel property not devised to her."

2. Then follows a disposition of the other half of "the chattel property."

3. "It is my will and wish, that at the death or marriage of my said wife, the land

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shall be divided \* \* \* in the following manner \* \* \*; and that the balance of the property, bequeathed to my wife during her life, shall, at her death, or marriage, be equally divided between the before mentioned legatees, \* \* \*." And testator's wife, Rhody, was constituted executrix. She is now dead, and her administrator is one of the parties to the suit, though not in his official character.

One of the questions in the case is, whether the widow took what the will denominates the chattel property (i. e. the half of it) absolutely or for life only. In the latter case, it is agreed that though her administrator is not officially impleaded, the objection be waived and an account decreed as to this portion of what the widow took under the will.

The Court after a careful examination of the different parts of the will, is of opinion (and so adjudges) that this chattel property was given absolutely, and that no party before the Court is entitled to claim a remainder therein under the testator's will.

On the 24th of February, 1846, the widow, Rhody, in consideration of two hundred and fifty dollars, paid her by one John Sarratt, now deceased, but whose personal representatives are parties defendants, sold and conveyed to him Emeline, a small girl, child of Eliza, warranting the title; and subsequently Sarratt sold this negro, and she has been carried out of the State, and cannot now be found. The bill seeks an account from the estate of the life-tenant, and Sarratt, her alienee, for the value of Emeline.

There is no ground for inferring that Sarratt made the purchase without notice of the nature of the title, and certainly the life-tenant had notice; so that the legatees in remainder are entitled to the full value of the slave, (there is no averment of increase) and have their remedy by way of account against either or both the parties to the devastavit.

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\*A question will arise between Sarratt's estate and that of the widow, with regard to which of them is primarily liable.

It seems very plain that if the sum of money placed by Sarratt in the hands of his vendor, as the equivalent of the slave, were,

at this time, an actual equivalent, full justice would be done by declaring that sum to be the primary fund. But it may, and probably will, turn out that the legatees can entitle themselves to a much greater sum, as the real value of the slave. They are entitled, in analogy to the law of trover cases, to the highest value of the property since the right in remainder accrued by the death of the life-tenant.

Should a greater amount be established, then the question will be, as between the vendor and vendee, who shall bear the loss. It is clear that Sarratt will be entitled to a restitution of his purchase money from the estate of Rhody Arndell. But is he entitled, in case the remainder-men make good their damages against him, to recompense for more than the price paid for the warrantee given him. My impression is that this point should be settled thus: The legatees should be required to exhaust their remedy in the first instance by resorting to the estate of Rhody, which is liable to them for the full value of the property. If they then resort to Sarratt's estate, and that should be obliged to pay more than the value affixed to the slave in his purchase, then I think he would be confined, in claiming indemnification from his vendor to the price he paid. But I do not conclude this point now. Let it come up by exception from the Commissioner's report.

It is ordered that the matters of account be referred to the Commissioner.

At June sittings, 1857, the Commissioner submitted his report in which he stated, that he had ascertained the value of the girl Emeline to be eight hundred dollars, and recommended that the estate of the tenant for life be charged in the first instance with the value.

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\*The case was heard on exceptions to the report before Dunkin, Ch., who pronounced the following decree:

Dunkin, Ch. This case was heard on the Commissioner's report. The estate of Rhody Arndell, the life tenant, is primarily liable to those entitled in remainder for the negroes which she received.

It is conceded that her estate is ample, and her legal representative is a party to these proceedings.

It is ordered and decreed that the report of the Commissioner, recommending that the estate of Rhody Arndell be charged with eight hundred dollars the value of the slave Emeline, be confirmed and become the judgment of this Court.

It is further ordered that it be referred to the Commissioner to examine and report as to the parties entitled to the funds, with leave to report any special matter.

The complainants appealed and now moved this Court to reverse the decree on the ground:



Because, from the case made, the estate of Rhody Arndell should not have been required to account for anything beyond the price she got for the girl Emeline and the interest thereon, and that the estate of John Sarraatt should have accounted for the remainder.

Bobo, for appellant, cited Act of 1824, 6 Stat. 238, § 4, as to measure of damages. Saratt had no notice. *Ware v. Weatherall*, 2 McC. 213; *Alexander v. Maxwell*, Rich. Eq. Cases, 209.

**PER CURIAM.** The Court announces its concurrence in the decree appealed from. Ordered that the same be affirmed and the appeal dismissed.

**JOHNSTON, DUNKIN, DARGAN, and WARDLAW, CC., concurring.**  
Appeal dismissed.

9 Rich. Eq. \*369

**\*JAMES E. KERR v. JOHN WEBB,**  
Administrator.

(Columbia. Nov. and Dec. Term, 1857.)

[*Equity* ⇐295.]

In 1852, plaintiff claiming to be distributee of B., who was a distributee of W., filed a bill against the administrator of W., and the ordinary, for account, alleging that the estate of B. was derelict. The ordinary answered, denying all intermeddling or notice of assets. In 1854, the plaintiff administered on B's estate and filed another bill, styling it a supplemental bill, against W., for account:—*Held*, that the second was not a supplemental but an original bill.

[*Ed. Note.*—For other cases, see *Equity*, Cent. Dig. § 581; Dec. Dig. 295.]

[*Judgment* ⇐560.]

A recovery in trover against the administrator of W., by one claiming under a deed executed by B., who was a distributee of W., *held*, to bar the administrator of B., from demanding an account from the administrator of W., for the value of the slaves thus recovered in trover, or any part thereof, although it appeared, that the verdict in trover was the result of a compromise, and was for much less than the full value of the slaves.

[*Ed. Note.*—For other cases, see *Judgment*, Cent. Dig. § 1000; Dec. Dig. ⇐560.]

[*Set-Off and Counterclaim* ⇐41.]

On bill by the administrator of a distributee of W. against W's administrator for account, a counter claim, consisting of various matters, *held*, not objectionable because the claims were not in mutual right.

[*Ed. Note.*—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. § 76; Dec. Dig. ⇐41.]

Before Wardlaw, Ch., at Kershaw, June Sittings, 1856.

This case will be fully understood from the circuit decree, which is as follows:

Wardlaw, Ch. By his original bill, filed April 18, 1852, the plaintiff, a resident of Salisbury, N. C., claimed that, as sole distributee and next of kin of Jane Berry (by birth, Kerr,) a widow of John Webb, Sr.,

who died intestate about 1827, he was entitled to a third of Webb's estate, leaving two thirds to the defendant, John Webb, son and administrator of said intestate. After the death of John Webb, Sr., the widow, Jane, was taken in marriage, about 1828, by one Josey, who died about 1832, and again taken in marriage between 1841 and 1844, by Thom-

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as Berry, who died about a \*year after the intermarriage; and herself died in the summer of 1848. She retained in possession until her death, a slave named Anna and her issue, now five, which had belonged to John Webb in his life-time. On November 24, 1838, while widow of Josey, she gave the said negroes, by deed to Sarah P. Anderson, daughter of Frances Kerr, reserving to herself their services during her life-time. After her death, defendant administered on the estate of his father, John Webb, Sr., and an appraisal returned to the Ordinary of Chesterfield, October 16, 1848, included, as belonging to the estate of his intestate, said six slaves, at the value of one thousand seven hundred dollars, some cattle and furniture at the value of one hundred and thirty-two dollars and fifty cents, and some notes ranging at maturity from January 26, 1845, to March 5, 1848, to the aggregate sum of five hundred and forty-nine dollars and forty-eight cents. On October 3, 1848, Sarah P. Anderson instituted, in the Court of Common Pleas for Kershaw, an action of trover against John Webb the younger, for the recovery of said slaves, and at Spring Term, 1850, obtained a verdict for one thousand two hundred dollars, she agreeing to pay her own cost, and on April 30, 1850, entered up a judgment which has been satisfied in full by the defendant. There is testimony that the verdict was the result of a compromise, and for considerably less than the market value of the slaves.

To the original bill W. R. Griffith, Ordinary of Chesterfield, was made a party defendant as the official administrator of the estate of Jane Berry, and in his answer, the Ordinary denies all intermeddling on his part with the estate of Jane Berry, and all notice that she possessed any estate at her death. She seems to have died in Kershaw. As to this defendant the suit is not pressed, and it is ordered that the bill be dismissed.

The plaintiff filed another bill June 6, 1854, against the defendant, John Webb, as

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administrator, which is styled a \*supplemental bill, wherein he reiterates the statements of his former bill, with the additional allegation that the Legislature had repealed the Acts making Ordinaries official administrators, and that plaintiff himself, on May 26, 1854, had received grant of administration of Jane Berry's chattels and effects.

In neither of his bills does the plaintiff state his degree of kindred to Jane Berry, nor the process of his claim to be her sole distributee. He makes no proof on the point.

In answer to the former bill, defendant, John Webb, requires strict proof of the allegation that plaintiff is next of kin and distributee of Jane Berry; insists that the recovery against him in trover by one claiming under the deed of Jane and his satisfaction of the sum recovered vests title to the slaves in him absolutely, and bars any one deducing claim through Jane Berry, and sets up, as a counter claim, moneys expended by him for said Jane, and services rendered to her during her widowhood.

In answer to the second bill, John Webb additionally insists in defence, that the latter is not truly a supplemental bill in continuation of the former, but really an original suit in a new character; that Jane Berry, by reason of her enjoyment of the services of said slaves and her representative, are largely indebted to him, as representative of John Webb, Sr., that her rights in the estate of said intestate passed to her subsequent husbands, Josey and Berry, and that representatives of these estates should be made parties, and that plaintiff is barred by the statute of limitations and the lapse of time.

The objection of the defendant, that the prior bill did not commence suit continued by the latter, has some force, for it was in a character as distributee to which the plaintiff has not shown right, and against a supposed representative, who disclaimed the office. Indeed the title of plaintiff, in the second bill as administrator, is not supported by any

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proof \*in this Court that he was kinsman or creditor of the intestate, but from the grant of administration to him by the Ordinary, it must be presumed that before that judge some evidence of his right was given, or at least that the Ordinary properly exercised the discretion confided to him by Sec. 3, A. A. 1839, 11 Stat. 39, of appointing any person administrator in default of application by those of superior claims for the trust. In my view of the case, this objection affects the matter of costs only; and it is adjudged and ordered that plaintiff pay the costs of the former bill.

The plea of the statute of limitations is no bar to the general account sought by the bill, for the statute did not begin to run until the grant of administration to the defendant in 1848. *Geiger v. Brown*, 4 McC. 427; indeed it has no application to a technical trust, such as subsists between administrators and distributees. The analogous defence of lapse of time has little weight. The explicit acknowledgement of the defendant, under oath too, that in 1848, certain property belonged to his intestate—and the controversy is confined to this property—creates

a new starting point for the presumption from lapse, and the subsequent succession of years is quite too brief to raise the presumption. This appraisal is proof *prima facie* from the defendant himself, that the property included was liable to be shared after payment of intestate's debts, among the distributees of John Webb, Sr.; not proof absolutely estopping the defendant against the truth of the case, but requiring him to satisfy the tribunal that his admission was made in mistake, or that the property belonged to another.

Such countervailing proof has been made by the defendant in relation to the slaves. A verdict in trover for plaintiff usually implies that plaintiff has recovered the value of the chattels converted with compensation for the use since the conversion; and satisfaction of the sum recovered vests in the defendant title to the chattels themselves.

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The recovery here \*was under the deed of plaintiff's intestate, and is conclusive as to any claim derived through her. She always claimed Anna as her individual property, and a partition of the property of John Webb, Sr., between defendant and herself, at least of the slaves, is rendered so probable as to be now adopted as a fact, from the circumstances, that shortly before his death, John Webb, Sr., took with him to Edgefield where he died, two slaves, a negro man and Anna, and that after his death defendant sold the negro man as his own to Col. Levy, and the widow took and retained Anna. The plaintiff urges that, by reason of the compromise between S. P. Anderson and the defendant, the case is exceptional, and one in which the fiction of law as to the effect of the verdict in trover should not be pressed, and that full equity would be afforded to defendant by requiring him to account for the full value of the slaves and their hire, and allowing him credit for the one thousand two hundred dollars paid in the spring of 1850. It is a misconception to treat as a fiction what is an established principle of law as to the effect of a verdict in trover. If plaintiff had shown that defendant fraudulently or improperly allowed the verdict to be taken against him on some private arrangement for his own emolument, in breach of his duty as trustee, he would have laid some foundation for redress, but he has not enlightened the Court as to the terms of the supposed compromise, and the whole evidence on the subject is in effect hearsay, that the opposite counsel agreed upon the sum of the verdict, and that the cost should be divided. He was sued as an individual and not as a representative at a time when he supposed himself the sole distributee of his father, and it would not have been grossly unconscientious in him to save something for himself in the imminent wreck of the estate. The proof on this point seems to me insufficient to overcome the inferences



from the verdict; and it is ordered that the bill be dismissed as to the slaves.

As to the cattle and furniture and notes

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mentioned in the \*appraisement, I suppose the plaintiff, as administrator, is entitled to an account, although it is questionable whether he will be benefited by the result. He claims for his intestate only the third to which she was entitled as a widow of John Webb, Sr. It is extraordinary, that the chattels in her possession escaped the marital rights of her husbands Josey and Berry, and that choses falling due from eighteen to twenty-one years after the death of John Webb, Sr., should belong to his estate; still I must treat the sworn admission of defendant, in 1848, as proof until contradicted, that these chattels and choses, by arrangement of parties in marriage articles or otherwise, and in lack of partition, remained the property of his intestate.

In bills for account, both parties are actors and it is not intended to exclude the defendant from setting up in rebuttal any just demands which he may establish for payments made as administrator of John Webb, Sr., towards debts generally, or the satisfaction of the widow's share, nor for payments or services or claims by him as administrator, or before his administration, affecting her or her estate or her representative. Nothing is prejudged as to the validity of defendant's claims, nor as to the defences which may be made by the statute of limitations, or his failure to recover from the husbands of Jane, or otherwise, as the facts on these points are not before me. It is intended, however, to overrule the objections of plaintiff as presented broadly, that the claims of plaintiff and counterclaim of defendant not being in mutual right, the defendant is precluded from setting up any discount. These matters cannot be adjudged definitely until the Commissioners' report be made.

It is ordered that it be referred to the Commissioner of the Court for Kershaw to state the accounts between the parties on the principles of this opinion. Let the costs await the accounting.

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\*The complainant appealed, and now moved this Court to modify the decree, on the grounds:

1. Because the bill last filed by complainant was properly a continuance of the former bill, and supplemental to it.

2. Because complainant is entitled to an account for the negroes returned in the inventory of the estate of John Webb, Sr., by the defendant as administrator.

3. Because the compromise verdict in trover, in the case of Anderson v. Webb, left the defendant in possession of negroes of the estate of John Webb, Sr., his intestate, for the full value of which he was bound to ac-

count, first deducting the amount paid by him in satisfaction of the verdict.

4. Because the claims of complainant and the counter claims of defendant, not in mutual right, cannot be set off.

Kershaw, for appellant.

Gaston, contra.

PER CURIAM. This Court sees nothing in the appeal to invalidate the decree. It is, therefore, ordered that the decree be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

**9 Rich. Eq. \*376**

\*MANSEL HALL, et al., v. CHRISTINA W. FAUST, et al.

(Columbia. Nov. and Dec. Term, 1857.)

[*Husband and Wife* ⇨151.]

Where the separate estate of a married woman living apart from her husband, was declared liable for necessities furnished her, a sum exceeding the income was allowed to the creditors.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 595; Dec. Dig. ⇨151.]

[*Husband and Wife* ⇨18.]

The married woman during the lifetime of her father, lived with and was maintained by him, she then having no separate estate. Her separate estate afterwards acquired was not charged with debts contracted during that time.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 120; Dec. Dig. ⇨18.]

[*Husband and Wife* ⇨151.]

Interest not allowed on the demands for necessities established against her, although for some of them she had given notes.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 595; Dec. Dig. ⇨151.]

Before Dunkin, Ch., at Fairfield, July sittings, 1857.

This case came before the Court on exceptions to the report of Mr. Sterling a special referee. The report is as follows.

"The Circuit decree states that 'this is a creditor's bill whereby the plaintiffs seek to subject to the payment of their demands the distributive share of the defendant, Christina W. Faust, in the estate of her father, the late Dr. William Bratton, who died intestate on the 1st December, 1850.' Under proceedings for the partition, of Dr. Bratton's estate, the share of the defendant, Mrs. Faust, has been vested, temporarily, in her next friend, Wm. M. Bratton, to prevent the marital rights of Faust from attaching, but no trusts have as yet been declared. Faust has disclaimed. That decree adjudged the claims of the plaintiffs, then before the Court to be established, and authorized the other creditors to establish their demands before the Commissioner.

"On appeal from this decree, it was held that the defendant had no authority to bind

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her separate estate, except as derived \*from the provisions of the settlement, (which settlement has not yet been perfected): and that under the circumstances, it was 'the peculiar province of this Court to interfere, as well for the benefit of the married woman, as for the protection of those who have supplied her necessities. But we are of opinion that the plaintiffs asking the aid of this Court, their recovery may properly be restricted to such articles as were necessary and proper for the defendant in the condition in society which she occupied. The decretal order of the Circuit Court is modified accordingly.'

"The Commissioner of this court being a nominal party, I have been requested by the parties to act as a special Commissioner under the order of reference.

"The estate of the defendant, Mrs. Faust, consists of cash and bonds in the hands of the commissioner... \$3,055 58

"Cash in the hands of her trustee, exclusive of interest as by his statement presented..... 1,725 20

Total cash..... \$4,780 78

"And twenty-seven slaves, which, at the moderate estimate of six hundred dollars each, will amount to... \$16,200 00

"Making a total value of defendant's estate of over twenty thousand dollars.

"It appears by the record and evidence that the defendant, Mrs. Faust, married in 1837, and was deserted by her husband about three years after, when she returned to her father, with whom she resided until his death, in December, 1850. In June, 1851, she removed to Georgia, was divorced in that State, October, 1852, and there married Wm. W. Eaton, 1st November, 1853. Dr. Bratton was a very wealthy man, indulgent, but of rigid economy; his family occupied the front rank of fashionable society, and so far as appearances indicated, the expenditures of Mrs. Faust were not greater than those of Dr. Bratton's other daughters by

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a second \*marriage. She had no means of her own, prior to his death, and the witness inferred that she was supported by her father, as the rest of his family were. Mr. Gracey, a brother-in-law, says she was so treated; that Dr. Bratton opened an account with him in 1836, and requested him to let Mrs. Faust have such articles as she desired and as he thought she needed, and that he (Dr. Bratton) did not wish her to contract accounts in Winnsboro. Her accounts at witness' store in Columbia amounted annually from two hundred and fifty dollars to three hundred dollars, which Dr. Bratton paid. This witness did not regard her cautious and prudent in money matters, and thinks she was easily imposed upon. Other accounts of the defendant were paid by Dr. Bratton; one with McMaster for five or six years, amounting to four or

five dollars annually; a small account contracted with Adger in 1843 and 1844, and accounts contracted with Cathcart up to 1843 or 1844. This is the substance of the evidence, on the general merits of the case.

The claims presented may be most conveniently classed under the following heads:

"1. Claims admitted to be proper and entitled to payment.

"2. Claims arising in the life-time of Dr. Bratton.

"3. Claims to which the statute of limitations is pleaded.

"4. Claims arising subsequent to Dr. Bratton's death.

"1. The following claims are admitted:

1. Jer. Cockrell's account.....\$226 16  
2. W. A. Morrison & Co.'s account.... 10 65  
3. J. B. McCants' note and interest.. 84 45

"2. The claims arising in the life-time of Bratton are those of—

"1. James Nelson, (of whom W. R. Robertson is assignee,) on an account contracted

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between April, 1847, and April, \*1849, settled by note 6th January, 1853, for five hundred and forty-eight dollars, and interest from date.

"2. Three notes, belonging to Wm. Harrison and wife, given in settlement of account contracted in 1844, 1845, 1846 and 1847, as follows:

A. Note dated 9th January, 1846, for..\$408 41  
B. Note dated 22d February, 1847, for 110 35  
C. Note dated 20th January, 1848, under seal.  
Interest from January 1, 1848, for.... 127 07  
Besides the claim of M. Hall, to be noticed hereafter.

"The account of Nelson embraces articles of dry goods such as befitted defendant's condition, and amounted to four hundred and twenty-four dollars and seventy-five cents. When this account was closed by note, interest was added in, amounting to five hundred and forty-eight dollars. Mr. McCants testified that he submitted the matter fairly to the defendant—is sure that he told her she was not liable for interest, and thinks he mentioned to her that he did not "regard her liable on the account—and that she replied, that it was a just debt and she wanted to pay it." Interest was added with her knowledge and consent. This witness states that it was a matter of indifference to him whether she gave the note or not. The note seems to have been cheerfully executed, and amounts, with interest, to seven hundred and twenty-nine dollars and forty-four cents. The account produced is headed, "Dr. Bratton for Mrs. Faust;" but Dr. Bratton's name does not appear in the original entries on the ledger, the charges being made to Mrs. C. Faust.

"The claim of Mr. Harrison and wife (formerly E. B. Campbell) is for the three notes above, the consideration of which are articles of millinery, furnished from 1844 to 1848. The account for 1844 and 1845 amounts to seven hundred and sixty-seven dollars and



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thirty-seven cents. \*But the witness proved that Dr. Bratton had paid on this account, four hundred dollars, and Mrs. Faust forty dollars, and that the note for four hundred and eight dollars and forty-one cents (A) was given for the balance. If she is not mistaken as to the account to which this credit was applied the consideration for the full amount does not satisfactorily appear, and

I reduce the amount of this note to...\$328 37  
And interest from 19th July, 1846.... 263 17

\$591 54

The second note is for.....\$110 35  
The account produced only shows..... 67 30  
Which with interest from March 4th.

1847, amounts to..... 48 53

\$115 38

"The third note (C) is for one hundred and twenty-seven dollars and seven cents. The account produced is for one hundred and twenty-one dollars and seven cents, which, with interest from 1st January, 1848, is two hundred and one dollars and fifty-seven cents.

The demands thus reduced amount.

without interest, to.....\$516 74  
And with interest, to.....908 94

"The witness stated that the old books had been supposed valueless, and portions of them had been destroyed. Letters of defendant were introduced, running through a series of years, admitting the indebtedness, (though not the amount,) accompanied by the strongest promises of payment. Those subsequent to her father's death, and within a short period of the last marriage, contain expressions of the strongest anxiety to obtain possession of the property to pay these and other debts, if it exhausted her entire

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means. In one letter, (with\*out date) she says: 'what am I to do? before God he (Dr. Bratton) gave me five last year, and this year, before my Maker, I have not had a dollar. Oh! I cannot stand it, if my father was a poor man, then I would expect nothing; there must be some alteration and that soon, for the rest have money.'

"3. The statute of limitations is pleaded to the account of M. Hall and that of S. Wolfe. The account of M. Hall extends from April, '48, to April, '49, and is for one hundred and ninety-one dollars and fifty-nine cents. If the plea is available, and the currency of the statute is stopped at the filing of the bill, these demands previous to 1st June, 1850, are barred. Two letters are offered in evidence, without date, containing strong promises of payment, one indicating that it was written in Dr. Bratton's lifetime, and the other requesting indulgence 'until the middle of February.' The witness was incompetent to prove the dates, but I gather that the letter was written in the fall either of '49 or '50; and, in the absence

of evidence, I adopt the latter, as by the usage of merchants, accounts are not demanded until January, and a portion of this account was contracted in 1849. If this be correct, the account is not barred, but the evidence is slender. I am more inclined to adopt the view suggested by plaintiff, that the statute is not applicable, this not being the case depending on promises express or implied. But the sum of twenty-six dollars and forty-eight cents of this account was originally charged to Dr. Bratton, and subsequently transferred to Mrs. Faust. The witness undertook to explain that the charges and changes were made by Mrs. Faust's directions, but, on objection made, I excluded this proof. The amount originally charged to defendant, is one hundred and sixty-five dollars and eleven cents.

"The account of S. Wolfe was for the most part contracted subsequent to Dr. Brat-

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ton's death, and amounts to one hundred and forty-eight dollars and eighty-one cents; of this, items amounting to twenty-eight dollars and sixty-eight cents, were sold in April, 1850, more than four years prior to the filing of this bill, from which deduct ten dollars paid in cash, June 25, 1850, (before any other articles are charged,) leaves barred eighteen dollars and sixty-eight cents, if the plea of the statute be available. In that event the account will be reduced to one hundred and thirty dollars and thirteen cents; of this latter amount, the sum of two dollars and fifty cents was contracted before Dr. Bratton's death.

"4. The accounts, &c., contracted subsequent to Dr. Bratton's death, are as follows:  
1. J. W. Shaw, for articles of jewelry...\$ 36 80

2. W. T. Walter, for articles of millinery ..... 191 43  
Closed by note, interest from 1st Jan., 1852 ..... 73 70  
265 13

3. Brice & Roddy, dry goods..... 318 00

4. M. Campbell, for millinery..... 95 12  
Close by sealed note, interest annually, from 1st January, 1852..... 42 92  
138 04

5. John Seigling, note for Piano..... 406 00  
Interest from 1st January, 1853..... 123 00  
529 00

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\*6. Hayden & Brother account for jewelry .....\$134 00  
Note for jewelry..... 250 69  
Interest from December 1st, 1853..... 49 33  
380 93

7. C. H. Duryee, note for cash lent... 236 00  
Interest from 28th October, 1852..... 77 23  
Do. account for cash lent..... 200 00  
Interest from 20th August, 1853..... 53 90  
\$567 13

"All these demands are sufficiently proved. As to that of W. T. Walter, it is conceded that the note was given in settlement of the account produced, for articles of millinery furnished in 1851. The proof by the books would not have been sufficient to establish the account, (the book of original entries not being produced,) but the admission that the note was given in settlement of the account, established it more satisfactorily to my own mind than the proof by original entries, if such had been made.

"I am much embarrassed in attaining a conclusion in this case. If I am to understand the opinion of the court, as deciding that the estate of the defendant is only liable for necessities in the sense, in which that term is used when applied to demands against infants, or married women when actions are brought against their husbands, I should feel much difficulty in recommending the payment of any of the demands contracted on Dr. Bratton's lifetime, even although subsequently recognized, and this is the view urged by defendant. But under the circumstances of this case, I do not understand the Court so to have held. The application is here for payment out of defendant's own estate, and not out of the estate of Dr. Bratton, or her husband; it is simply that she herself

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\*having the means should pay for the articles furnished her, at her own request. The reason of the application of the strict rule, in cases of infants, is, that they may not become the victims of the fraud of designing men; but although Mr. Gracey proves that she was not cautious and prudent in money matters, and, in his opinion, easily imposed upon, she certainly does not occupy the position of an infant, nor demand, in that respect, the protection of the court. The protection of the court was sought and extended, to protect her estate from the hands of her husband, who had deserted her, and not from her creditors, in whose behalf she herself asked, as stated in the circuit decree, that her estate might be placed in her possession. In taking a practical view of the case presented, it seems to me that it would be a much greater fraud to turn the plaintiffs out of court than suffer the defendant, a person of full age, to use their property, and then refuse payment therefor, when her means are comparatively ample. I infer from the correspondence principally, that until her last marriage, she, herself, was anxious to have all the debts discharged, and that the present resistance dates from that period. If, then, these demands were against the estate of Dr. Bratton, or against the husband, to be paid out of his own means, I should feel bound to exclude a large part, if not all, the demands arising in his life-time, and to reduce to some extent those that have since arisen. But the honesty of the claims of the plaintiffs, most of whom I personally know to en-

joy a high reputation for integrity, induces me to suppose that the opinion of the court does not demand of me the rejection of these claims. The answer of the defendant is not sustained, but directly contradicted by the oaths of those witnesses who have been examined as to distinct portions thereof. I have hesitated most as to the claims of Hayden, Brother & Co., for jewelry, and that of Seigling for a piano, both furnished since the death of Dr. Bratton. But I cannot say that these articles were improper and unnecessary for a lady of the defendant's

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\*means and condition in life—at all events, they are articles not consumable in the use; and there being no tender of a return of the articles, I am of the opinion they should be allowed.

"A serious question presents itself in regard to the allowance of interest. After reflection, I think that while the liquidation of the accounts furnished the best evidence of the correctness, yet as the court has decided that they are not to be treated as contracts per se, I exclude the interest, except as to claim of Mr. McCants, where it is admitted, and that of Duryee, for cash lent, which character of demand carries interest per se.

"I recommend the demands be paid as follows:

1. Jeremiah Cockrell.....	\$226 16
2. W. A. Morrison & Co.....	10 65
3. J. B. McCants.....	85 45
4. W. B. Robertson, Assignee for Nelson .....	424 75
5. Wm. Harrison and wife.....	516 74
6. Mansel Hall.....	165 11
7. S. Wolfe.....	148 81
8. J. W. Shaw.....	36 70
9. W. T. Walter and wife.....	191 43
10. Brice & Roddy.....	318 00
11. Mary Campbell.....	96 12
12. John Seigling.....	400 00
13. Hayden, Brother & Co.....	331 00
14. Charles H. Duryee.....	567 13
15. J. B. Mickle, Assignee.....	100 00

\$3,617 05

"I recommend that these sums be paid to the respective parties out of the cash funds in the hands of the Commissioner and trustee.

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\*"Three items of C. H. Duryee's claim for money lent, as to which separate proceedings have been instituted, and the demand of W. B. Peak, presented since the reference, will form the subject of a supplemental report, possibly at the present term."

The decree of his Honor is as follows:

Dunkin, Ch. It has been already determined that the defendant, Christina W. Faust, being a married woman, was incapable of binding herself by a contract, and that she had no authority to charge her separate estate. But it was further ruled, that in the anomalous situation which she had occupied since her desertion by her husband, those persons who had supplied her with necessities suitable to her condition in life, had



an equitable claim on her estate now under the control of this Court.

The special referee has very properly classified the demands which were presented before him, and the cause was heard upon exceptions to his report. Adopting the order suggested in the report, the Court will first consider the claims originating prior to the death of Dr. Bratton, in December, 1850. According to the testimony of Mr. Gracey, (who had married a sister of the defendant,) she was young at the time of her marriage with Clement C. Faust, in 1837. They lived together but a few years, and in 1840 she was left with her father, Dr. Bratton, a highly respectable and wealthy gentleman of Winstonsborough, with whom she continued to reside until his decease. During this interval, Mrs. Faust had no means, and was entitled to no estate. She was supported by her father like the rest of his family, and as she had herself been supported prior to her marriage. It was not until the death of her father that she became entitled to an estate as one of his distributees. For any articles furnished to Mrs. Faust during this period, the only

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legal claim \*of the creditor was upon the husband; or, it may be, upon the father, so far as he authorized the transaction. It is very questionable whether this class of claimants falls within either the principle, or the reason of the appeal decree. As she had no estate, so it does not appear that her husband was in any better condition.

According to the evidence, she lived, during these ten years, with her father, Dr. Bratton—appeared as one of the family, and was treated as such. Mr. Gracey said that her father opened an account with him, and requested him to let Mrs. Faust have such articles as she desired, and as witness thought she needed. This witness is the proprietor of a large and fashionable store in Columbia. Dr. Bratton told him that he did not wish her to contract accounts in Winstonsborough. He further stated that Mrs. Faust's annual accounts with him amounted to from two hundred and fifty to three hundred dollars. The testimony of John Adger proves that Mrs. Faust was abundantly supplied by her father, and his statements throw much light upon the relations which subsisted between them. Mrs. Campbell, another witness, proves that at one time Dr. Bratton paid her four hundred dollars on a millinery account of Mrs. Faust, for the years 1844 and 1845.

It is superfluous to recapitulate the evidence; but the claimants of this period have manifestly failed to show any such necessity on the part of Mrs. Faust, for the articles they furnished, as would entitle them to the aid of this Court.

The defendant's fifth exception, is therefore sustained.

After the death of Dr. Bratton, in December, 1850, the situation of Mrs. Faust became entirely changed. She had no longer his support and protection, and her sole means consisted of her interest in his estate. In June, 1851, Mrs. Faust removed to the State of Georgia, where she has ever since resided.

It appears from the previous decree in this

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cause that, in \*1851, proceedings were instituted in this Court for partition of Dr. Bratton's estate, in which Mrs. Faust was a party plaintiff, and her husband, C. C. Faust, a defendant. No final decree has yet been made in that cause; but, so well as the Court can understand, Mrs. Faust was entitled to between twenty and thirty slaves, besides between three and four thousand dollars in cash. By certain interlocutory orders, the income was directed to be paid to Mrs. Faust, for her support and maintenance. For the reasons stated in the report of the special referee, he has not made up the accounts of the trustee. But the estate of Mrs. Faust is now estimated at about twenty-one thousand dollars; and of the cash reported to be in the hands of the Court and of the trustee, it is very clear, that nearly two thousand dollars consists of surplus income. The defendant, in her first exception complains that, since 1852, very little has been paid to her, and this seems fully confirmed by the trustee's informal statement. In the defendant's fifth exception, it is urged that the jewelry purchased from Hayden, the piano from Siegling, &c., were not necessities. As is suggested by the special referee, this objection is rather ungracious, as neither the piano nor the jewelry are articles consumable in the use, and there has been no proposal to return them. But the decree of the Appeal Court declares the plaintiffs entitled to recover "for such articles as were necessary and proper for the defendant, in the condition in society which she occupied." The defendant had probably been accustomed to these advantages under her father's roof. Her estate warranted the continuance of them, and the Court is not disposed to scrutinize very minutely into the degree of necessity which existed, on the part of the defendant, for the solace of music, or the indulgence of a gold watch.

The demands of Charles H. Duryee, require a more particular notice. In addition to the note presented by him, he has filed a supplemental bill, in the nature of a bill of

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discovery. The answer of the defendant is conclusive, and the supplemental bill must stand dismissed. But on 28th October, 1852, the defendant borrowed from Lieut. Duryee, at Thomasville, in Georgia, two hundred and thirty-six dollars, for which she gave him her note, and on 25th August, 1853, he sent her two hundred dollars by mail, which she

received. The defendant's answer admits the receipt of about four hundred dollars from this plaintiff, but adds, "that it had been, and still is, her impression (though she will not undertake to speak with absolute certainty,) that she repaid him all that she ever borrowed from him." Of course this amounts to no proof of the discharge. But the exception submits that there was no proof of the necessity of the loan of money at that time.

It is true that money can, in this sense, be regarded as necessary only when the purposes to which it is applied, or to be applied, are necessary purposes. The evidence upon this point is defective; but it may have arisen from misapprehension, and may yet be supplied.

The sixth exception is overruled, except as to the claim of Charles H. Duryee, which is re-committed for further examination.

The plaintiffs except, because interest has not been allowed on their demands. They were declared entitled to the aid of this Court, so far as the articles supplied by them were necessary and proper for the defendant. Their demands constituted an open account not bearing interest; and the note of the defendant, or her promise to pay interest, is, in itself, a nullity, as the act of a married woman. The plaintiffs' exceptions are overruled.

The claim of Dr. Peake remains to be considered. The decree of Chancellor Wardlaw, of November last, authorized creditors to present and prove their demands before the Commissioner, on or before 1st May, 1857. The appeal from this decree was heard and

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disposed of at the sittings \*in May last. No notice was published for creditors; but a reference was held on 27th June, and the report of the special referee filed 6th July. In the meantime, Dr. Peake, had, on 1st July, sent the note of the defendant to the Commissioner, not having heard, as he affirms, of the reference of 27th June. The report of the special referee, notices the demand of Dr. Peake, but says that it was presented since the reference. The practice of the Court upon this subject is stated by the Court of Appeals, in *ex parte, The United States, in re Shubrick's Creditors v. Shubrick's Executors*, 1 McC. Eq. 406. Although the time for proving claims has elapsed, the Court will let in creditors at any time while the fund is in Court on payment of any costs incident to the delay.

It is ordered and decreed that the report of the special referee stand confirmed, except as modified by this decree. It is further ordered and decreed that the special referee take further testimony, and report upon the claim of Charles H. Duryee, as hereinbefore directed, with liberty to report any special matter; that he also examine and report up-

on the claim of W. B. Peake; that he report fully upon the accounts of the trustee as heretofore directed, by the decree of November, 1856; and that the parties have leave, in the meantime, to submit any provisional order for the appropriation of the fund in Court, as also, the balance admitted to be in the hands of the trustee.

The defendant, Christina W. Faust, appealed and now moved this Court to reverse or modify the decree, on the grounds:

1. Because the Court, by its decretal order of 1851, having directed the trustee to pay to Mrs. Faust the income of her estate for her support and maintenance, and there being no proof that the said allowance was insufficient for the purpose—the decree of the Chancellor, in allowing claims to a large

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\*amount over and above the said income, and to be paid out of the corpus of the estate, is erroneous, and ought to be reversed or modified.

2. Because the decree is silent as to the matter of costs, when some direction ought to have been given as to the division thereof—several of the claims sued on, or presented, having been disallowed.

The plaintiffs also appealed and moved this Court to modify the decree on the grounds:

1. Because the claims of the creditors, arising in the lifetime of Dr. Bratton, should have been allowed, as recommended by the report.

2. Because the claim of Charles H. Duryee, should have been ordered to be paid.

3. Because interest should have been allowed on the demands which are liquidated.

Gregg, McAliley, for defendant.

Boylston, for plaintiffs.

PER CURIAM. This Court perceives no error in the decree; and it is ordered that the same be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

9 Rich. Eq. \*392

\*MARIA F. BAILY v. FRANCES C. BAILY, et als.

(Columbia. Nov. and Dec. Term, 1857.)

[*Judicial Sales* ¶11.]

Where a Commissioner sells land without having advertised the sale for the time prescribed by the order, the sale is invalid, and will be set aside.

[Ed. Note.—Cited in *Davis v. McDuffie*, 18 S. C. 500; *Witherspoon v. Witherspoon*, 33 S. C. 228, 11 S. E. 704; *McMaster v. Arthur*, 33 S. C. 515, 12 S. E. 308; *Ex parte Alexander*, 35 S. C. 412, 14 S. E. 854; *Tompkins v. Tompkins*, 39 S. C. 545, 18 S. E. 233; *Townes v.*



City Council of Augusta, 52 S. C. 410, 29 S. E. 851.

For other cases, see Judicial Sales, Cent. Dig. § 29; Dec. Dig. 11.]

Before Dargan, Ch., at Laurens, June Sittings, 1857.

This case came before the Court by motion to set aside a sale of land made by the Commissioner. His report states the facts and is as follows:

"The Commissioner respectfully reports that he offered for sale the land and premises described in the pleadings in this case, on the first Monday in January, 1857, at Laurens Court House, and the same was bid off by John Martin, at and for the price of one thousand dollars, he being the highest and only bidder; that the said John Martin shortly afterwards offered to give bond and security for the purchase money, and at the same time demanded titles; that prior to this offer and demand, the Commissioner had been notified that the confirmation of the sale would be resisted, and he declined making the titles or taking the bond, deeming it advisable to have the judgment of the Court as to the validity of the sale, before doing so. The Commissioner deems it proper to bring to the view of the Court, the circumstances attending the sale, and the ground upon which its confirmation is resisted. After the bill was filed and the papers were in readiness for obtaining the order for the sale of the land, they were delivered to one of the Solicitors to obtain the order at Chambers, in Columbia, in December last; the parties were exceedingly anxious to have the land

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sold on sale day, in January, 1857, \*believing that said land would sell better on that day than on any subsequent sale day thereafter; the Commissioner not doubting that the order had been obtained, although it had not then reached him, on the 15th day of December, 1856, advertised the land for sale on the 1st Monday in January following, but when he received the order, he found that it bore date on the 17th December, and consequently left but twenty days from the signing of the order to the day of sale, including the day on which the order was granted and the day of sale, although the land was actually advertised for over twenty-one days. It sold for less than its value. The Commissioner submits to the Court whether under the circumstances the sale should be confirmed, the bond taken for the purchase money, and the titles executed."

His Honor made the following order:

Dargan, Ch. On hearing the report of the Commissioner, of the sale of the land made by him in this case, from which it appears that the twenty-one days public notice of said sale had not been given, as required by the order directing the sale, and that the land did not sell within three hundred dollars of its value, it is, on motion of

Young & Simpson, Complainant's Solicitors, ordered that the sale be set aside, and that the Commissioner do resell the said land and premises at Laurens Court House, on the first Monday in October next, or some convenient sale day thereafter, the Commissioner having first given at least twenty-one days public notice of said sale, upon the same terms as directed by this Court in its previous order for the sale thereof.

It is further ordered that the nett proceeds of said sale be distributed, when collected, amongst the parties entitled thereto, according to their respective legal interests, to be ascertained, if necessary, by the future order of this Court.

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\*The purchaser, John Martin, appealed, and now moved this Court to reverse the order on the grounds:

1. Because the sale made of the land when he became the purchaser was valid, and ought to have been confirmed.

2. Because it was not shown that any other person would have given more for the land than he did, and if there was any irregularity in the sale he did not know it, and it is submitted that a mere irregularity will not defeat the purchaser's right to the property purchased.

Sullivan, for appellant, cited *Young v. Teague*, Bail. Eq. 13; *Maddox v. Sullivan*, 2 Rich. 4.

Young & Simpson, contra.

The opinion of the Court was delivered by

DARGAN, Ch. In a sheriff's sale, the omission to advertise in the manner, and for the time prescribed by law, or even the omission to advertise at all, is an irregularity that does not vitiate the sale. The object of a sale by a sheriff by virtue of an execution, and a sale under a decree in equity, are for purposes widely different, and it does not follow because the want of due notice does not invalidate a sale made by a sheriff, that the same rule must prevail in sales made by a commissioner, or master under a decree in equity.

As to sales made under the order of this Court, the law does not prescribe the length of time notice shall be given. It ought to be a reasonable time, and what would be reasonable time in one case, might not be so in another. It is left to the discretion of the Court. As a general rule the Court has adopted the rule as to notice, prescribed by the Statute Law in cases of sheriffs' sales.

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The object desired, and intended \*to be secured, is notoriety and competition. And it is obvious, that where these objects can be obtained by a shorter notice, the Court being tied down by no positive requirement of the law, may, with propriety and without injury to any one, dispense with the notice of twenty-one days usually required.

But where the Court has made an order of sale, of which a notice is to be given by advertisement for a given time, such direction, as well as the other terms, become the law of the case. It becomes the condition, on which the authority is to be exercised, the non-performance of which will destroy the power.

In this case, the decree directed the sale to be advertised for twenty-one days, and the advertisement was for twenty days. If this departure from the directions of the order, does not invalidate the sale, why may not a notice of fifteen days, or even of ten, be sufficient, and how, with any consistency, could we stop short of applying the rule that prevails in sheriffs' sales on this subject? The Court could not, without great danger to the rights and interests of the parties to be affected by its sales, dispense with the condition of notice, and allow a commissioner or master to modify the terms at his discretion: the conditions on which he was to exercise his authority. Such a discretion was never intended to be reposed in that officer. In this case, I will say, en passant, that no blame is imputable to the commissioner, who very properly, when he learned that the land thus irregularly sold was worth three hundred dollars more than the bid of John Martin, refused to execute and deliver titles, and submitted the matter for the judgment of the Court.

It is true, that in this State, we have adopted a different rule from that which prevails in the Court of Chancery in England, in regard to opening the biddings, on account of the inadequacy of the bid at which the property has been knocked down, or because

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some one offers more. In such a \*case, otherwise fairly conducted, the contract is valid and binding, and needs no confirmation by the judgment of the Court. The decree investing the commissioner with authority to sell, is held sufficient, if he conforms to the conditions of his authority. But this rule as to not opening the biddings for deficiency of price, renders it more important, that the conditions prescribed should be rigidly observed. It would be unsafe, and extremely unwise, to say, that while on the one hand the sale cannot be set aside, and the biddings opened, however inadequate the bid, on the other hand to hold, that due notice of the sale may be dispensed with by the selling officer of the Court.

This Court is of opinion that the sale, in this case, was invalid, for the want of due notice. It is ordered and decreed that the circuit decree be affirmed, and the appeal be dismissed.

DUNKIN and WARDLAW, CC., concurred.

JOHNSTON, Ch., absent.

Appeal dismissed.

9 Rich. Eq. \*397

\*W. WALKER v. T. S. ARTHUR, et al.  
(Columbia. Nov. and Dec. Term, 1857.)

[Judgment ¶762.]

Though a judgment confessed to secure future advances to the borrower himself, will, in Equity, be postponed to a subsequent bona fide judgment for a subsisting debt, except for such advances as had been made before the second judgment was obtained, yet a judgment confessed to secure existing debts which the plaintiff agrees to pay or assume to the amount of the judgment, does not come within that category, and is valid from its date, against subsequent liens, although at the date of the confession no debt is specified except one due the plaintiff himself.

[Ed. Note.—Cited in *Adickes v. Lowry*, 15 S. C. 136; *Hirshkind & Co. v. Israel*, 18 S. C. 175; *Norwood v. Norwood*, 36 S. C. 343, 15 S. E. 382, 31 Am. St. Rep. 875.

For other cases, see Judgment, Cent. Dig. § 1317; Dec. Dig. ¶762.]

Before Dunkin, Ch., at Spartanburg, June Sittings, 1857.

A statement of the case is contained in the circuit decree which is as follows:

Dunkin, Ch. The defendant, J. D. McCullough, was indebted to the plaintiff in the sum of seven hundred and sixty-eight dollars and ten cents, by sealed note, dated 9th January, 1855, and payable with interest from 1st January, one day after date. To secure the payment of this note, the said defendant, on the 17th March following, mortgaged to the plaintiff two slaves, therein named. In the meantime (as is recited in the bill) the said J. D. McCullough had, on 1st February, 1855, confessed a judgment to his co-defendant, T. S. Arthur, for the sum of twenty-three thousand and forty-seven dollars and ninety-six cents, on which execution was duly lodged. The plaintiff in the execution being about to enforce the same, this bill was filed, 7th April, 1856, impeaching the judgment on various grounds, and calling upon the defendants to disclose the consideration of the same. The answers of the defendants present a clear and distinct narrative of their transactions in relation to the judgment of

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\*February, 1855, and are fully sustained by the uncontradicted evidence adduced at the hearing. It appears that as early as the fall of 1853, J. D. McCullough became indebted to his co-defendant in the sum of two thousand five hundred and thirty dollars and ninety-six cents, for money lent and advanced, and school furniture, &c. Some time prior to 1st February, 1855, J. D. McCullough was indebted to several other persons in large amounts, some of whom were pressing in their demands. Under these circumstances, he applied to his co-defendant for assistance, who was willing to assist him, provided he could do so without too great loss to himself. With this view J. D. McCullough made a statement of his estate, real and personal, and of his indebtedness. But the indebted-



ness proved greater than he supposed, (according to a schedule adduced, not less than twenty-seven thousand dollars;) and although, from Mr. McCullough's statement, his co-defendant thought his estate was worth more than the amount of his debts, he was unwilling to make himself responsible for more than twenty-three thousand dollars, including the amount due to himself. He accordingly, on 28th January, 1855, executed his sealed note to J. D. McCullough for twenty thousand five hundred and seventeen dollars, payable one day after date, with interest. On the 1st February, 1855, J. D. McCullough gave him the confession of judgment, set forth in the pleadings, for twenty-three thousand and forty-seven dollars and ninety-six cents, being the aggregate of his prior debt, and for the amount which the said T. S. Arthur was to pay. No debts were specified which Mr. Arthur was to pay, or to assume to pay. He had declined to assume them, and had given to his co-defendant, J. D. McCullough, his absolute note for twenty thousand five hundred and seventeen dollars, which he (Mr. McCullough) continued to hold until 9th April, 1856, when it was surrendered by him, as it was settled by payments and assumptions on the part of the maker. The defendant, T. S. Arthur,

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says \*he hoped that, by paying and assuming to pay in this way, time could be obtained to enable Mr. McCullough to pay off all his creditors. Both defendants state that no debts were specified, but that T. S. Arthur was to pay debts to the amount of his note, and, as one of the defendants says, such debts as were pressing upon him. The witness J. H. Carson, who was the friend of the parties, and privy to their arrangements, testified that the agreement was, that "whatever debts were paid by Mr. Arthur should be credited on his note." It was fully proved that the payments made by Mr. Arthur had considerably exceeded the amount of twenty thousand five hundred dollars, for which his note was given; that the entire property of J. D. McCullough (except these two slaves) had been exhausted; and that the original debt to T. S. Arthur of two thousand five hundred and thirty dollars and ninety-six cents, with interest, remained wholly unpaid.

Both the defendants are distinctly interrogated whether it was not part of the agreement, when the confession was given, that the defendant, T. S. Arthur, should pay the debt of the plaintiff. To this they reply unequivocally in the negative. They state that no debts were specified; but the defendant, Arthur, was to pay or assume debts to the amount of his note; and he avers that he had exceeded what he had agreed to, and he established this by the evidence adduced. The defendant, Arthur, denies that he ever heard of the plaintiff's mort-

gage until June, 1855. But, as an evidence of the desire of both the defendants that the debt due by J. D. McCullough should be placed on the most favored footing, the defendants answer, that soon after the confession of judgment, (of which the plaintiff was fully apprised,) it was proposed to the plaintiff that the defendant, T. S. Arthur, would join the defendant, J. D. McCullough, in a note for the amount of his indebtedness, (the sufficiency of the defendant T. S. Arthur not being doubted,) but that the proposition was declined; that it was then proposed that the plaintiff should take, in

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payment of \*his debt, a part of J. D. McCullough's land, which adjoined that of plaintiff, and that the defendant, T. S. Arthur, would release the lien of the judgment upon the land so taken; but this proposal was also declined, the plaintiff saying he preferred to have his money. In the answer of J. D. McCullough, he says, that "when he gave plaintiff the mortgage of the slaves Lewis and Suckey, he distinctly informed him that he had already given to his co-defendant the confession above stated and that the slaves were also included in a mortgage he had given to his co-defendant; that he stated to the plaintiff that instead of giving him a mortgage of the slaves, he would get his co-defendant to join him in a note, or that he would take land," &c.; that, at "first the plaintiff agreed to take the joint note of himself and his co-defendant for his debt, but that the plaintiff afterwards wrote the defendant a letter, requesting him to send the mortgage in lieu of the note, which was done accordingly." The witness William Irwin, confirmed all that was material upon this point. He, too, was anxious that the plaintiff's debt should be paid. After a sale by the Sheriff, of part of J. D. McCullough's property, witness, at the request of the defendant T. S. Arthur called on the plaintiff; he (witness) expressed to him his regret that he had not taken Mr. Arthur's note, as originally proposed to him, and then offered that plaintiff should take a part of Mr. McCullough's land in payment; but the plaintiff declined to take anything but his money.

It is very true, as was said by the plaintiff's counsel in his argument, that land is not a legal tender, and that the plaintiff was not bound to receive it. But, on the other hand, the conduct of the defendants evinces no disposition to evade the payment of the plaintiff's debt. They were desirous to place him on something better than the most favored footing; but he rejected every proposal, except the immediate satisfaction of his demand, in constitutional currency. He preferred the chances of a bill in equity to

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an unquestionable security, or \*to land convenient to him. The Court is well satisfied

of the justice of plaintiff's debt, and regrets, only less than the defendants seem to regret, that the course pursued by him has so much jeopardized its ultimate payment.

It is ordered and decreed that the bill be dismissed.

The complainant appealed and now moved this Court, to reverse the Circuit decree, on grounds which are stated in the opinion delivered in the Court of Appeals.

Bobo, for appellant, cited *Brinkerhoff v. Marvin*, 5 Johns. Ch. 320.

Perry, Dawkins, contra.

The opinion of the Court was delivered by

DARGAN, Ch. Of questionable policy is the rule of law, which sanctions, and recognizes as valid, a confession of judgment, which is intended to stand as security for future advances. Its tendency is to abuse. Besides, it mars the symmetry of the law, and is inconsistent in this; it is a judgment upon a debt which at the time does not exist. The validity of such a judgment is now too well settled to be shaken, or questioned. It only remains for the Court, to regard such a proceeding with that scrutinizing jealousy, demanded by the nature of the transaction. Where there is a confession of judgment, which is intended to stand as security for future advances, and subsequently, there is another judgment upon a bona fide and subsisting debt, the first judgment, (in this Court at least,) would only be permitted to take priority over the second, from the time the advances were made. The equity of the postponement of the first to the second judgment in the case supposed, and to the extent stated, is too obvious to re-

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quire discussion. And here I will \*make a remark, which has a direct pertinency to the present case. Where as in this instance, a confession is given to secure the plaintiff in the payment of existing debts of the defendant, the case does not fall within the suspicious category of those, where the advances are to be consumed by the borrower, or embarked by him in the hazards of trade. I see no difference between such a confession, and a confession to each creditor separately and directly upon his subsisting debt.

To turn now, to the facts of the case, I am gratified to be able to say that the arrangement made between the two reverend gentlemen who are defendants, is not only permitted by the law, but was fairly, and honorably conducted, and carried out. In all cases of bankruptcy, there must of necessity be one or more victims. In this instance, the plaintiff occupies that unhappy position. His debt is confessedly just, and he says he will suffer greatly from loss of the money. This is certainly a misfortune, much to be regretted. But the claims of the other

creditors are equally just, and the Court perceives no equitable ground to deprive them of their more favorable position, to make room for the plaintiff. Indeed this is not claimed. But it is asked, that the Court should compel Arthur to pay the plaintiff's debt, which, as the said Arthur has not secured the payment of his own debt from McCollough, would be particularly hard upon him, unless he has committed some fraud upon the plaintiff, or violated some obligation to him. But the most scrutinizing search can discover no semblance of fraud, and there is a total absence of all proof to show, that Arthur had made any assumptions to pay the plaintiff's debt.

It seems, that Arthur at first contemplated an arrangement to pay, or assume, all the debts of his friend McCollough, but, on some estimate made by the latter, they were found to amount to about twenty-seven thousand dollars, including Arthur's own debt.

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and that of the plaintiff. But Arthur \*was unwilling to assume so large an amount. He however was willing, and agreed to assume the payment of McCollough's debts to the amount of twenty-three thousand dollars, including his own claim, amounting at that time to two thousand, five hundred and thirty dollars and ninety-six cents. McCollough confessed a judgment to Arthur for twenty-three thousand dollars. This judgment was to stand as security for the payment of Arthur's own claim as has been stated, and also for the sum of twenty thousand, five hundred and seventeen dollars, which Arthur was to apply in payment of McCollough's other debts. It has not been shown, it has not been pretended, that the fund, or property over which Arthur acquired a control by virtue of his judgment, was more than adequate for these purposes, so as to leave a balance for the satisfaction of the plaintiff's judgment. On the contrary, it seems that the property has been exhausted without satisfying all of Arthur's claim.

But it is said, and is assumed in the notice of appeal, and in the argument, that the plaintiff's judgment was one of the debts which Arthur assumed to pay. This is not proved, but the evidence is directly the reverse. The agreement was, that Arthur was to pay twenty thousand, five hundred and seventeen dollars, on McCollough's debts in the aggregate, without the specification of a single particular debt.

The first ground of appeal is, "because the mortgage to the complainant was good from the time the defendant Arthur had notice of it." The logic of this ground is not perceived.

The second is "because the defendant Arthur undertook to pay the debts of McCollough to the amount specified in the pleadings, that the complainant's debt was enu-



merated among those to be paid, and the mortgage to Walker was a direction by McCollough to pay this debt first."

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\*It is true that Arthur undertook to pay the sum of twenty-three thousand dollars, on the debts of McCollough including that due to himself. But according to the evidence, it is not true, that the complainant's debt was enumerated among those to be paid. Nor is it perceived, that the mortgage to Walker was tantamount to direction by McCollough to pay that debt first. It is not perceived, that McCollough had any authority to direct in the matter.

The third ground is, "because Arthur was a trustee for the creditors, and undertook to pay all the debts enumerated at the time he took the confession, and mortgage; which confession and mortgage were taken to cover all the debts of McCollough, of which Walker's was one."

This ground is but a repetition of the preceding. How could a confession which was but for twenty-three thousand dollars, be intended to secure all the debts which amounted to twenty-seven thousand dollars. I have already said, that according to the evidence, there was no stipulation as to Walker's debt, nor was there any specification of the debts to be paid.

The fourth ground is, "because Arthur undertook to raise and pay the cash, and the plaintiff was not bound to take a note or land in lieu of cash."

This ground presupposes that Arthur had undertaken or was in some way bound to pay the complainant's claim, which has not been shown.

The fifth ground is, that "there was no impediment in the way of Arthur's paying the plaintiff's debt, and the mortgage was direction of McCollough, who had the whole matter in his hands, to pay Walker in preference of all others from that date."

It is true that Arthur might have paid

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Walker's debt, if he had thought proper to do so. But not having stipulated to do so, he had the discretion to pay, or not to pay it. It is not perceived, that McCollough had any power of direction in the matter; and if he had, I do not think the mortgage by him to Walker was an exercise of that power.

The sixth ground is, "because the judgment and mortgage to Arthur, being to secure future advancements, was only good to Arthur for any sums advanced before the mortgage to Walker. As Arthur had paid but little for his judgment, but Walker's was for a valuable consideration, and was intended to be covered both by Arthur's and Walker's liens."

This ground asserts a principle founded on a just distinction, and would have been well taken, if the facts had been applicable.

I have already intimated, that if the confession to Arthur by McCollough had been to secure future advances to be consumed or embarked by him in the hazards of trade, or more broadly, to secure a debt not then in existence, such judgment as a lien would, in my opinion, take precedence over subsequent incumbrances only from the time the advances were actually made. But the case here is different. The confession is for bona fide debts actually existing at the time the confession was made. It is no more than if McCollough had confessed to the creditors representing those debts individually. As to the facts assumed in the latter part of the proposition, it is clear from the proof, that the confession of judgment, and the mortgage from McCollough to Arthur were for full consideration. Arthur has paid the amount stipulated by him to be paid to McCollough's creditors, and, in the way of security for his own claim, he is himself in part left without the pale.

The seventh ground is, "because it is evident from the case made, that Arthur intended to hinder Walker in the collection of his

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debt; for notwithstanding McCollough gave the mortgage (to Walker) in March, 1855, (of which Arthur had notice,) he (McCollough) recognized it as a valid lien on the negroes in January the next year, and tried to borrow money on the faith of it, at that time, yet Arthur refused to pay it."

If the fact as to notice, had been as stated in this ground of appeal, I do not see, how it could have placed Walker on a better footing. But it does not appear that Arthur was aware of this mortgage to Walker until June subsequent to its date. The attempt of McCollough to obtain from Walker further advances on the security of his mortgage of the two negroes, without the concurrence or connivance of Arthur, cannot affect the validity of the liens which the latter held, or even the morale of his position. As to McCollough, it is probable that he, as most failing debtors do, embraced the illusive hope, that his means were more ample than they proved to be, and that they would be sufficient to satisfy the claims of all his creditors. His overtures to Walker to procure further advances, do not necessarily involve any imputation upon his honesty. How can they affect the claims or character of Arthur, who does not appear to have been aware of those proceedings? Some desire was manifested both by McCollough and Arthur to pay Walker's claim. Arthur did not advance much, (if any) money in the payment of McCollough's debts. They were satisfied for the most part from the proceeds of the sale of McCollough's property. They, Arthur and McCollough, tendered to Walker satisfaction of his claim out of lands adjoining his own. This having been declined, they then tendered to him

in satisfaction of his claim, McCollough's note with Arthur as surety: which was also declined. This is what is alluded to, in the plaintiff's fourth ground of appeal. If he had accepted either of these proposals his debt would have been secured. This does not look like hindering. These offers having been declined by Walker, were made, I sup-

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pose, to more accom\*modating creditors. McCollough property has proved insufficient to satisfy all his debts. The sum secured by Arthur's judgment and mortgage, has been exhausted without satisfying all of Arthur's own claim. It is a hardship upon Walker, as it is upon the other unsatisfied creditors of McCollough. The plaintiff's case is a very common misfortune, which the most equitable administration of the laws cannot prevent or relieve.

It is ordered and decreed that the appeal be dismissed, and the circuit decree be affirmed.

DUNKIN and WARDLAW, CC., concurred.

JOHNSTON, Ch., dissented.  
Appeal dismissed.

9 Rich. Eq. \*408

\*GEORGE A. HUGGINS and ELLEN, His Wife, v. JOHN BLAKELY and Wife, and Others.

(Columbia. Nov. and Dec. Term, 1857.)

[*Guardian and Ward* ¶54.]

Mode of stating the accounts of a guardian where the receipts of every year have exceeded the expenditures.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 253; Dec. Dig. ¶54.]

[This case is also cited in *Livingston v. Wells*, 8 S. C. 363, as to the question of interest.]

Before Johnston, Ch., at Sumter, June Sitings, 1857.

This case will be understood from the opinion delivered in Court of Appeals.

Spain, Richardson, for appellant.  
Blanding, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. The defendant, Isabella E. Blakely, while a widow, was appointed guardian of her daughter Ellen, the female plaintiff. After she had been taken in marriage by John Blakely, she was removed from her office, and another guardian appointed. This bill is filed against herself and husband, and the sureties to her bond for an account of her guardianship. Her accounts as guardian were referred to the commissioner by order of the Court; and it appears, by his report, that from 1843, when she was ap-

pointed, until 1854, when she was removed, her receipts in every year exceeded her expenditures. In stating the account, the commissioner charged interest on the excess of receipts over payments in every year from the beginning of the year next succeeding, but in no instance augmented the sum bearing interest by the surplus of interest remaining after the payments of the preceding year. He applied the payments primarily to the extinguishment of the interest which had

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\*accrued; but where they were insufficient to this end, the principal was not increased except by accretion from receipts, which were added at the expiration of the years in which they were received. Joseph Montgomery, one of the sureties to the bond, excepts to the commissioner's mode of computation as compounding the interest, affirming he should have deducted the expenditures of each year from the receipts of that year, and carrying out the balance as principal, should have charged on that balance simple interest from the end of the year. This exception was overruled by the Chancellor on circuit, and this defendant appeals because it was not sustained.

The mode of calculation suggested differs from the mode pursued in applying the payments of each year to the particular principal first taken into the account for that year, instead of to the aggregate of principal and interest; and has the effect to some extent of reducing the principal or allowing interest on the payments. In the commissioner's computation, the interest is not compounded, except as this is the legitimate consequence of the doctrine that a partial payment should not diminish the capital, until the interest due be paid. Interest is as fairly an incident of any accretion of capital as of the original principal, and the whole interest on both sums where they are parts of the same fund should be absorbed by payment before the aggregate producing this sort of profit is diminished. Compound interest, in the sense of interest upon interest at annual or shorter rests, is discouraged by the course of the Court, and is allowed only in exceptional cases. *Henderson v. Laurens*, Car. Law Jour., 134; *Myers v. Myers*, Bail. Eq. 29; *Baker v. Lafitte*, and the cases cited there, in a note, 4 Rich. Eq. 395. But to the extent allowed by the commissioner in this case, and necessarily flowing from the primary appropriation of payments to the extinction of interest due, what is sometimes called compounding is approved by the gen-

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eral practice of the accounting \*officers of the State, and the judgments of the Courts of law and equity. In *Rowland v. Best*, 2 McC. Eq. 321, the rule as to interest is briefly stated to be to allow it on annual balances, but



not to compound it. In *Black v. Blakely*, 2 McC. Eq. 1, Judge Nott says, "that the rule for casting interest where partial payments have been made, is to apply the payments, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes to discharge the principal, and interest is computed on the balance of principal. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal, until the period when the payments taken together exceed the interest then due. That method of calculating interest has been settled by the decisions of our Courts for more than thirty years." That case is decisive of the case under consideration. No distinction in principle exists between them, and none of any sort is suggested except that Judge Nott does not expressly apply his doctrine to the state of facts where the receipts continually exceed the expenditures. But if the annual balance must bear interest, wherever this balance is not the result of adding the surplus of interest above the payments, it is quite immaterial whether it be attained by increment or reduction of the former principal. It is the general rule, which was followed by the commissioner here, to exempt a trustee from interest on his receipts for the year in which they were received; but surely from the beginning of the next year such additions of principal should be as productive rateably as that part of the fund in his hands which first bore interest, and the rule concerning partial payments is equally applicable to both.

It is ordered and decreed that the circuit decree be affirmed, and the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC.,  
concurring.

Appeal dismissed.

#### 9 Rich. Eq. \*411

\*JOIN J. AARON, et al., v. ELIJAH BECK,  
et al.

(Columbia. Nov. and Dec. Term, 1857.)

[Wills  $\hookrightarrow$  590.]

Testator devised and bequeathed as follows: "I give all my property real and personal to my wife S. K. during her natural life and should she again marry then and in that case the whole of the property to be equally divided between her and my daughter M. E. the half of which my wife shall die possessed to be disposed of at her death as she may think proper and that which shall fall to my daughter to be exclusively hers" for life, with remainder, &c.:—*Held*, that the wife took an estate for life in the whole property, defeasible upon her marriage as to one half—that her estate in the half which upon her marriage she was entitled to retain, was not enlarged into an absolute es-

tate, but remained an estate for life with power of appointment to take effect at her death.

[Ed. Note.—Cited in *Wilson v. Gaines*, 9 Rich. Eq. 421; *Boyd v. Satterwhite*, 10 S. C. 51, 52; *Bilderback v. Boyce*, 14 S. C. 541; *Wallace v. Craig*, 27 S. C. 521, 523, 4 S. E. 74; *Humphrey v. Campbell*, 59 S. C. 47, 37 S. E. 26.

For other cases, see Wills, Cent. Dig. § 1297; Dec. Dig.  $\hookrightarrow$  590.]

[Remainders  $\hookrightarrow$  17.]

On bill by remainder-men for an inventory, costs allowed the plaintiffs.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 12-17; Dec. Dig.  $\hookrightarrow$  17.]

Before Wardlaw, Ch., at Barnwell, February, 1857.

A full statement of the case is contained in the circuit decree which is as follows:

Wardlaw, Ch. Robert Kennedy died October 16, 1834, leaving of force a will dated October 10, 1834, whereby, in a single sentence, without marks of punctuation, he disposed of his estate in the following terms: "I give all my property both real and personal to my loving wife Sarah Kennedy during her natural life and should she again marry then and in that case the whole of the property to be equally divided between her and my daughter Mary Elizabeth Aaron the half of which my wife shall die possessed to be disposed of at her death as she may think proper and that which shall fall to my daughter Mary Elizabeth Aaron to be exclusively hers during her natural life and at her death to the lawful issue of her body and

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in \*the event of my daughter's dying without issue to revert to my nearest blood kindred;" and specific partition by disinterested persons, and not by sale, is directed.

Afterwards in the year 1836, the widow, Sarah Kennedy, intermarried with Charles Beck, and thereupon a division of the estate of testator was made, and the said Sarah, took as her moiety, (besides some land which is not in controversy,) the slaves Billy, Bowman, January, Vacey, Amy, Samuel, Sophy, Sabrina, George, Priscilla, Cornelius, Aquilla and Marcella. Charles Beck died in 1855, leaving of force a will dated June 1, 1846, whereby, he gave to his said wife, Sarah for life, the slaves Billy, Bowman, January, Vacey, Amy, George, Sabrina, and Sylvia, (which last is dead) and all the remainder and residue of his estate to the defendants, his four children by a former marriage, on certain trusts and limitations not affected by the present litigation. After the death of said Charles Beck, namely, on November 1, 1855, his widow, Sarah, professedly in execution of the power of appointment given to her by the will of Robert Kennedy, made a deed, whereby, after reserving to herself the enjoyment for life, she appointed and transferred the aforesaid twelve slaves to John J. Aaron absolutely, in trust for the sole and separate use of Mary E., wife of John Aaron,

for life, and at her death to her children left living. After the death of Charles Beck, the defendants, or some of them, as his legatees and representatives, procured the said slaves to be appraised as belonging to his estate, and were proceeding to divide them among themselves, when the plaintiffs filed this bill to have their rights declared and secured. It is conceded by the defendants, that, if the plaintiffs as appointees of Sarah Beck or distributees of Robert Kennedy, (and the mother Sarah, and daughter Mary E. are his distributees,) have any right to the slaves, then they are entitled to a schedule of the slaves, signed by the defendants, identifying them as liable to delivery to plaintiffs on the death

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of Sarah Beck; and the plaintiffs are \*content to have this remedy. The question of the cause, therefore, is whether Sarah, widow of Robert Kennedy, took under his will an estate for life only in the said slaves, with a power of appointing the succession, or an absolute estate in the slaves, which on her marriage with Beck vested in him as husband.

The distinction although nice is completely established, between a gift to one indefinitely with a general power of appointment superadded, and a gift to one for life with like power of appointment; in the former case the estate passes absolutely to the donee, and in the latter case an estate for life only passes to the donee, with a power of appointing the inheritance or succession which must be exercised to be effectual. Where the estate for life is given to let in intervening estates in strangers in default of appointment, and especially if no specific mode of appointment be prescribed, and the intervening estates fail in event, this distinction has not been so inflexibly preserved as in cases where there is no such mesne estate, and a particular mode of appointment is specified. The general doctrine, however, as to express gifts for life is as above stated. Wherever a power only, by the construction of the instrument of gift, is properly interpreted to be given, the donee cannot take an absolute estate; and it is against the course of Courts to enlarge express estates by implication. 1 Sug. Pow. 119, 128. Anon. 3, Leon 71. Tomlinson v. Dighton, 1 P. Wms. 149. Bradley v. Westcott, 13 Ves. 445. Reith v. Seymour, 4 Russ. 263. Pulliam v. Byrd, 2 Stro. Eq. 142.

In the present case, the primary gift of the estate is to the widow Sarah, for life, and the express and formal word of donation to her is limited to such life estate, and this affords an argument of some strength against extending her estate by implication. Still it is plain that the terms of the will directing equal division of the whole property between widow and daughter in the event of the widow's second marriage, are adequate to pass the fee if the context demonstrates

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such intention of the donor; Bankhead v. Carlisle, 1 Hill, Eq. 357; Shaw v. Monefeldt, 6 Rich. Eq. 240. And it is urged that such intention is demonstrated as to the widow's moiety, by the omission of express restriction of her estate for life, and the insertion of a general power of disposal; whereas the other moiety, by the same clause, is expressly restricted to the daughter's life, with limitations over at her death, and as the daughter might, and in the course of nature probably would survive the mother, this provision could not be reasonably confined to the widow's life estate. But the words of division are satisfied by supposing them to refer merely to the subjects of property to be divided, without defining the estate therein to be acquired by the widow on the division; and there is no inconsistency of purpose imputed to the testator by deducing his intention to be, to give, in the event of the widow's marrying again, one-half of the property to her for life with power of appointment, and the other half to the daughter for her life with remainder to her children, &c. It is unusual, perhaps, unnatural, for a testator to provide with greater or equal liberality for his wife, in case she shall become the partner of another's bed, as where she preserves her widowhood intact; and yet this would be the result of the construction urged for defendants. The portion of the widow upon second marriage is described as "the half of which my wife shall die possessed to be disposed of at her death as she may think proper," and these words seem to contemplate that she shall remain in possession of the specific property during her whole life, and make no valid disposition of it to take effect in enjoyment before her death. If the general power of disposal conferred had been intended to carry the fee, it was inconsistent and preposterous to provide for the time when her appointment should take effect, as her jus disponendi as owner would have included any lawful time and mode. The fact, that the property is not given to her separate use, strengthens the inference, that her right of disposal accruing when she married, was a

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power and not an \*absolute estate. It is argued that as the wife's power of disposal has no limit as to mode beyond her discretion, her second marriage without any settlement of the chattels on herself amounts to an appointment by the act of marriage in favor of the husband; but this view overlooks the provision that the power was to be exercised only in the event of her marriage, or in other words, after she had incurred disability by the act of marriage. It is held in Nix v. Bradley, 6 Rich. Eq. 43, that the husband does not acquire eo instanti upon marriage, chattels settled to the separate use of the wife; and chattels as to which she has



merely a power of appointment after marriage are clearly within the same principle. And notwithstanding the disparaging remark of my esteemed brother Dargan in that case, I am satisfied with the sufficiency of the reason for the doctrine that the title of the husband to the wife's chattels does not accrue until the fact of marriage be complete, whereby she is rendered incompetent to contract with him, except in virtue of some special power reserved to her. The wisdom and policy of the law, that the wife by marriage confers upon the husband the unsettled chattels owned and possessed by her, may be vindicated; but surely a different result is reasonable, where a separate estate in her has been created for the obvious purpose of restricting the marital rights, or a power has been given to her to be exercised when she has ceased to be *sui juris*. Where in the instrument creating the power there is no limitation as to mode or objects, the wife might appoint to the husband or any other person in any form by which the estate, according to its nature, could be legally transferred; *Clark v. Makenna*, Chev. Eq. 163; *Converse v. Converse*, MS. [9 Rich. Eq. 535.] But it is not pretended here that the wife has appointed to the husband unless by the act of marriage. Again, it is argued that as the will of Kennedy does not dispose of his estate beyond the life of his wife, except on the contingency of her marrying again, which event has happened, it is proper to presume,

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in the actual event, \*against intestacy, and in favor of complete disposition. It is the province of the Court to expound and not to make the wills of testators; and if, in some possible event which has not occurred, Robert Kennedy might have been intestate as to the remainder of his estate after the interest in the wife for life, the defect could not be judicially supplied, nor made the ground for deflecting the interpretation of his dispositions so far as they were expressed.

It may be observed, however, that the testator does not absolutely define the interest of his daughter in the estate as a portion or part, or as accruing on a single event, but describes it as "that which shall fall to my daughter;" and perhaps these words are adequate to embrace the whole remainder if the wife died without contracting another marriage, or if she married again, then one-half certainly, with as much more as the mother might choose to appoint to the daughter.

My general conclusion is, that the will of R. Kennedy gave to his widow an estate for life in the whole property, defeasible as to one-half on her second marriage in favor of his daughter and her issue, and with a general power of appointment to take effect at the widow's death in the other half: and

that the execution of this power in favor of the plaintiffs is effectual.

It is adjudged and decreed, that the defendants are bound to deliver to the plaintiffs, the slaves in question at the death of Sarah Beck; and it is ordered that defendants sign a schedule of said slaves under the direction of the Commissioner. It is further ordered that the defendants, except Sarah Beck, pay the costs.

The defendants appealed and now moved this Court to reverse the decree.

Because the will of Robert Kennedy, rightly construed, gives one-half the property to

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Sarah Beck, not for life, but \*generally and indefinitely, with a general power of appointment superadded, and his Honor should have so decreed.

Failing in the motion to reverse, the defendants then moved to modify the decree as to the costs, because in all such cases as this, where there is no proof of danger, and the complainants are therefore only entitled to an inventory of the property, the proceeding must be at the costs of the complainants, as was decided in *Joyce v. Gunnels*, 2 Rich. Eq. 259, and his Honor should have so decreed in this case.

J. T. Aldrich, for appellants, cited Co. Litt. 221 b; 2 Crabb, 2067; 1 Sug. on Pow. 120, 331, 472; 2 Crabb, 2059; 2 Atk. 202; 2 Johns. 391; 2 Story Eq. 1394; 1 Sug. on Pow. 128; 1 Ventr. 203; Napier v. Wightman, Sp. Eq. 370; 1 Jac. & Walk. 89; 13 Ves. 108; *Austin v. Payne*, 8 Rich. Eq. 1; 1 Jarm. 830; 18 Ves. 429; 1 Sug. on Pow. 109, 110, 406; *Bac. Abr. Legacy, B*; *Blewer v. Brightman*, 4 McC. 60.

Hutson, contra, cited 1 Spence, 528, 557, 587; 2 Jarm. 742; 2 Wm's on Ex'ors, 714, 715.

PER CURIAM. This Court concur in the decree of the Circuit Court, which is hereby affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.  
Appeal dismissed.

### 9 Rich. Eq. \*418

\*JOHN L. WESTMORELAND and Wife, et al., v. WM. WEST, Administrator of James West.

(Columbia. Nov. and Dec. Term, 1857.)

[*Guardian and Ward* 73.]

Where a guardian, who was the grandfather of his wards, made, in his annual returns, no charge against his wards, for the rearing and keeping of slaves, his representative

was not permitted, after his death, to make such a charge.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 322; Dec. Dig. ☞73.]

Before Dargan, Ch., at Greenville, July Sittings, 1857.

A sufficient statement of this case is contained in the opinion delivered in the Court of Appeals.

Elford, for appellant  
Perry, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. The female plaintiffs were the wards of their grandfather, James West, in his lifetime, and they seek by this bill, amongst other things, an account of his guardianship from his representative. In his returns as guardian, deliberately made after consultation with the Commissioner, he included no charge against his wards for the rearing and maintenance of a negro woman Fanny and her children, which he had purchased with the funds of his wards, and no charge against himself for the hire of these slaves, while he did include charges against the wards for their own board at his house. The Chancellor on circuit ruled that the estate of the guardian was not entitled to compensation for keeping the slaves nor liable for their hire, and confirmed the

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\*amended report of the Commissioner made in conformity to this ruling. The defendant appeals because the decree refused any allowance for the rearing and keeping of the slaves.

We approve the decree of the Chancellor. The case is within the principle of *Booth v. Sineath*, 2 Strob. Eq. 31. There a step-father who was guardian of a female ward living with him was refused all allowance for her maintenance and education, mainly on the ground that he had made no such charge in his returns to the Commissioner; and although he affirmed in his answer that he always intended to charge for her maintenance, and omitted the items in his return on the advice of the Commissioner that it was unnecessary to include them until a final settlement. The present case is stronger, for not only did the guardian omit in his returns to make charge against his orphan grand-daughters for rearing the slaves, but there is no allegation that he was misled into the omission, and his attention must have been directed to the matter, as he was careful to set down analogous charges for rearing the wards themselves. The decree properly pursues an intimation in the former decree of the Chancellor who originally heard the cause, that from the omission of the guardian to charge the funds of his wards, with the price of the slaves it might have been inferred that the grandfather intended an advancement to his wards, if plaintiffs had not

avowed their willingness to pay the purchase money.

Many witnesses were examined on the issue whether keeping these slaves was burdensome or profitable, and their testimony was so widely variant and conflicting as almost to baffle any conclusion.

It is ordered and decreed that the appeal be dismissed and the decree be affirmed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Appeal dismissed.

### 9 Rich. Eq. \*420

\*JOHN H. WILSON v. WILLIAM GAINES,  
et al.

(Columbia. Nov. and Dec. Term, 1857.)

[*Deeds* ☞129.]

Slaves were conveyed to a trustee for the sole and separate use of M. a married woman, "during her natural life, and subject to her disposal at her death by will or otherwise":—*Held*, that M. did not take an absolute estate in the slaves, but an estate for life only, with power of appointment.

[Ed. Note.—Cited in *Bilderback v. Boyce*, 14 S. C. 541.

For other cases, see *Deeds*, Cent. Dig. §§ 351, 360-365, 416-430, 434, 435; Dec. Dig. ☞129; *Wills*, Cent. Dig. § 1422.]

[*Powers* ☞34.]

M. by an instrument purporting to be her will, and referring to the power, disposed of the slaves:—*Held*, that this was a valid execution of the power.

[Ed. Note.—Cited in *Wallace v. Craig*, 27 S. C. 523, 4 S. E. 74.

For other cases, see *Powers*, Cent. Dig. § 125; Dec. Dig. ☞34.]

[This case is also cited in *Humphrey v. Campbell*, 59 S. C. 47, 37 S. E. 26, without specific application.]

Before Dargan, Ch., at Abbeville, June Sittings, 1857.

The questions discussed and decided in the Court of Appeals in this cause, will be understood from the opinion delivered in that Court.

McGowan, for appointees of Mrs. Gaines.  
Thomson, for W. Gaines.

The opinion of the Court was delivered by

DUNKIN, Ch. On 7th October, 1848, Franklin Branch, by deed of that date, conveyed to Andrew Wilson certain slaves, in trust, (among other things) "for the sole use of Margaret Gaines, not subject to the debts of her present or any future husband, to be held to her sole and separate use during her natural life, and subject to her disposal at her death, by will or otherwise." On 23d August, 1856, Margaret Gaines, by an instrument purporting to be her last will and testament, after referring to her power under the deed and in pursuance of said power, disposed of the slaves, and appointed the



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plaintiff \*executor thereof. She soon after departed this life. This bill was filed against the husband and other parties, and prayed the direction of the Court in the premises. The decree of the Circuit Court declared that Margaret Gaines took an absolute estate in the slaves, and that the same was distributable as in case of intestacy. From this judgment an appeal has been taken upon the grounds set forth in the brief.

It has long been well settled that a gift or grant to a person indefinitely, with a general power of appointment, vests an absolute estate in the donee or grantee. Such estate might not pass by the direct gift, but the superadded power of disposition authorizes an implication which enlarges the estate. If the power be not general, as if by will only, the implication does not arise. See *Bentham v. Smith*, Chev. Eq. 33 [34 Am. Dec. 599]. Nor will the Court imply an absolute estate when the interest of the donee is expressly limited to a life estate. An implication will not arise in derogation of the terms of the gift. The rule may now be regarded as well established that a gift to the donee for life with a general power of appointment passes only a life estate to the donee, and that the power of appointing the succession or inheritance must be exercised in order to be effectual. See *Aaron v. Beck*, (decided at this Court [9 Rich. Eq. 411]). In *Pulliam v. Byrd*, 2 Strob. Eq. 134, the principal proposition had been fully considered and authoritatively recognized.

It remains only to apply these principles to the case before us. The legal title to the slaves was in the trustee, Andrew Wilson, with a usufruct in Margaret Gaines, to her sole and separate use, during her natural life, and a power to dispose of the slaves at her death, by will or otherwise. It is not necessary to restrict the natural interpretation of these general expressions. She had the power to dispose by will, by donatio causa mortis, or by deed reserving her life interest. She has attempted to execute the power. In *Clarke v. McKenna*, Chev. Eq. 163, it is held that where in the instrument creating the

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\*power there is no limitation as to the mode of exercising it, the wife may appoint in any form by which the estate, according to its nature, could be legally transferred. The act of the wife derives its authority and efficacy from the instrument creating the power. As is justly remarked in the decree of the Circuit Chancellor, "a feme covert, or an infant, may become the depository of such powers, and may execute them, provided they be possessed of sufficient mental capacity."

In the judgment of this Court the power of appointment or disposal, vested in Margaret

Gaines by the deed of 7th October, 1848, was well executed by the instrument of 23d August, 1856.

It is ordered and decreed that the decree of the Circuit Court be reversed, and that the plaintiff, John H. Wilson, proceed in the discharge of the duties of his trust; and that the defendants be enjoined from further proceedings in the Court of Ordinary. Each party to pay their own costs, those of the plaintiff to be paid out of the trust estate.

JOHNSTON, DARGAN and WARDELLAW, CC., concurred.

Decree reversed.

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### 9 Rich. Eq. \*423

\*MARY OWEN DEAN v. LOWRY LANFORD and Wife et al.

(Columbia. Nov. and Dec. Term, 1857.)

[*Executors and Administrators* ⚭394.]

All persons in interest being parties, it is competent for the Court to appoint any one, the Commissioner or another, to execute titles to land.

[Ed. Note.—Cited in *Gibbes v. Greenville & C. R. Co.*, 13 S. C. 242.]

For other cases, see *Executors and Administrators*, Cent. Dig. § 1595; Dec. Dig. ⚭394.]

[*Trusts* ⚭160.]

The rule in *ex parte Hunter*, that the Court will never appoint a husband trustee for his wife, is imperative.

[Ed. Note.—Cited in *Pool v. Dial*, 10 S. C. 448; *Oliver v. Grimball*, 14 S. C. 568.]

For other cases, see *Trusts*, Cent. Dig. §§ 204, 207, 208; Dec. Dig. ⚭160.]

[*Trusts* ⚭160.]

An order appointing a trustee is administrative and may be suspended by another Chancellor.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 208; Dec. Dig. ⚭160.]

Before Dunkin Ch., at Spartanburg, June Sittings, 1857.

This bill was filed by the complainant as executrix of H. J. Dean, who in his lifetime, was the executor of his father John Dean. The legatees of the will of John Dean were numerous, and his executor was appointed trustee of the married females. He sold the estate under a power conferred by the will, and died before he had made distribution of the proceeds. The bill prayed that an account might be taken of H. J. Dean's acts as executor, and the share of the several legatees ascertained, that titles might be made for certain lands which the executor had sold, and that the complainant might be relieved from her position as trustee.

At June sittings, 1856, his Honor, Chancellor Johnston, made an order that the Commissioner ascertain and report fit and proper persons to act as trustees for the married women and for the minor children, with leave to report any special matter.

The Commissioner by his report, dated 6th

October, 1856, recommended the husbands of the four married daughters of the testator, John Dean, as suitable persons to be appointed trustees of their wives respectively.

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\*This report was taken before his Honor Chancellor Wardlaw, who, on 10th October, 1856, at Chambers, made an order as follows:

Wardlaw, Ch. In this case, it appears that John Dean, Esq., in his lifetime, executed his last will and testament, in which, among other things, he devised certain property to H. J. Dean, Esq., in trust, for the use of his daughters during their lives, and the remainder to their children. That in his lifetime, he delivered the bulk of the property to the daughters which never came into the hands of the trustee. That there is now a fund of about six hundred dollars in the hands of the complainant as executrix of H. J. Dean, the trustee, which she now desires to dispose of, and rid herself of the trust. The life tenants are all dead, except Rosannah Brewton, Mary B. Walker, Amelia B. Lanford, and Emily G. Patton; and the Commissioner reports that their husbands to wit, Miles Brewton, William Walker, David Patton, and Lowry Lanford, are fit and proper persons to act as trustees of their wives respectively. Though it is not customary, and under ordinary circumstances this Court would not appoint the husbands trustees, yet, under the peculiar circumstances of the case, the Court thinks it but just and proper to do so.

It is therefore, ordered and decreed, that William Walker be appointed trustee for Mary B. Walker, in lieu of H. J. Dean, deceased, upon his giving bond and two good sureties in the sum of sixteen hundred dollars, for the faithful performance of his trust; that Miles Brewton be appointed trustee for Rosannah Brewton, upon the same terms; that Lowry Lanford be appointed trustee for Amelia B. Lanford, upon the same terms; and that David Patton be appointed trustee for Emily E. Patton, upon the same terms.

It is further ordered, that it be referred to the Commissioner to report as to the propriety of allowing the complainant to execute titles to the land sold by her testator, H. J.

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\*Dean, as referred to in the bill, with any special matter; and that he report upon the estate so far as to enable the parties to make a final settlement thereof.

The complainant then filed a petition in which she again brought the facts to the notice of the Court and prayed to be at once relieved from all responsibilities as trustee.

The decree of the Chancellor upon the bill and petition is as follows:

Dunkin, Ch. The bill was filed against the several legatees under the will of John Dean, deceased. The plaintiff is the executrix of

her husband Hosea J. Dean, deceased. Her testator had in his lifetime been the executor of his father, John Dean, deceased, and trustee for the various legatees. Hosea J. Dean had in his own lifetime filed a bill to be relieved from the trust, which from various circumstances he found onerous and troublesome. But he had voluntarily assumed the trust, and as no one equally competent was presented, the Court declined to interfere. The plaintiff occupies a position essentially different. She has never assumed the trusts under the will of John Dean, deceased, and positively declines to assume them. As the executor of her husband she is merely a constructive, and not a technical trustee under the provisions of John Dean's will. She is only so far a trustee as that the legal title in the personalty may rest in her as that of the realty, (if any,) devised to her husband in trust, would rest in his heirs. She has the right to the aid of the Court in being relieved from this relation. See Hill on Trustees, 215, and the authorities there cited.

The bill stated that the property, not delivered by the original testator, John Dean, in his lifetime, had been afterwards sold by his executor, and the proceeds, after payment of debts, amounted to about fifty-five hundred dollars, or about five hundred dollars to each

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set of legatees. The plaintiff \*prayed that an account might be taken of the transactions of her husband as trustee; that titles might be made to the purchasers of certain real estate of John Dean, deceased, sold by his executor; that a proper trustee or trustees, might be appointed, and that, upon payment of the sums ascertained to be due by her testator, she might be relieved from further responsibility in that behalf. At June term, 1856, Chancellor Johnston ordered a reference to the Commissioner, to recommend fit and proper persons as trustees, under the will of John Dean, deceased. A subsequent order was made that the Commissioner inquire as to the propriety of allowing the complainant to execute titles for the land sold by her testator; and also that he report upon the estate, so as to enable the parties to make a final settlement thereof with leave to report any special matter. Under this order the Commissioner at June Sittings, 1857, submitted his report, recommending the complainant as a fit person to execute titles for the land sold by her testator, and, as special matter, recommended William C. Miller, as a trustee for his wife, Mary Ann Miller, grand-daughter of the testator, John Dean, deceased. This report was presented to the Court for confirmation, and at the same time was presented the petition of the plaintiff hereafter to be noticed.

Upon the decease of John Dean, the title to his real estate descended to his heirs-at-law, with a power in his executor, Hosea J. Dean,



to sell the same and execute proper conveyances. The land was sold, but titles not executed. If the heirs-at-law of John Dean, deceased, are parties in these proceedings, it is competent for the Court to appoint any person to execute a conveyance for the lands sold by Hosea J. Dean, deceased, and either the plaintiff or the Commissioner may be appointed to execute the deeds. But let it be referred to the Commissioner to report the names of those who are heirs-at-law of John Dean, deceased, with liberty to the plaintiff to make them parties, if they are not already made parties.

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\*In *ex parte* Hunter, Rice, Eq. 294, it was declared to be the rule of this Court never to appoint the husband of a married woman as her trustee. Almost universally, the leading purpose of creating the trust is to exclude the husband, and this object is seriously jeopardized, if not practically frustrated, by appointing him trustee, and thus vesting in him the legal title. But it is not proposed to vindicate a rule which probably always existed in the administration of trusts, and was only declared imperative in consequence of some exceptional departures from the rule.

It was said, however, that a similar order to that now sought, had been made at Chambers, on the 10th of October, 1856; and this brings the Court to the consideration of the petition of the plaintiff in connection with that order. She states that it was made without her knowledge or acquiescence, and suggests reasons why so much of the order as relates to this point should be re-considered. It was merely an administrative order, and was manifestly made under the impression that it was by consent. Under the circumstances set forth in the petition, it is deemed expedient to suspend so much of said order as directs the appointment of the husbands as trustees, so that the husbands may have an opportunity of taking the judgment of the Court of Appeals upon this subject. The Commissioner will, in the meantime, inquire and report upon the matters heretofore referred to him, and particularly as to the indebtedness of the testator, Hosea J. Dean, deceased, to the estates of his *cestui que trusts*, with leave to report any special matter.

The defendants appealed, and now moved this Court to reverse the decree of Chancellor Dunkin, upon the ground, that he had no jurisdiction to set aside the decree of Chancellor Wardlaw.

The complainant also appealed, upon the

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ground, that the \*relief sought for in her bill and petition ought to have been granted.

Edwards, for complainant.  
Bobo, contra.

PER CURIAM. In this case, the Court has considered the grounds of appeal submitted

by the parties respectively, and are of opinion that the appeal should be dismissed, and it is ordered accordingly.

JOHNSTON, DUNKIN, DARGAN and  
WARDLAW, CC., concurring.

Appeal dismissed.

### 9 Rich. Eq. \*429

\*WM. L. YANCEY, and SARAH, His Wife, v.  
CHARLES B. STONE.

(Columbia. Nov. and Dec. Term, 1857.)

[Evidence ⇨582.]

The notes of evidence taken at the trial of a former suit between the same parties cannot be read at the trial of another action relating to the same subject matter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2421; Dec. Dig. ⇨582.]

[Evidence ⇨576, 577, 581.]

In such case, in order that the testimony given at the first trial may be proved at the second, it must appear that the witness is dead, or absent from the State, or kept away by the opposite party; and even then the proof must come from a witness who heard the examination, and he must speak from memory, though he may use his own or another's notes to refresh his memory.

[Ed. Note.—Cited in *Fellers v. Davis*, 22 S. C. 428.

For other cases, see Evidence, Cent. Dig. §§ 2401, 2406, 2417; Dec. Dig. ⇨576, 577, 581.]

[Limitation of Actions ⇨87.]

A plaintiff, who lives in another State, is entitled to five years under the statute of limitations, within which to file a bill for the specific delivery of a slave.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 457; Dec. Dig. ⇨87.]

[Limitation of Actions ⇨87.]

Where the bill is filed against an administrator, whose possession was acquired through his intestate, the plaintiff is not entitled to nine months in addition to the time fixed by the statute: *semble*.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 456-462; Dec. Dig. ⇨87.]

[Adverse Possession ⇨60.]

Where the possession of an intestate of a slave was not adverse, the possession by her administrator will not be considered adverse before notice to the owner: *semble*.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282-312, 323, 328; Dec. Dig. ⇨60.]

[Limitation of Actions ⇨193.]

One who sets up the bar of the statute of limitations to an otherwise just claim, must prove strictly the facts which entitle him to the protection of the statute.

[Ed. Note.—Cited in *Moore v. Smith*, 29 S. C. 256, 7 S. E. 485.

For other cases, see Limitation of Actions, Cent. Dig. § 710; Dec. Dig. ⇨193.]

[Action ⇨53.]

The owner of a family of three slaves may file a bill for the recovery of two, and after decree in his favor, may file a second bill against the same defendant, for the recovery of the other slave, although the conversion of the

whole family was at the same time and by the same act.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. § 578; Dec. Dig. § 53.]

Before Dargan, Ch., at Greenville, July Sittings, 1857.

The defendant was the administrator of Mrs. Elizabeth Earle, who died intestate in March, 1852, having in possession, at the time of her death, a family of three slaves, to wit: Juda, the mother, and Jim, and

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Noah her children. The plaintiffs \*were residents of Alabama, and the plaintiff, Sarah, was the daughter of Mrs. Earle, the intestate. After the death of Mrs. Earle, the plaintiffs filed their bill against the defendant, for the specific delivery of Juda and Noah, alleging that Juda, when a girl, and before she had issue, was given by Mrs. Earle, by parol gift and delivery, to her daughter, the plaintiff, Sarah, and that the possession of the donor after the gift was permissive. The plaintiffs obtained a decree for Juda and Noah; and they then filed this bill for recovery of Jim, who was the oldest of the two children, and was born in 1850. His honor, the presiding Chancellor, after hearing the pleadings, evidence and argument, decreed for the plaintiffs.

The defendant appealed.

Sullivan, for appellant.

Perry, contra.

The opinion of the Court was delivered by

DARGAN, Ch. This is a bill for the specific delivery of a negro, (Jim,) in the possession of the defendant. The plaintiffs allege that Jim was the child of Juda, who had been given by the late Mrs. Elizabeth Earle, to her daughter, Mrs. Sarah Yancey, the wife of the complainant, William L. Yancey. In a former suit between the same parties, the complainants had recovered, by a decree of this Court, from this defendant, the negroes, Juda, and Noah, a younger son of Juda; but the name of Jim was omitted in the bill, and he was not recovered in that case. The plaintiffs explain in their bill, that the name of Jim was omitted by the inadvertence of the solicitor, who drafted the bill. The omission is not otherwise explained.

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\*After the termination of that case, the defendant, still refusing to deliver Jim, the plaintiffs brought this suit for the specific delivery of Jim. On the hearing of the cause at June term, 1857, it was "adjudged and decreed, that the slave, Jim, the child of Juda, be delivered up to the complainants by the defendant, Charles B. Stone, and that the said slave belongs to the complainants."

From this decree, the defendant has appealed on four grounds, which will be considered in order. It will be convenient to take

up the two first grounds of appeal to be considered together; they are as follows:

1. Because, it is respectfully submitted, that the Court erred in receiving the testimony taken on the trial of a former case between the same parties in relation to two other slaves, without giving the defendant the advantage of cross-examining the said witnesses.

2. Because, the proof offered did not establish a gift of the boy, Jim, but was vague and uncertain.

The suit alluded to, in the first ground of appeal, is that to which I have already referred, as having been tried between the same parties for Juda and her younger son, Noah. The evidence taken in that case was, as is assumed in this appeal, admitted in evidence on the last trial. To make such evidence properly admissible, the suit must be between the same parties, or their privies, and relate to the same subject matter: the witness must be dead, absent from the State, or kept away by the contrivance of the adverse party; even then the notes of the testimony cannot as such be read in evidence. What a witness has testified to on a former trial, must be proved by a witness who heard the examination, and he must speak from memory. He may look at notes taken by himself or any other person to refresh his memory, but he must then testify from a revived recollection of his own mind. Measured by these stringent rules, the evidence taken on the

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former \*trial was incompetent, and should have been rejected. If there had been no other testimony, the bill should have been dismissed.

But there was other testimony taken on the last trial, which was competent, and which goes to establish the gift of Juda by Mrs. Earle to Mrs. Yancey, before the birth of Jim. And of course, if the gift of Juda is proved, the right to Jim follows. *Partus sequitur ventrem*.

Some part of the evidence regularly taken on the trial, has not been printed in the brief. Whether any part of the omitted testimony bears upon the question of the gift, I am unable to say. But the Court sees enough in the evidence before it to sustain the decree of the Circuit Court.

The third ground of appeal is in the following words:

"Because the possession of Jim by the defendant from the date of his intestate's death was adverse to the complainants, and they were barred by the statute of limitations."

The plaintiffs being inhabitants of another State, were entitled to five years, in which to bring suit before the statute operates as a bar. I do not think that they are entitled to five years and nine months. The owner of a chattel may bring his action for it against one who is in possession, and refuses on de-



mand to deliver it up. His refusal is a conversion, and subjects him to an action of trover. Though he may have acquired the possession by virtue of his administration, he is not sued in his representative character. He is sued personally, as a wrong doer, in consequence of his conversion of the property. The torts of his intestate are gone. *Actio personalis moritur cum persona*. A person not an inhabitant of the State is barred simply in five years. The disability to sue executors and administrators, for nine months relates to causes of action arising *ex contractu*.

But with this interpretation of the Act are the complainants barred? Mrs. Earle died in

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February, 1852, and this bill \*was filed 25th May, 1857. Was the possession of Mrs. Earle adverse? and if hers was permissive, could that of her legal representative be otherwise, unless he had advertised the plaintiffs of his intention to hold adversely, or did some act, coming to their knowledge, manifesting the adverse character of his possession? We are not informed as to these questions. But when did the defendant take possession of the negro? How long after Mrs. Earle's death? No one has testified as to this fact. The party who sets up the bar of the statute to an otherwise just claim, must prove strictly that he is entitled to its protection. But the defendant did not take out letters of administration on the estate of Mrs. Earle, until the 14th day of January, A. D., 1853. Before that time, he had no right to take possession of the negroes as the property of his intestate, and in the absence of all other proof, we must presume he did not take possession until that date. If his possession commenced at that time, the plaintiffs' right to sue is not barred.

The defendant's fourth ground of appeal is,—

4. "Because the complainants, by suing in the former case for Juda and Noah alone, and prosecuting their case to a recovery, waived all claim to Jim, and were precluded from making any further claim."

The Court perceives no force in this objection. The omission to include Jim in the former suit, independent of any proof, probably occurred in the way in which it has been explained in the plaintiffs' bill. But whether the omission was by accident or caprice, I do not see how it can be of itself a waiver, or a transfer of title.

It is ordered and decreed that the circuit decree be affirmed, and the appeal dismissed.

DUNKIN and WARDLAW, CC., concurred.

JOHNSTON, Ch., absent.  
Appeal dismissed.

## 9 Rich. Eq. \*434

\*REBECCA SPIVA v. SINGLETON JETER.  
(Columbia. Nov. and Dec. Term, 1857.)

[Dower  $\Leftrightarrow$  41.]

A contract to marry on condition that the wife should receive no portion of the husband's property which he then possessed:—*Held*, not to preclude her from demanding dower even from a purchaser—it appearing that the husband had not performed his duties as husband, but on the contrary had deserted his wife for ten years before his death, leaving her without means of support except from her daily labor.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 114; Dec. Dig.  $\Leftrightarrow$  41.]

Before Dunkin, Ch., at Union, June Sit-tings, 1857.

A statement of this case is contained in the circuit decree, which is as follows:

Dunkin, Ch. This bill was filed by the widow of David Spiva, who died in the West, some two years since. The purpose is to obtain dower in a tract of land, called the David Myers tract, conveyed by the husband during the coverture, to wit: on the 16th Nov., 1846, to A. V. Jeter, the father of the defendant. It appears that the plaintiff, at the time of her intermarriage with David Spiva, was a widow, with children by a former marriage with ——— Lee, and that David Spiva was a widower, with children by a previous marriage. Before the solemnization of the marriage, and in contemplation of that event, to wit, on the 26th September, 1844, the following agreement was signed by the parties, to wit: "David Spiva, Rebecca Lee—agreement. South Carolina, Union District, Sept. 26, 1844. A marriage contract, made and entered into this day, between David Spiva, on the one part, and Rebecca Lee, of the other part, witnesseth—the said parties do agree to marry, on condition that the said Rebecca Lee and her children are to receive no portion of the money or property of the said David Spiva, held or pos-

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\*sessed by him at this time. (Signed,) David Spiva, Rebecca Lee, x her mark. Witnesses, C. P. Jenkins, W. C. Lee." This paper was proved by Wm. C. Lee, one of the subscribing witnesses, on the 17th Nov., 1846, and recorded in the Register's office for Union District, on the 26th Nov., 1846.

On the part of the defendant, it was submitted that this paper, though not a legal estoppel, was an equitable bar to any claim of dower on the part of the plaintiff. The land was part of the property in possession of Spiva when the agreement was made, and was proved and put on record contemporaneously with the conveyance to defendant's ancestor. On the other hand, it was urged that dower is a legal right, and always highly favored; that the paper on which the defendant relies is not under seal, is without consideration, and is no bar to the enforcement of the plaintiff's right. In the case of *Massey v. Massey*, [2 Hill, Eq. 492,] heard

by Chancellor Wardlaw, at Lancaster, June, 1855. Sarah Miller and Benjamin Sykes Massey entered into an ante-nuptial agreement of this character, which was sustained by the Chancellor in a suit between his surviving widow and his personal representative. The agreement however, was under seal. Both parties were in possession of considerable estates, and the release was mutual. It was an amicable proceeding, for the purpose of obtaining the judgment of the Court, and in which both parties acquiesced. But it was a case for judgment, and not of consent. In this case, the agreement between David Spiva and Rebecca Lee, is very inartificially prepared; even less artificially than the copy represents.

But the intention may nevertheless be collected. Both parties had children. Spiva had some property; while it is fair to infer from some of the testimony, that the dowry of Mrs. Lee was not in worldly chattels. The consideration was marriage; and this is held to be a valuable consideration. By it the husband becomes immediately entitled to

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his wife's \*personalty in possession, and to a certain qualified interest in her whole estate of every kind. The wife acquires a right to support and maintenance, and an inchoate interest in all the real estate of which he is seized during the coverture, in addition to the claim of protection, comfort and sympathy, which the relation implies. Spiva undertook to maintain and fulfil all the obligations of a husband, and she those of a wife, with the understanding that neither she nor her children were to receive any part of the property he then held. The argument of the defendant's counsel appears well taken, that this was an agreement to renounce dower or thirds. Although this rested in agreement, yet if the representatives of the husband, or the purchaser from him, might, on bill filed, insist on the performance of the agreement, it would be scarcely deemed desirable to drive the parties to this circuity of action. Assuming that the plaintiff, in consideration of the advantages stipulated for her by the proposed marriage, agreed to renounce or release her claim of dower, was the agreement so fulfilled on the part of Spiva, as to authorize his representatives to demand a fulfilment on her part? The strongest case to bar a wife of dower, is by jointure, according to the Statute, 27 Henry VIII., being a competent livelihood of freehold for the wife, to take effect presently after the death of the husband. But, even in this case, if the jointress is evicted by bad title or otherwise, the statute provides that she shall be remitted to her claim of dower at the common law. 2 Bl. C. 138. Spiva and his wife, lived together about two years. It appears that in November, 1846, Spiva had determined to remove to the West. "One morning before daylight, (says the witness Paulina Lee,)

Spiva rose and called up the plaintiff, and said to her, 'I'll tell you what I think. It is better that you go and get you a place to live, and take your things and go to it.'" Plaintiff went that morning to the house of Joseph Shuttlesworth, and the next morning Spiva took his wagon and moved her to

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\*Shuttlesworth's. Witness believed plaintiff was willing to go with her husband to the West. Spiva's daughter, Adeline, asked witness if her mother was going with them to the West, and at the same time observed to her that "she had better not—that if she started, she would never get to her journey's end." Witness informed her mother of this declaration the same day. After plaintiff had removed to Shuttlesworth's, she went back to Spiva before he left. None of the family would speak to her, except the two youngest children and Davis's wife. Spiva spoke to her, but witness did not hear the conversation. Spiva was fixed to go away on that day. He left nothing for plaintiff. On her cross-examination, she said Spiva called up plaintiff before day, and told her "to go and get her a home." Joseph Shuttlesworth testifies that he was in his field at work when plaintiff came to him and asked leave to put her things in his house. He looked down the road, and saw Spiva's wagon and negro, who brought her things. He permitted them to be put in his house. Plaintiff seemed distressed, and shed tears at the time. Witness had heard of no interruption in the family. After Spiva left, plaintiff had no means of going to the West. She now lives in a small house near witness, and has no means of support but her daily labor. N. W. Cooper, (the only witness examined for defendant,) proved no reluctance on the part of the plaintiff to accompany her husband to the West, but rather the contrary. The defendant's counsel objected to her declarations as to the reasons why she did not remove with her husband, and the objection was properly sustained by the Commissioner. Spiva removed to the West, lived there about ten years and then died. No imputation was made against the character, either of Spiva or of the plaintiff.

The Court is obliged to conclude, from the testimony, that in removing to the West, it was either not convenient or not agreeable to Spiva to take with him his wife; and the

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result of \*his reflections was to call her up and tell her "to go and get her a home." If the plaintiff had refused to accompany him, it would seem very easy to have established this by Adeline, or any other inmate of the house, or by any other witness. Thenceforth for ten years, and during the remainder of the husband's life, the plaintiff was left to find a roof to shelter her, and to earn her daily bread by her daily labor. Under these circumstances, when her legal



right to dower has now become perfect, would this Court interfere to enjoin her from prosecuting that right, if she had selected another tribunal?

The Court is of opinion, that under the circumstances, the heirs of David Spiva would be entitled to no such relief, and that the defendant is in no better situation.

It is ordered and decreed, that it be referred to the Commissioner to assess the plaintiff's dower according to the principles of the Act of 1824.

The defendant appealed on the ground, because the plaintiff was not entitled to dower in the land in question, and the ante-nuptial agreement is a bar to her dower.

Herndon, for appellant.

Dawkins, Gadberry, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. It is not supposed, or contended, that the paper executed 26th September, 1844, was a release of dower. It was no more than an agreement, and, assuming that the defendant, when he purchased from the plaintiff's husband, was made acquainted with this ante-nuptial arrangement, he must be presumed to have understood the character, and effect of the instrument. The obligation of the plaintiff to release any interest she might acquire, rested in contract,

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and \*depended on the fidelity with which the conditions of the contract were fulfilled by her future husband. Under the circumstances detailed in the evidence, neither the husband, nor his heirs, would have any claim to the interference of this Court, in enforcing the execution of the contract; and the purchaser from him, having a knowledge that the dower had not been released, would have no higher equity to insist on the performance of the agreement; and to invoke the aid of this Court in restraining the plaintiff from the prosecution of her legal rights.

It is ordered and decreed, that the appeal be dismissed.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

#### 9 Rich. Eq. \*440

\*A. A. NETTLES, Escheator, v. JOSEPH T. CUMMINGS.

JOSEPH T. CUMMINGS, et al. v. A. A. NETTLES, Escheator, et al.

(Columbia. Nov. and Dec. Term, 1857.)

[Escheat ⚡8.]

A Society was incorporated in 1853, "with power to possess and hold" escheated property within the County of Claremont, to a certain amount. The estate of one S. became liable to escheat, and in 1856, while proceedings were pending, in the name of the State escheator, for

an account against the administrator of S., and to have his land escheated, an Act was passed vesting all the right, title and claim of the State in the estate of S., in certain persons, with a proviso reserving to the Society "any right in and to the estate of S. heretofore vested in said" Society by any Act, &c.:—*Held*, that the Society was entitled to be paid the amount of their claim, from the estate of S. and that the grantees under the Act of 1856, could only claim any balance that might remain.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. § 20; Dec. Dig. ⚡8.]

[Escheat ⚡6.]

A society having the right under its charter to escheated property, does not forfeit or waive its right because it proceeds through the State escheator, and not through an escheator appointed by itself under the Act of 1805.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. § 11; Dec. Dig. ⚡6.]

[Escheat ⚡8.]

The Legislature may by Act grant future escheats.

[Ed. Note.—Cited in *Re Malone's Estate*, 21 S. C. 447.

For other cases, see Escheat, Cent. Dig. § 20; Dec. Dig. ⚡8.]

[Escheat ⚡2.]

An Act conferring upon a Society "power to possess and hold" escheated property, to a certain amount, is not void for uncertainty, and will be enforced against a subsequent grantee of the State, who takes a particular escheated estate, subject to any right to the same which the Act may have vested in the Society.

[Ed. Note.—Cited in *Re Malone's Estate*, 21 S. C. 450.

For other cases, see Escheat, Cent. Dig. § 2; Dec. Dig. ⚡2.]

Before Johnston, Ch., at Sumter, June, 1857.

The circuit decree, from which the case will be sufficiently understood, is as follows:

Johnston, Ch. These causes were taken up together for trial.

In 1837, (8 Stat. 456,) the trustees and

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members of the Sumterville \*Academical Society were constituted a body corporate "with power to possess and hold, subject to former grants, escheated property within the County of Claremont, to an amount not exceeding ten thousand dollars."

In 1853, (12 Stat. 234,) the charter of incorporation was renewed and extended for the term of fourteen years, by the name of the Sumterville Academical Society, "with power to possess and hold, subject to former grants, property heretofore or hereafter escheated, or liable to escheat, within the County of Claremont, to an amount not exceeding fifteen thousand dollars, and with all the other powers heretofore conferred upon it."

The 3d Sec. of Act of 1856, (12 Stat. 578), "to vest the title of the State in certain escheated property in sundry persons," enacts "that all the right, title and claim which the State may have in and to the estate real and personal, whereof Josiah H. Smoot, late of Sumter District, deceased, was the owner at the

time of his death, he vested in Josiah T. Cummings, Ann M., wife of William A. Young, Susan, wife of John McSween, Joanna, wife of Peter A. Brunson, and Elizabeth, wife of Robert R. Cannon, to them, their heirs, executors and administrators forever: Provided, that nothing in this clause contained shall be construed to divest the Sumterville Academical Society of any right in and to the estate real and personal of the said Josiah H. Smoot, heretofore vested in said corporation, by any Act or Acts of the General Assembly."

Amos A. Nettles, the plaintiff in the first stated cause, was escheator for the District of Sumter, and on the 15th March, 1856, filed his bill against Joseph T. Cummings, the administrator of Josiah H. Smoot, charging the death of said Smoot in the month of June, 1852, leaving no persons who could claim as his distributees, and required the said administrator to account to him as such escheator for the personal estate of

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\*the intestate, which went into his hands, and the rent of the lands received by him.

Cummings answered the bill; admitting the death, his administration; no distributees entitled; and his willingness to account, but prayed that the judgment of the Court might be suspended to allow the children of his mother with whom Smoot had intermarried, and whom Smoot survived, to obtain the action of the Legislature on their petition to vest the right and title of his estate in them.

On 15th April, 1857, the second bill was filed by the plaintiffs therein named, against Nettles, escheator, the Sumterville Academical Society, and William A. Young and wife, setting out their claim under the Act of 1856, to the estate of Smoot; denying the right of the Society to any part of it, and claiming that the proceedings already taken by the escheator may be decreed to enure to their benefit.

This bill is answered by the escheator, averring that his action taken against the property and administrator of Smoot, was at the instance of and for the benefit of the said Society. The Society answering, deny the claim of the plaintiffs and claim the property for themselves.

It is not perceived by the Court how the claim of the Society can be affected by non-exercise of the privilege of appointing its own escheator under the Act of 1805, (5 Stat. 507). This in no way violated any obligation it has come under to the State, by reason of any power or right conferred upon it, and there is nothing to prevent its acting through the public escheator, which in this instance the company did.

Looking to the various Acts under which these parties respectively claim, the Court must give to them a construction consistent with the plain intention of the Legislature;

and not permit the solution of questions to depend on merely technical distinctions.

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\*The Act invests the Society with power to possess and hold, subject to former grants, property escheated or liable to be escheated. It is in effect a concession of the rights of the State to the Society which is substituted in its place, to enjoy the proceeds of such property after the right of the State is established through the forms provided by law.

The very grant under which the plaintiffs in the second case claim this property, notifies them of the Act of the General Assembly, under which the Society prefers its rights, and provides that their claim shall be subsidiary to it, and with this express (not intimation, but) condition, they aver a right to take, not what may be left of Smoot's estate after the Society receives its portion, if it is worth so much, but the whole.

The Court cannot give such a construction to the Act referred to.

It is ordered, therefore, that so much of the bill of the plaintiffs Cummings, et al., as seeks to enjoin the said escheator from proceedings to escheat the plantation of said intestate, and claims a partition thereof among said plaintiffs and the defendant Ann M. Young, or that they may be adjudged entitled to said proceedings, and that said escheator may be restrained from compelling an account from the said Joseph H. be dismissed.

It is further ordered that the said Joseph H. Cummings, administrator as aforesaid, account before Mr. Thomas B. Fraser, special referee by the Court appointed for these causes, for his actings and doings as such administrator, and for the rents of any real estate of said intestate by him rented or used.

It is also, further ordered, in the event that the estate of the said J. H. Smoot is found, after the payment of all debts and liabilities charged upon it, to be worth no more than the sum of fifteen thousand dollars, that the same be held by the said A. A. Nettles, escheator, for the benefit of the said Sumterville Academical Society; if found to be worth more, the surplus after said fifteen thousand dollars to said Society,

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shall \*be held for the benefit of the plaintiffs in the second cause with said defendant Ann M. Young, share and share alike. Let the costs be paid out of the estate of Smoot.

Joseph T. Cummings, and his sisters, with their husbands, appealed, and now moved this Court for a decree in conformity with the prayer of their bill, on the grounds:

1. Because the said Joseph T., and his sisters, are entitled, under the Act of 1856, to the whole estate, real and personal, of Josiah H. Smoot, deceased; no right to said estate having ever vested in the Sumter-



ville Academical Society, under the Acts constituting the charter of said society; and his Honor erred, it is respectfully submitted, when he construed the proviso to the Act of 1856, as if the word vested were not in it.

2. Because the grant to the Sumterville Academical Society gives no vested right to any particular piece of property; that, at most, it confers a mere power to possess and hold escheated property to a certain amount, and that, until possession taken, under the power, the grant is incomplete and revocable, and was, in fact, revoked, so far as it relates to Smoot's estate, by the Act of 1856.

3. Because the grant to the Sumterville Academical Society is void for uncertainty.

4. Because, the grantee of the State must move in its own name, or in the name of its own escheator, in order to vest in said grantee the subject matter of the grant, and if said grantee stands by, advises and consents to proceedings on the part of the escheator, appointed by the State, such proceedings enure alone to the benefit of the State.

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\*5. Because, the grantee of the State cannot, by law, make the escheator of the State the trustee of said grantee. The State escheator can only move in behalf of the State; in this case, therefore, the grantee (the Sumterville Academical Society) is barred, or is precluded, or has waived its power to possess and hold Smoot's estate by its own acts.

6. Because, the grant to the Sumterville Academical Society is void, at least to the extent of the value of property heretofore escheated or liable to escheat within Claremont county, lost to the State or its grantee, by the laches of said grantee, and proof on this subject should have been heard by the circuit Chancellor.

7. Because, the proviso (or saving clause) is itself void, if it should be construed as by the circuit decree, to be repugnant to the grant actually made in the first part of the third clause of the Act of 1856.

8. Because, testimony, as to the amount of property acquired by Smoot upon his intermarriage with Mrs. Cummings, and the value of the estate left by him, was competent in aid of the construction of the Act of 1856, contended for by the plaintiffs, and his Honor erred in excluding such testimony as irrelevant.

9. Because, if the construction put by the Court upon the Act of 1856, and the Acts constituting the charter of the Sumterville Academical Society, is correct, then said society should be charged the full value of all property, (if there be any such) that has been lost to said Society by contract or by neglect to prosecute its rights, and having other sources to which it can resort in order to raise the sum claimed by it, should, upon familiar principles of equity, be compelled

to resort to said sources; and the order of

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reference should \*be enlarged so as to require the referee to report what other escheated property has at any time been, or is now, liable to the claim of the said Society, and the value thereof.

Spain, for appellants, said, the question arises under the 6th section, Act of Assembly, 1837, (8 St. 456,) the 14th section, Act of Assembly, 1853, (12 St. 234,) and the 3rd section, Act of Assembly, 1856, (12 St. 578;) and is this—What right in and to Smoot's estate vested in the Sumterville Academical Society, by any Act or Acts of the General Assembly? The Society by the terms of its charter was merely clothed "with power to possess and hold" certain property not exceeding a specified money value. It was not vested with title, as in all other cases of grants of escheated property. The Act of 1805, (5 St. 507,) gives to corporations, "full power and authority," in relation to ceded property, to appoint their own escheators. This the Society did not, but the State officer began proceedings and an inquisition was returned as to the land of Smoot. The Legislature then ceded its title to the plaintiffs in that specific estate. The Society and the escheator say that proceedings were commenced at the instance of the Society, for their benefit. This was his imperative duty under the Act of Assembly, 1787, (5 St. 46, et seq.) and for the benefit of the State treasury.

In this state of things was passed the Act of 1856, vesting title of the State to Smoot's property in the plaintiffs. This was a revocation of the "power" given the Society to "possess and hold" Smoot's estate. Indeed, before the passage of the Act, the Society waived its power to possess and hold the Smoot property, standing by, as it did, and consenting to steps legally necessary to possession thereof, on part of the State.

But by Acts of 1837 and 1853, nothing vested in the Society in Smoot's estate. First as to the personality. Both were affirmative Statutes, which, according to a legal maxim do not take away the Common Law.

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\*2 Inst. 200; Bac. Ab., Statute (G).

Now, at Common Law, moveables never escheated in the technical sense, and upon the death intestate of the owner, leaving no representative, the personal estate remained in England at the disposal of the crown. 4 Kent., note f, page 426. Bac. Ab. Prerog (B). Such, too, seems to be the notion in this State, if reference is had to the Act of 1787, the 8th section of which (5 St. 48,) provides for the reversion to the State of such personal estate as "shall be found in the hands of an executor or administrator, being the property of any person heretofore deceased, or hereafter dying, and leaving no person entitled to claim, according to the statute

of distribution, and without making disposition of the same, the escheator of the district where such chattels shall be found, or the Attorney General, on behalf of the State, shall and may sue for and recover, either at law or in equity, and pay the same into the treasury of the State." After such payment into the treasury, the treasurer complying with certain formalities, "then such personal estate shall become vested in and applied to the use of this State."

Again, "both at law and equity, the whole personal estate of the deceased vests in the executor or administrator." 1 Williams on Executors, 449.

Ex'ors., *Gregory v. Forrester, et al.*, 1 McC. Eq. 318.

Gill, escheator, v. Administrator Douglass, 2 Bail. 387.

At Smoot's death, therefore, "leaving no person entitled to claim, according to the statute of distribution," and without disposing by will of his personalty, the escheator of Sumter finding Smoot's chattels in the hands of his administrator, sued for them by bill in equity. This was done with the knowledge and at the instance of the Society. For whose benefit? "In behalf of the State," is the response of the statute. What right has the Court, contrary to the expressed legislative will, to pass an Act appropriating the fund to the Society, and away from the treasury, or the last grantor

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of the State, after its own officer had begun proceedings? The Act of 1856 appropriated that fund to plaintiffs, as the Legislature alone could do, under the constitution. The legal title was in the administrator, and the equitable in the State—this was assigned after its accrual to plaintiffs by Act, and they alone are entitled.

At best the grant to the Society was merely of power to "possess and hold" a mere possibility and was, therefore, void at common law. *Attorney General v. Farmer, Raymond*, 241.

A grant of goods which were not in existence, or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the property. *Lunn v. Thornton*, 50 E. C. L. 379.

Other considerations on this head will suggest themselves as to the other head in reference to the land of the intestate—to which we now turn attention.

The King in England cannot grant lands when they shall escheat. "It is only a possibility, and therefore void, and if the king grants land when it shall escheat, it is a void grant. If it shall be a good grant, it shall be of a freehold to commence in futuro, which the law permits not." *Attorney General v. Farmer, Ray*. 241.

Grant by the crown of an estate, &c., for-

feited, before, &c., any inquisition is illegal. *Col. Leighton's case*, 2 Ver. 173. Now if the Court, per Cheves, J., in *City Council v. Lange*, (1 Mills, 456,) were right when they said, "We are of opinion that in all cases in this State, the relation of the State is like that of the king to his immediate tenants," the law of England as quoted, is applicable on this point in all its bearings.

Other considerations then arise.

Keeping in view the "likeness." As the grants of the king are to be construed most favorably for the king, so must the grants of the State be construed. *Bac. Ab. Title Prerog (F)*. Hence grant of royal escheats "shall

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not pass \*by general words." (*Id.*) Such are the terms of grant to the Society—but not so in the grant to plaintiffs—to them the gift is made of a specific estate by name.

Again, the grant to the Society is void for "incertainty." Thus, Queen Elizabeth being seized of a great waste in the parish of Chipman, granted a moiety of a yard-land in the said waste to the mayor and aldermen of Chipman, without any certainty, name, or description, and afterwards granted the said waste to H. It was adjudged, that the first grant was void, not only against the Queen, but against the second patentee, for "incertainty." *Id.* In *Stockdale's case*, 12 Rep. 86, an example is put, as thus, "If the king hath one hundred acres of land in D.; and he grant to a man twenty acres of the land in D. without any description of them by the rent, occupation, or name, &c., this grant is void." And so, in *Kelsey v. Duck*, 2 Ver. 684, it was held that if one possessed of a term of two thousand years in lands, grants them to A. without mentioning any term, such grant was void for uncertainty.

Failing in all this, "when the crown (or the State) is entitled, it has been questioned whether it is not necessary for an office to be found in order to vest the property, and at least the crown (the State) cannot, without such office, vest any interest in a third person by grant or otherwise." 1 Chitty, Gen. Prac. 280. *Hayne v. Redfern*, 12 East, 96. In *Evans v. Evans*, (11 E. C. L. 595), "the case was of copyholder of landholder of the manor of the vicarage of Chew Magna and Dundry, convicted of larceny, sentenced to transportation, then capitally convicted of being again at large in England. Pardon before Lord did any act towards seizing the copyhold. Per Abbott, C. J. There is no doubt that the pardon by virtue of the 6 G. 4, C. 25, restored the felon to his competency to hold land; but it has been properly urged that it could not divest an interest which had previously been vested in another. That in-

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troduces another question, whether after the forfeiture it was necessary that any thing should be done by the Lord to vest the estate in him. As at present advised, we think that



some step by the Lord was necessary; but if upon further consideration we alter our opinion, we will mention the case again." Per Reporter, "The case was never mentioned again."

In the case before the Court, the Society, pretending to be the grantee of the State of Smoot's estate, took no step, authorized by law, but the State officer did, yet the estate is to go to the former and not to the grantee of the estate, specifically granted by the Act of 1856. The second grant was specific, and after the State was properly and officially informed of the inquisition. No right of the Society was, therefore, divested, as to Smoot's estate by the donation contained in the Act of 1856.

Come now to cases in our own books. Cheves, J., in *City Council v. Lange*, (1 Mills, 457,) says, "It has been determined that the State cannot grant escheated lands, until office found under the Act, and very properly, for the object of the Act is to avoid any injustice to the citizen, and therefore the State forbears to exercise the right which the common law casts upon it, until that right is ascertained." How? by office found. In that respect it is analogous to the English statutes, which are the subject of construction in *Hayne v. Redfern*, (12 East, 96).

And in *Bodden v. Speignee*, (2 Brev. 321,) which was a case of regnant of land, the former owner dying with heirs, the Court held the grant void, saying, "If it (the land) has fallen to the State by escheat for want of heirs, the escheat law must be pursued, to enable the State to dispose of it legally."

The deductions are obvious, the foregoing principles being admitted as legal. The plaintiffs are entitled, and the decree should go for them.

If the circuit decree goes on the ground of repugnancy or inconsistency of the pro-

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viso, or saving clause, with the \*purview of the Act of 1856, then the proviso or saving clause is void. See as authorities: *Bac. Ab. Stat. (J.)*, the case of *Alton Woods*, 1 Rep. 47. 1 Kent, 463, as to case from *Fitzgibbon*, (195). "The Reporters," 263. *Hilton v. Granville*, 48 E. C. L. 730.

The Act of 1805, was imperative. The Society were bound to appoint their own escheator. Having neglected so to do, as already argued they cannot now be heard in opposition to plaintiff's claims. The grant to them by Acts of 1837 and 1853, were clearly for the benefit of the public; in such cases words of permission are obligatory. *King v. Mayor and Jurats of Hastings*, 16 E. C. L. 23.

Haynsworth, Moses, contra, relied upon the argument contained in the circuit decree. The Act of 1853, was an assignment of an interest—a grant in presenti, which vested the right. It looked to the future, it is true, and necessarily so, because of the nature of

the things granted. Though the subject was not in esse, yet the right to it, when it would come in esse, was vested. The meaning of the Act of 1856 is plain. It only gives to the plaintiffs such rights as remained in the State after the claims of the Society should be satisfied. They cited *Whightman v. Laborde*, 1 Sp. 525; *Brown v. Chesterville Academy Society*, 3 Rich. Eq. 362; 5 Stat. 507.

J. S. G. Richardson, in reply. He would discuss the questions involved in the appeal, under four heads.

1. That the charter of the Sumterville Academical Society contains no grant, but only a gift in futuro, or promise to give, without valuable consideration, coupled with a power to possess and hold, escheated property to a certain amount within the county of Claremont, and that, until possession taken or in some way acquired under the power,

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the gift is \*incomplete and revocable, and was in fact revoked by the Act of 1856.

2. That regarding the charter as containing a contract, for valuable consideration, still it confers, before possession taken with permission of the State, no vested right to any particular escheated estate.

3. That if the charter be construed to contain a grant, then the grant is void for uncertainty.

4. That the word vested, used in the proviso to the Act of 1856, was used in its proper technical sense, and that the Act was intended to divest the Society of all right to Smoot's estate, which had not at the passage of the Act become vested, that is, fixed, determined.

1. The Acts constituting the charter of the Society, create it "with power to possess and hold" escheated property "to an amount not exceeding fifteen thousand dollars." Not a single word indicating an intention to vest title in the Society, by the mere terms of the charter itself, is to be found in it. The terms, give, grant, bargain, sell, release, confirm, alien, assign, transfer, set over, vest the right, title, or estate in, some of which are to be found in every grant, are none of them here. The only words are "with power to possess and hold." These are not words of immediate gift—of a gift in presenti. They look to the future. The gift is inchoate—something is to be done to make it complete—and that is, the Society is to take possession—it must execute the power. The Legislature may, it is true, grant a possibility or an expectancy, though such grant is contrary to common law; but it will hardly be presumed that the Legislature intended to make such a grant in the absence of express and clear words to that effect. The

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presumption should be that \*the Legislature intended to conform to the rules of the common law. Construe the Act according to its

terms, that is, as a gift in futuro, with power to take possession, and the consistency of the law is preserved. There was clearly no consideration; for a promise to give money to build a school house is no more binding in law than any other promise. Then was it revocable before possession taken? Clearly it was. Suppose a father were to write to his son: "Go to my plantation and take possession of ten negroes, such as you may choose, and hold them for your own use;" would there not be a locus penitentie? Might not the father revoke the gift before possession taken? Might he not at any rate revoke it so far as to prevent the son from taking possession of a particular family of negroes which he wished to reserve to himself, or give to another? And is not that the case here? "If the gift does not take effect by delivery of immediate possession, it is then not properly a gift but a contract, and this a man cannot be compelled to perform but upon good and sufficient consideration," 2 Bl. Com. 441; 2 Kent. 438. "There is no case in which a party has been compelled to perfect a gift, which in the mode of making it he has left imperfect. There is a locus penitentie as long as it is incomplete.

\* \* \* To make a complete gift there must not only be a clear intention, but that intention must be executed and carried into effect;" *Cotteen v. Missing*, 1 Mad. Rep. 395. The obligee voluntarily gave the obligor an order on his agent to deliver to him the bond. This was intended as a gift. The order was presented by the obligor, but the agent refused to deliver the bond, and after the death of the obligee delivered it to his administrator who brought suit against the obligor:—Held, that the gift was incomplete and could be revoked, and that the taking possession by the administrator and suing upon the bond amounted to a revocation. *Picott v. Sanderson*, 1 Dev. 309. So we say here. The gift was incomplete—it was in

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fieri—no possession had been taken \*when the Act of 1856 was passed—no right had then vested in the Society, and that Act was a revocation of the gift, so far as it might be held to relate to Smoot's estate. This case is stronger than any to be found in the books, and stronger than the illustration of the gift to a son which has been put in the argument, for here the gift was not only by the terms used clearly in futuro, but was, ex necessitate, in futuro, from the very nature of the rights given—rights not in esse—mere possibilities. But again, there is no gift of property—that is, of lands, goods and chattels. The words are, "property to the amount of" (not to the value of) "fifteen thousand dollars." The use of the word "amount," instead of value, shows plainly the intent. The gift was intended to be not of the property itself, but of the proceeds—money arising from the sale. If the charter

were paraphrased so as to express its true meaning it would read thus, "when an amount, not exceeding fifteen thousand dollars shall be raised from escheated property, &c., the Society shall be entitled to receive the same, &c." This is the true meaning of the Act, and the Society itself so construed it, else why did it apply to the escheator to proceed under the Act in relation to escheats; and if this be the true meaning, is it not too clear for argument that the title remained in the State. Two cases have been referred to; *Brown v. The Chesterville Academy Society*, and *Whightman v. Laborde*, as conclusive of this. It is enough to say that no question presented in this case was considered or adjudged in either of those, and that in both those cases the Societies claimed under words of immediate and direct gift, plainly and clearly expressed.

2. Suppose the case to stand upon the footing of contract for valuable consideration, still the charter confers no right to any particular estate. In that view it is a contract that the Society shall have power to possess and hold escheated property to a certain

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amount. Let the word "amount" be \*construed value, still the Society has no right to take Smoot's estate without the consent of the State. A. binds himself to sell to B. real estate of the value of fifteen thousand dollars lying in Claremont. B. cannot lay his hands on this or that parcel of land, and say I will take it at so much. That is clear, and it is well settled that even a bill will not lie to enforce such a contract. *Story Eq. § 1249*. A. upon his marriage covenanted to settle lands upon his wife of the value of sixty pounds per annum:—Held, that no lands were specially bound, and that the wife could only come in as a creditor; *Fremoult v. Dedire*, 1 P. Wms. 429. The remedy of the Society is to petition the Legislature for the proceeds of Smoot's estate when sold, and if the Legislature has given the estate to others (as it has done) then the Society may have a moral right (that is, upon the assumption that it claims under contract for valuable consideration) to have the "amount" of the estate paid from other sources.

3. It is said that the charter contains a grant. If so, it is void for uncertainty. Most of the authorities on this point have been already cited. The principle seems to be, that public grants are to be construed strictly, in favor of the grantor "because most grants proceeding from the application of the subject, they ought to know what they ask; and if that do not appear, nothing shall pass from the king by reason of the uncertainty." *Bac. Abr. Prerogative (F) 3*. In *Stockdale's case* the grant was of "such debts, &c., being of record" in certain Courts, "as shall amount to the sum of a thousand pounds." This was held "void for the incer-



tainty, for by the grant no debt in certain may pass." The principle would seem to be even more strongly applicable to public grants in this country than it is to royal grants in England, for there the king is the owner of the thing granted, while with us a public grant is always made by some power vicariously exercised.

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\*4. It seems clear from the context of the Act, and would be most manifest if the evidence as to the value of Smoot's estate had been received on circuit, that the word vested in the proviso to the Act of 1856, was used in its proper, technical sense, that is fixed in, determined, secured to with certainty. Smoot's estate is not worth more than ten thousand dollars, and if the Legislature was informed of that fact, and it is hardly to be presumed that it was left in ignorance of it, then the word vested must have been used in its strict, technical sense. Will it be presumed that the Legislature made a grant, knowing at the time that nothing could pass to the grantees? Should it not rather be presumed that the Legislature intended to deal fairly with the parties and not deliberately to deceive them by using words in some out-of-the-way and jesuitical sense—no one knows what. The reason that the proviso was inserted is obvious. It might appear upon judicial inquiry that the Society had taken possession, and thus had become invested with the right. It was this right that the Legislature declined to interfere with. Any supposed right which the charter alone conferred was intended to be taken away. That is the true construction of the Act.

The opinion of the Court was delivered by

JOHNSTON, Ch. The Court has considered this appeal, and is of opinion that the decree should be affirmed.

Manifestly there is nothing in the ground that the Sumterville Society, instead of appointing its own escheator, proceeded through the agency of the State officer. The power to appoint was a privilege merely, and not a condition. Besides, it may be affirmed that the Society's selection of the State officer was an appointment of him as its own officer to the duties they required him to perform. And were all these considerations waived,

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yet as the State makes no claim, \*the contest between the claimants before the Court, may well be decided without reference to the agency through which the property is to be escheated.

The force of the argument is not perceived:—that such an interest as the Act of the Legislature professed to confer on the Society cannot pass by grant, being future, contingent and uncertain as to the subjects out of which it is to arise, and therefore the

Act vests nothing in the Society, until possession taken.

Let it be conceded, that the incidents of a grant, by prerogative, are all truly stated in these objections; does it follow that it is incompetent for the Legislature, by statute, which is, of itself the law, to dispose of any part of the State's property upon what terms it pleases, provided there be no breach of the constitution?

It is not necessary to inquire whether the interest conferred upon the Society was technically of a vested character, or whether, if it was not, it was competent for the Legislature to take it away, by giving the whole property to another. The Legislature has not attempted to exercise such a power if it possesses it. What it has done was to confer its own interests upon third persons, subject to whatever rights it had already conferred upon the Society. The word vested, employed in respect to the rights of the Society, is plainly used in a popular sense, as is manifest from the whole clause taken together; as well that part of it relating to the distributees of Mrs. Smoot, as that which relates to the Society.

As to the objection that the Society by neglecting to enforce its rights in former cases of escheated property has forfeited its rights to the extent of the property thus lost; is there any thing in the statutes compelling it to take its remedy out of the first property which presented itself? Is not the authority plainly conferred, to take the remedy out of whatever escheated property it might select, provided it should not raise more than the amount limited in the Acts?

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\*In modification of the order made, occasion is taken under the ninth ground of appeal, (with the assent of appellee's counsel) to order that the special referee inquire whether the Society has already received the amount warranted by statute, (leaving it undetermined until the report comes in whether it is entitled to both the sums of ten thousand dollars and fifteen thousand dollars, or only the latter;) or what amount it has received, and what it is still entitled to receive. In all other respects the appeal is dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

#### 9 Rich. Eq. \*459

\*JESSE WESSENGER, et al., v. A. M. HUNT, et al.

(Columbia. Nov. and Dec. Term, 1857.)

[Wills 524, 532.]

Where there is a bequest to one for life, "and at her death to be equally divided amongst" a class of persons, as "my children and grandchildren," all who come within the terms of description at the death of the tenant for life,

whether in esse at the death of the testator or born afterwards, are entitled to take; and, if there be nothing in the will indicating a contrary intent, they take equally and per capita.

Ed. Note.—Cited in *Hayne v. Irvine*, 25 S. C. 292, 293; *Gourdin v. Deas*, 27 S. C. 487, 490, 492, 4 S. E. 64; *Brown v. McCall*, 44 S. C. 519, 22 S. E. 823; *Tindal v. Neal*, 59 S. C. 18, 36 S. E. 1004; *Reynolds v. Reynolds*, 65 S. C. 393, 43 S. E. 878; *Tindal v. Richbourg*, 91 S. C. 410, 74 S. E. 932.

For other cases, see *Wills*, Cent. Dig. §§ 1123, 1146; Dec. Dig. §§ 524, 532.]

Before Wardlaw, Ch., at Richland, June Sittings, 1856.

This case will be fully understood from the circuit decree which is as follows:

Wardlaw, Ch. George B. Hamner, Sr., of Mecklenburg county, Virginia, made his will, bearing date November 17, 1834, the disposing clauses of which are in the following words:

"It is my will and desire that all my just debts be paid, and funeral expenses out of my estate, and all the residue thereof I give to my wife during her life, to be used for her use and benefit as she may think proper; and at her death it is my will and desire that the estate which may be then in being for her support be equally divided amongst my children and grand-children, except Howell Jeffries, son of my daughter Sarah, (as his uncle, Howell L. Jeffries, has promised to provide for him,) and my daughter Maria, (having given her as much as I intend her to have out of my estate.) It is also my will and desire that Samuel Jeffries, also son of my daughter Sarah, shall have no part of my estate at the death of my wife. It is my will and desire that my wife and my son, W. H. Hamner, shall have the management of my estate."

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\*The testator died soon after the date of his will, and the will was admitted to probate in Mecklenburg, May 18, 1835. William H. Hamner assumed the management of the estate; sold property and paid the debts; and, as it appears by a return made to the Court of Probates of Mecklenburg, December 21, 1835, there remained of the estate, after discharging all its debts, in the hands of said William H. Hamner, and of the widow Ann Hamner, ten slaves—Gloucester, Betty, Martha, Beverly, Sally, Edith, Armstead, Richard, Sam, Amos; two horses, four beds and furniture, and three hundred and thirty-five dollars and eighty-seven and a half cents in money. It is not alleged nor proved that William H. qualified regularly as executor of his father's will, and it is probable that he avoided this, and with the view of saving from forfeiture under the Virginia Statute referred to in *Cole v. Broom*, Dud. 7, and in *Reese v. Holmes*, 5 Rich. Eq. 556, the life estate of his mother Ann, who contemplated removal of herself and slaves from Virginia. She did remove with her slaves above named about the close of the year 1835, to Columbia, South Carolina, and thenceforth resided with her

son, William H., who had previously become a resident householder of Columbia. She brought with her, two sons, Richard and James, and three daughters, Martha, (widow of William S. Lane,) Maria and Margaret. These were all the children left by testator except Nancy, wife of Reuben A. Puryear, who resided in Virginia, George B., Jr., who resided in Tennessee, and William H. It is averred in some of the answers, that in February, 1836, the widow, with the consent of most of her children, on the application of George B., Jr., who was in necessitous circumstances, advanced to him certain chattels and money, greatly exceeding the value of his interest in remainder in testator's estate, and that thereupon he gave to the acting executor an acquittance of all interest in the estate, which acquittance was afterwards accidentally consumed by fire in and with a

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lawyer's office and its contents. One of the sons, Richard, died intestate, and unmarried, October 5, 1836, leaving some personal estate of which, according to the averment of some of the answers, William H. assumed the control without regular appointment as administrator. It is further averred concerning the slaves above named, that the widow, Ann, gave Armstead to George B., Jr., as part of the advancement to him, and that Gloucester died in 1836, and Amos died in 1837. Martha Lane and A. M. Hunt intermarried March 15, 1838.

Ann Hamner, widow and legatee for life of testator, died September 28, 1838, and the children of testator who survived her were William H., George B., James B., Nancy, wife of Reuben A. Puryear, Martha E., wife of Alfred M. Hunt, Maria and Margaret; and the grand-children who survived were Howell Jeffries and Samuel Jeffries, sons of Sally who predeceased testator; Sally, daughter of Nancy Puryear, and now the wife of William E. Morgan; Elizabeth daughter of George B., and now the wife of Jesse Wessenger; Mary Frances, daughter of George B., and now the wife of Thomas P. Walker; and perhaps as alleged in the bill, and denied in the answer of Hunt and wife, William, son of George B. At the death of testator his children and grand-children were the same as at the death of his widow, except that his son Richard, survived him and predeceased her, and it is disputed whether Mary Frances was then in existence, and certainly William was born long afterwards. The daughter, Maria, and John C. O'Hanlon intermarried in February, 1839.

In March, 1839, a private partition was made of the estates of testator and of Richard Hamner among the children of testator, under the direction of the eldest son, William H., to which all assented, except George B., who was not consulted as it was considered by the others that he had been already overpaid; and he, although he survived the parti-



tion more than three years, set up no dis-

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turbing claim. It is manifest \*that in this partition, the parties interpreted the will as giving the remainder to the children of testator, and contingently to grand-children whose parents might predecease the life tenant, and in the actual event entitling no grand-child to a share; and this construction is still urged in behalf of some of the parties. Of the particulars of this partition, we have a full statement in one of the answers, which is probably faithful but not proving itself. It is in evidence, however, by the admissions of the answers, and otherwise, that in this partition, Reuben Puryear and wife received their share of both estates, that Hunt and wife received Betty at the price of four hundred dollars, from the estate of testator and one hundred and seventy-five dollars from the estate of Richard, that Margaret received Martha at the price of eight hundred dollars, and Sally, averred to have been given to her by testator, and that Beverly from testator's estate and William, probably from Richard's estate, were set apart for the use of James B., during life, to be distributed at his death, and these two slaves were delivered to A. M. Hunt on his agreement, to maintain for life the said James B., who was very imbecile in mind, but capable of rendering and actually rendering some useful service; and it may be safely concluded that William H., the head of the family, received fully his share. About the time of the partition, William H. Hamner gave bills of sale, acknowledging receipt of the price and warranting the title, to A. M. Hunt for Betty, to A. M. Hunt, for the use of James B., of Beverly and William, and to Margaret Hamner of Martha.

On May 31, 1839, the daughter, Margaret, was married to Thomas Puryear, and she died February 12, 1845, leaving her husband and three children, one of whom is since dead. George B. removed from Tennessee to Lee or Baker county, Georgia, and died there in October, 1842, leaving a widow, since dead, and three children, of whom the two daughters lived with Hunt until they were respectively married in 1847 and 1852. Martha

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O'Hanlon died July, 1843, leaving a \*husband and three children, of whom two are dead; and her husband died in 1853, leaving a will whereby he appointed A. M. Hunt executor of his will and guardian of his surviving child, Margaret. William H. Hamner died in November, 1843, in Baker county, Georgia without wife or children, leaving a will but not an estate sufficient to pay his debts in full. James B. Hamner, died intestate and unmarried, January 27, 1855, having no estate in possession at his death except the slaves Beverly and William. A. M. Hunt advertised for sale on sale-day in January, 1856, for the purpose of partition, the slaves

Beverly and William, and thereupon this bill was filed January 5, 1856, for injunction and account.

The plaintiffs are Jesse Wessenger and Elizabeth his wife, Thomas P. Walker and Mary Frances his wife, and William Hamner, being the children of George B., Jr., with the husbands of the daughters, and the defendants are A. M. Hunt and wife, R. A. Puryear and wife, W. E. Morgan and wife, Thomas Puryear and his children, Richard and William, Margaret O'Hanlon, Howell Jeffries and Samuel Jeffries. All of the defendants have answered, except Howell and Samuel Jeffries, against whom the bill is taken pro confesso.

It will be observed that there is no legal representative of any deceased party before the Court, although in regular procedure representatives of Richard Hamner, George B. Hamner, Jr., William H. Hamner and James B. Hamner, passing by the other decedents, should have been made parties. No objection, however, for lack of proper parties is suggested by the pleadings of defendants, and as representatives are required principally for the protection of the rights of creditors, and if there be such here they cannot be prejudiced, it is not my purpose to raise unnecessary difficulties, or to avoid decision between the parties on the record so far as the materials of decision have been furnished.

At the hearing, no evidence was offered

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beyond the admissions of the parties, except an inconclusive deposition taken by commission concerning the destruction of George B. Hamner's release or acquittance, and it was mutually stated at the bar that doubtful questions of fact should be referred to the Commissioner for further examination and proof.

The first question in order, is as to the construction of the will; and that seems to me to be so settled by authority as not to require argumentation. The bequest of the remnant of the estate after the interest for life of the widow, is broadly to the children and grand-children of testator, in equal shares, some of these coming within the description, being expressly excluded. The terms children and grand-children are not words of art with technical meaning, and are to be interpreted in the popular acceptation, as descriptive of descendants from an ancestor in the first and second generations. A grand-child as completely sustains a definite relation to his ancestor, where his immediate parents are living, as when they are dead. In many instances the context demonstrates that a testator employs words in some deflected sense, and not in their natural meaning, but we are not at liberty, without support from the context, to conjecture some intention on his part at variance with his expressions; and in this will throughout

there is no intimation that the testator did not mean what he said. Supposing then, that all children and grand-children come in for shares, the next inquiry is, as to the point of time when the members of these classes are to be ascertained, the death of testator, or the death of life tenant. The inquiry involves the shares of Richard, a child, and Mary Frances and William, grand-children. It is clear on authority that the children and grand-children of testator living at his death, took vested interests in the remainder, transmissible to their representatives, subject to diminution by increase of the objects of bounty, or in other words vested estates, opening to let in all the classes who might come into existence before the period of distribution. Where a be-

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quest is immediate to \*children as a class not individually designated, or to any other class, those of the class in existence at the death of testator are exclusively entitled, but if the bequest be of a subject to be distributed at a time future to the death of the testator, as at the death of an intermediate life-tenant, all to whom the description of the class is applicable, who are in existence at the time fixed for distribution, are entitled to shares. It is palpable that all who take under this will, take aliquot portions, or per capita, grand-children with children equally. I am of opinion that the representatives of Richard Hamner, and the children and grand-children of testator, living at the death of Ann Hamner, except those expressly excluded, Maria Hamner, Howell Jeffries, and Samuel Jeffries, are severally entitled to equal shares of the estate of testator "in being" at the death of the widow. *De Veaux v. De Veaux*, 1 Strob. Eq. 283; *McGregor v. Toomer*; 2 Strob. Eq. 51; *Crim v. Knotts*, 4 Rich. Eq. 340; *Barksdale v. Macbeth*, 7 Rich. Eq. 125; *Perdriau v. Wells*, 5 Rich. Eq. 20.

A further question in the construction of the will is as to the power of the widow in disposing of the life estate given to her. The gift to the widow, although restricted to her life, is in strong terms, "to be used for her use and benefit as she may think proper," and the limitation over at her death is only of "the estate which may then be in being for her support." These words in my judgment confer on the life-tenant right to use the corpus, as well as the income, for her own benefit and support; nevertheless her power over the corpus, being in the nature of a trust, is confined to the specified purpose of her proper maintenance. She could not sell and convey the estate to strangers except for this purpose, nor could she transfer the remainder, or any part of it, by gift, to one or more of the remainder-men. Certainly she could surrender her life interest, or transfer the estate for the term of her life, with or with-

out consideration, but her disposition of the fee is limited to the end of procuring sup-

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port. The \*daughters who received\* beds, and George B., Jr., who, as it is alleged, received much more valuable chattels, by the gift of their mother, and those claiming under these parties, must account for the value of the subjects of gift. Adult parties who consented to these gifts are bound, but the title of infants is unimpaired.

As to the estate of Richard Hamner, it is clear that as well what he died possessed of, as that which he derived from his father's will, must be distributed in pursuance of our statutes for distributing the estates of intestates, and without reference to his father's will. It follows that Martha and the Jeffries are not excluded from shares, nor Sally Morgan entitled to a share.

The informal partition of March, 1839, binds those who made it, those who received shares under it, and those who acquiesced in it, although themselves excluded, so far as the partition was full and final. It is my purpose to refer the matters of fact concerning this partition to the Commissioner, and I adjudge nothing definitely in advance of his report. It is not improper, however, to suggest for the guidance of the Commissioner that R. A. Puryear and wife, William H. Hamner, and Margaret Hamner, prima facie, have received all to which they were entitled; that Hunt and wife, and James B. Hamner, and John C. O'Hanlon, received some shares, which must be considered in full, unless this presumption be rebutted by proof; and that it is a circumstance tending to show, I do not say conclusively, the acquiescence of George B. Hamner in the partition, that although living for three years and a half afterwards, he interposed no adverse claim, and that the partition is first questioned nearly seventeen years after it was made. If any of the parties concluded by the partition did not receive so much as they were entitled to, this cannot serve to enlarge the shares of parties not bound, although possibly it may increase the means of satisfying their legitimate claims. In like manner, I

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suppose that those who took \*benefit under the partition are not liable to contribute for the satisfaction of unpaid legatees, except to the extent of excess in the partition of their proper portions. A legatee who has received from an executor, or one acting as executor, no more than his own legacy, is not generally bound to account to another legatee who may have received nothing. Diligence in pursuit of rights is favored; and it is the policy of the State, pursued by its Courts, in avoidance of litigation, to uphold and foster arbitrations, compromises, private partitions and settlements. It



may be questioned whether, even if Margaret received in the partition more than her lawful portion, her surviving husband is bound to account for her ante-nuptial debt, liability or breach of trust, not prosecuted against him during the coverture. The slaves Beverly and William were not parted except for the life of James B. Hamner. I repeat that these remarks are suggestive and not decisive.

It is ordered and decreed, that it be referred to the Commissioner to inquire and report concerning the facts of this case generally, and more particularly as to the alleged gift by testator of Sally to his daughter Margaret; as to the amount and value of the estate given to Ann Hamner for life, and how much thereof was in being at her death, and how much and to whom had been disposed of in her life by gift to George B. Hamner and others, or in any other mode; as to the disposal of said estate after the death of said Ann, and the subsequent and present condition and possession thereof; and specially as to the alleged partition thereof, concerning the parties acquiescing therein, and the portions received by all and each; in like manner as to the estate of Richard Hamner—how it was disposed of, and who now have it, and whether the slave William belonged to this estate, or to the life estate of Ann Hamner, and whether this estate was embraced in the partition; and as to the fact, whether the plaintiff, William Hamner, was

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in existence at the death of \*Ann Hamner; or more generally as to the grand-children of testator living before her death, with leave to report any special matter affecting the merits of the case.

The defendants, A. M. Hunt and wife, Thomas Puryear, and Reuben Puryear and wife, appealed from so much of the decree as decides that the grand-children of the testator living at the death of his widow, are entitled to come in and take per capita, under the will, equal shares with the children, although the parents of such grand-children were living at the period of distribution, on the following grounds:

1. Because it appears from the whole will, and the general object and intention of the testator, that he did not intend his grand-children should take shares under the will, except in case of the previous death of their parent, and then only by representation; and that such intention appears manifest from the reason assigned by the testator in his will for excluding his daughter Maria from a share in the distribution of his estate.

2. If grand-children can take per capita, equally with the children of the testator, then it is submitted that those only can take who were living at the testator's death, and not those subsequently born.

Bauskett, for appellants, cited 2 Jarm. 111; Cole v. Creyon, 1 Hill Ch. 311; Lemacks v. Glover, 1 Rich. Eq. 141; Templeton v. Walker, 3 Rich. 543; Crowe v. Crowe, 1 Leigh, 74.

Arthur, contra, cited Mowatt v. Caron, 7 Paige, 328; Godard v. Wagner, 2 Strob. Eq. 1; Evans v. Godbold, 6 Rich. Eq. 26; Wright v. Kreber, 5 B. & C. 866; Freeman v. Knight, 2 Ired. 72; 42 Eng. C. L. R. 483; Doe v. Weber, 1 B. & Ald. 713; Mathis v. Hammond, 6 Rich. Eq. 399; Shoppert v. Gillam, 6 Rich. Eq. 82.

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\*The opinion of the Court was delivered by

DARGAN, Ch. The question presented in this appeal arises upon the construction of the will of George B. Hamner, Sr., of Mechenburg county, Virginia, which bears date the 17th November, 1834. The disposing part of the will consists of but one clause, which is in the following words:

"It is my will and desire that all my just debts be paid, and funeral expenses, out of my estate: and all the residue thereof, I give to my wife, during her life, to be used for her use and benefit as she may think proper; and at her death, it is my will and desire, that the estate which may be then in being for her support, be equally divided amongst my children and grand-children, except Howell Jeffries, son of my daughter, Sarah, (as his uncle, Howell L. Jeffries, has promised to provide for him,) and my daughter, Maria, (having given her as much as I intend her to have out of my estate.) It is also my will, that Samuel Jeffries, also son of my daughter, Sarah, shall have no part of my estate, at the death of my wife. It is my will and desire, that my wife and my son, W. H. Hamner, shall have the management of my estate."

The life estate of the widow, Ann Hamner, terminated at her death, 28th September, 1838. At the death of the testator, his children were, William H., George B., James B., Richard, Nancy, wife of Reuben A. Puryear, Martha E., wife of Alfred M. Hunt, Maria and Margaret. The grandchildren then living were Howell and Samuel Jeffries, sons of testator's daughter, Sally, who predeceased him, Sally, daughter of Nancy Puryear, now the wife of William E. Morgan, Elizabeth, daughter of George B., now the wife of Jesse Wessenger, Mary Frances, daughter of George B., now the wife of Thomas P. Walker, and perhaps, as alleged in the bill, and denied in the answer of A. M. Hunt and wife, William, son of George B. The same persons answered the description of children and grand-children at the death

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of the testator, and at that \*of his widow, the tenant for life—except Richard, who survived him, and predeceased her, and it is

disputed whether Mary Frances was then in existence.

The remainder having fallen in, this suit has been brought for a partition of the estate. The litigation is, as to the parties who are to take, and the proportions in which they are to take. The sole question of law is, do the children and grand-children take per stirpes, or per capita?

The Chancellor, who heard the cause on circuit, held, that the children and grand-children take equally in the distribution of this estate. From this decree an appeal has been taken on the following grounds:

"First. Because, it appears from the whole will, and the general object and intention of the testator, that he did not intend his grand-children should take shares under the will, except in case of the previous death of the parent, and then only by representation; and that such intention appears manifest from the reason assigned by the testator in his will, for excluding his daughter, Maria, from a share in the distribution of the estate."

"Second. If grand-children can take per capita equally with the children of the testator, then it is submitted, that those only can take who were living at the death of the testator, and not those subsequently born.

I think with the Chancellor who heard the cause on circuit, that the principles which must govern the decision of this case are too clearly defined to admit of discussion or doubt. Where a testator has given an estate to several persons as a class to take effect at his death, (which, in that case, is the period to which the partition refers) all who can bring themselves within the description at the death of the testator, are entitled to take. But where the partition is postponed by the interposition of a life estate, or to

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some future day for any other cause, all who can bring themselves within the description at the period of distribution are entitled to participate in the distribution. It is unnecessary to cite cases. All the authorities support the doctrine. There are none to the contrary. And the rule will not yield except to a qualifying context. In this will, the death of the tenant for life, the testator's widow, is the period fixed for the distribution of the remainder among the testator's children and grand-children, with the exception of two of the grand-children, who are expressly excluded. All the children and grand-children of the testator, who were in being at the death of the tenant for life, except the grand-children, (Howell and Samuel Jeffries, who are expressly excluded by the terms of the will,) are entitled to a share in the division of this estate: as well those who were born at the death of the testator, as those after born.

We have thus arrived at the conclusion, that all the grandchildren in being at the

death of the tenant for life, are entitled to participate. In what proportions they are to take—whether representatively or per capita, and in equal shares with the children, is another and a distinct question. But it is equally well settled, that where a testator gives an estate to his children and grand-children, without explanatory words, indicating a different intent, the children and grand-children will take per capita, and in equal shares. A division, by which the grand-children should take representatively through their parents, would, among lineals, I think, be more natural, and less repugnant to the common course of human affections. The intensity of a man's love for his offspring, is in proportion to their propinquity. His affection for the offspring of his own loins, to whom he is endeared by a thousand associations and fond memories is stronger than for his remoter, immature, or unborn descendants. Hence, if a man having one living son, and ten grand-sons, the children of a deceased son, were to give his estate to be

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equally \*divided among his son and ten grand-sons, without some special reason for such a disposition, by the common consent of mankind, he would be considered as having done injustice to the son. This sentiment does not exist as to collaterals. A man would not be considered as having violated any natural obligation, if he gave his estate to be equally divided among his living uncle and the ten children of his deceased uncle; or for having made any similar disposition. These natural distinctions are recognized in, and in part, form the basis of our statute of distributions; where, among lineals, the jus representationis, exists indefinitely to the remotest degree, and among collaterals, only in one or two specified cases among children of brothers or sisters of the whole blood.

It is upon reasons like these, I apprehend, that in cases similar to this, where a testator gives an estate to his children and grand-children, the Court is disposed to look into the will, to see if there be any satisfactory indicia manifesting on the part of the testator, a more natural intent than that which the words "to children and grand-children" import. And it is not to be denied that Courts have, on some occasions, laid hold of very slight circumstances to vary the construction. In one case, it is said, that the faintest glimpse of such intention is sufficient. But this, perhaps, would be going too far. To give a strained construction to carry into effect a favorite theory would not be the most conducive mode of arriving at the true meaning of the will.

The jus disponendi is absolute in the testator; and he has the right to dispose of his estate, as his judgment or caprice may dictate. And if he has expressed his meaning plainly, no tortured interpretation should be resorted to for the purpose of defeating



his purpose:—even though he may be supposed to have made an unnatural will. If, without wresting the import of the words

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employed, the will admits of \*two interpretations, the Court will adopt that which is the most natural.

We have been earnestly asked to look into this will, for the purpose of giving effect to certain alleged indications, that the testator's meaning was different from that which the Circuit Court has construed it to be. We have carefully examined the will, and we have discovered nothing to warrant us in holding that the testator, by his gift to his children and grand-children did not intend to use those words in their ordinary and popular sense, and that all who fell under that description at the death of his widow, should take per capita or in equal shares.

It is ordered and decreed that the circuit decree be affirmed and that the appeal be dismissed.

JOHNSTON, DUNKIN, and WARDLAW, CC., concurred.

Appeal dismissed.

#### 9 Rich. Eq. \*474

\*LYDIA G. SOLLEE v. RANDAL CROFT, et al., Executors.

(Columbia. Nov. and Dec. Term, 1857.)

[Trusts  $\hookrightarrow$ 315.]

A trustee allowed compensation for his personal services in going to Alabama to see after and secure the trust property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig.  $\S$  440; Dec. Dig.  $\hookrightarrow$ 315.]

Before Dargan, Ch., at Greenville, July Sittings, 1857.

In the report of the Commissioner upon the accounts of the defendant's testator, George Croft, as trustee, six hundred dollars were allowed for the personal services of the trustee in going to Alabama, four times, to see after the property, and protect it, first, from the claims of the creditors of F. W. Sollee, and again from the claims of the creditors of B. M. Pearson, (see 7 Rich. Eq. 34.)

An exception on this account was overruled by his Honor, on circuit; and the complainant appealed, on the ground, that a trustee cannot recover compensation in Equity, over and above his commissions, for his personal services—such compensation can only be recovered at law before a jury.

Sullivan, for appellant.

Perry, contra.

PER CURIAM. The decree of the Circuit Court appears well sustained by the judgment of the Court in *Huson v. Wallace*, 1 Rich. Eq. 1.

The decree of the Circuit Court is affirmed and the appeal dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurring.

JOHNSTON, Ch., absent from indisposition.

Appeal dismissed.

#### 9 Rich. Eq. \*475

\*DIXON BARNES v. WM. C. CUNNINGHAM, et al.

(Columbia. Nov. and Dec. Term, 1857.)

[Judgment  $\hookrightarrow$ 554.]

Where a widow on bill filed by her for partition of her husband's estate, allows to be partitioned, and takes herself, as part of his estate, a tract of land, which, on partition, in the husband's life-time, of her father's estate, had been allotted to her husband and herself and her heirs, with a direction that the husband pay to other heirs of her father, an excess in the value over her share, she, or her representative, is thereby barred upon the principle of res adjudicata, from afterwards claiming, from her husband's estate, the value of her inheritance in said tract of land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig.  $\S$  1053; Dec. Dig.  $\hookrightarrow$ 554.]

[Limitation of Actions  $\hookrightarrow$ 60.]

Such claim will be barred by the statute of limitations after four years from the time the excess ordered to be paid by the husband was due by him.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig.  $\S$  333; Dec. Dig.  $\hookrightarrow$ 60.]

[Judgment  $\hookrightarrow$ 590.]

Where a party to a suit fails to prosecute a matter proper for litigation in that suit, he cannot afterwards be heard on the matter.

[Ed. Note.—For other cases, see Judgment, Cent. Dig.  $\S$  1104; Dec. Dig.  $\hookrightarrow$ 590.]

[Dower  $\hookrightarrow$ 2.]

B. domiciled in this State, and owning property here, died intestate, leaving real and personal estate in Alabama, in which State, a widow is entitled only to dower in lands, never estimated at more than one-sixth the value. The administrators in Alabama, sold the whole estate and after payment of debts, remitted the nett proceeds to the administrators in this State, who allowed the widow in the distribution one-third. On bill filed, the Court refused to interfere and restrict the widow to one-sixth of the value of the lands.

[Ed. Note.—For other cases, see Dower, Cent. Dig.  $\S$  5; Dec. Dig.  $\hookrightarrow$ 2.]

Before Wardlaw, Ch., at Kershaw, June, 1856.

Wardlaw, Ch. John S. Cunningham, a widower with two children—Isabella L., who has recently become the wife of Thomas F. McDow, and Nancy, still infant and spinster—intermarried with Mary, daughter of James R. Massey. In December, 1850, proceedings were instituted in this Court for Lancaster, for partition of the estate of said James R. Massey, to which Cunningham and wife were parties, which resulted in decrees that the land of intestate, on Catawba River, denominated in the present proceeding as

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the Massey tract, containing nine hundred and twenty-seven acres, should be "vested in John S. Cunningham and wife, Mary, and the heirs and assignees of the said Mary, at the price of six thousand one hundred and eighteen dollars and fifty cents," and that the share originally of each child of intestate in the real estate of J. R. Massey, was one thousand six hundred and seventy dollars and five cents, exceeding the share of Cunningham and wife in the land, four thousand four hundred and eighty-eight dollars and forty-eight cents, and after taking in advancements made by intestate to his children, that Cunningham should pay to certain distributees the sum of four thousand eight hundred and one dollars and fifty-seven cents on January 1, 1852, with interest from January 1, 1851. This sum has been since paid by the administrators of Cunningham's estate. His wife joined in no receipt as to the one thousand six hundred and seventy dollars.

John S. Cunningham died intestate, in November, 1851, leaving a large estate in South Carolina and Alabama; and on his chattels and credits in this State, Robert A. and William C. Cunningham administered; and, on his effects in Alabama, the said Robert A. and one William Cunningham administered. The plantation and chattels in Alabama were sold by the administrators there, (the lands on January 12, 1853, for the price of six thousand nine hundred and ninety-six dollars and sixty cents, on a credit of one year) and the choses collected, and, after the payment of debts there, the proceeds have been remitted to the administrators here, and by them, for the most part, distributed according to the laws of this State. The said intestate left, as his distributees, his widow Mary, the two children of a former marriage, (Isabella and Nancy) and a child by the second wife, Mary, named Robert Alford Rinaldo.

On March 31, 1853, Mary, widow of intestate, instituted proceedings in this court for

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Lancaster, against the children and administrators of intestate, for partition of his estate in this State, expressly excluding account as to the estate in Alabama, alleging that he died seized of the Massey tract, the Barkley tract, and the proceedings resulted in decrees inter alia, that the Massey tract be vested in the widow Mary, at the price of seven thousand four hundred and sixteen dollars, and the Barkley tract of one thousand four hundred and fifty-one acres be vested in McDow and Isabella his wife, and in Nancy Cunningham, at the price of seven thousand nine hundred and eighty dollars and fifty cents.

In May, 1855, the said Mary intermarried with Dixon Barnes, and she died intestate, September 12, 1855, leaving her husband and

her son by former husband, Robert A. R., distributees of her estate. Her surviving husband has become administrator of her estate, and guardian of her son—Robert A. R.

This bill is filed by Dixon Barnes, as administrator and guardian, plaintiff, against the administrators and children of John S. Cunningham, defendants. The suit is amicable, but several questions are presented for judgment as preparatory to the accounting.

1. The plaintiff, as administrator of his wife, claims the sum of one thousand six hundred and seventy dollars, and interest, the value of her real estate by inheritance, never acknowledged to be received by her, or representative, from her former husband or his representatives. The defendants plead *res judicata* and the statute of limitations. The original right of the said Mary to said one thousand six hundred and seventy dollars is unquestionable, but, as a wife, she might waive it by joining her husband in a receipt for it, or giving her consent, on separate examination, regularly conducted, that the husband should receive it, and when she became discovert she could deal with her claims as any other contractor. Her right

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under the proceedings for partition of her father's estate was to the Massey tract in entirety, perhaps with a lien on the whole real estate divided for the one thousand six hundred and seventy dollars. But, while discovert and *sui juris*, (and, as was said at the bar and not disputed, after being admonished of her rights by Commissioner Witherspoon) she deliberately chose to consider the Massey tract as belonging to the estate of her late husband, J. S. Cunningham, and asserted no claim for the one thousand six hundred and seventy dollars. No claim for this sum was set up before the filing of this bill. The Massey tract in the partition of Cunningham's estate was assigned to her in fee and she acquiesced without clamor as to further demands. The matter was proper for litigation in that suit, and she had the opportunity of presenting it to the tribunal; and as she did not then speak, I suppose that on the doctrine of *res judicata*, the voice of herself or of any one claiming in her behalf cannot be afterwards heard, *Maxwell v. Connor*, Hill, Eq. 14; *Reese v. Holmes*, 5 Rich. Eq. 551; *Ex parte Geddes*, 4 Rich. Eq. 303 [57 Am. Dec. 730]. I suppose too that the claim is barred by the statute of limitations. The surplus payable by Cunningham, was due January 1, 1852, and this claim is brought forward by bill filed in 1856, at a date not furnished to me. There is some general equity in this claim, and it is with some regret, especially in connection with the next matter of controversy, that I adjudge the bill to be dismissed in this particular.

2. The defendants, McDow and wife, and Nancy Cunningham, urge that two hundred



acres or more of the Barkley tract were of the inheritance of their mother, and that, on her death, two-thirds of this portion descended to said Isabella and Nancy, and only one-third to John S. Cunningham; whereas, in the partition, the whole tract was treated as the estate of said J. S. Cunningham. At the time of the partition these defendants were infants, and defended themselves only by formal answer through next friend. At

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the hearing, I was \*inclined to the view that this matter was not regularly presented by answer, and needed a bill with the special object of vacating the former decree: for an infant is as much bound as an adult by a decree, until it be regularly vacated: [Spencer v. Bank] Bail. Eq. 468; [Huson v. Wallace] 1 Rich. Eq. 6; Clarke v. Jenkins, 3 Rich. Eq. 339; Sto. E. P., 792; but I understood objection on this score to be waived, and that the parties consented to a reference to the Commissioner to inquire and report how much, if any of the Barkley land was of the inheritance of the mother of Isabella and Nancy. And it is so ordered.

3. The defendants insist that, as to the land in Alabama, a widow, by the law of that state, does not come in with children as a distributee, and is restricted to her claim of dower, which is never allowed to exceed one-sixth of the proceeds of sale where the land has been sold, and which must be claimed by a procedure prescribed, within three years from the death of her husband; and that she and her representative, for lack of claim in due time, are entitled to nothing in this subject, and should repay the third which in fact they have received from the administrators here, to whom the nett proceeds were remitted. The statute law of Alabama is not unfairly stated in this claim: Ala. Code, 1354, 1372, 1572, 1826-7, 1874, 1755. If the widow should be considered as restricted in this matter to dower, still there would be no place for the bar of the statute from non-claim in three years; because it would be preposterous in her to institute a suit for the sixth of the land when the representatives of her husband were proceeding to pay her a third. Moreover her title to a third seems fair. She was entitled to that portion of the personalty, by the law of Alabama. Her husband and his distributees were domiciled in South Carolina and the principal administration of his estate was here. In both States the principal business of administrators is with the personalty of decedents; although, by the laws of Ala-

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bama, administrators may sell lands instead of slaves, if more beneficial to the estate, especially for the payment of debts. The intestate here was largely indebted, to an amount greatly exceeding the price of his lands in Alabama and the balance of the Alabama property, after payment of debts,

was received in cash by the S. C. administrators. It would not be straining to take either of two views, that the price of the Alabama lands was absorbed in payment of debts of intestate, or that the whole estate should be distributed according to the law of the domicile. Very intricate questions underlie the state of facts, but without discussing them, I adjudge this claim to be invalid.

4. Robert Cunningham, father of John S., made a will of which John S. was executor, and thereby inter alia bequeathed the sum of ten thousand dollars to a posthumous son Robert J. This fund remained in the hands of John S., for many years, until May 1, 1854, when his administrators paid to the guardian of said Robert J., the principal sum of ten thousand dollars and as simple interest for seventeen years and four months the sum of twelve thousand one hundred and thirty-three dollars and thirty-three cents, after deducting payments made by said John S., and his administrators, to the sum of three thousand one hundred and twenty-three dollars and sixty-five cents, and upon which as the payments were insufficient to extinguish the interest accrued, neither interest nor commissions were allowed. The calculation was made by commissioner Witherspoon. It is supposed that the administrators have not satisfied this legacy in full, and that they may be liable to pay interest at annual rests. No proof is offered that the trustee made for himself more than simple interest from this fund; indeed it is not shown how he employed it. I see no reason why more than simple interest should be allowed; and the attempt to disturb this settlement is overruled.

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\*It is ordered that it be referred to the Commissioner of this Court for Kershaw to state the accounts between the parties on the principles of this opinion.

The complainant appealed on the grounds:

1. Because his Honor erred in holding that complainant's claim to the one thousand six hundred and seventy dollars and five cents was *res judicata*; and that his intestate had waived her right to the same, by omitting to litigate it in the proceedings she instituted for partition of her deceased husband, J. S. Cunningham's estate.

2. Because his Honor erred in holding that complainant's claim to the one thousand six hundred and seventy dollars and five cents, was barred by the statute of limitations.

The defendants, administrators of John S. Cunningham, also appealed from so much of the circuit decree as relates to the interest calculation, or settlement with guardian of Robert J. Cunningham.

The defendants, Thos. J. McDow and wife, also appealed from so much of the circuit decree as allows to complainant, as administrator of Mary Cunningham, deceased, the

interest of one-third in the Alabama lands, on the grounds:—

1. That, in no event was she entitled to more than one-sixth, and that under requisites never complied with.

2. That the proceeds of the sale of the lands were not applicable primarily to the payment of debts.

Caston, for complainant, cited *Ex parte Geddes*, 4 Rich. Eq. 301; *Wardlaw v. Gray*,

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2 Hill, Ch. 644; *Yekel v. Quarles* \*Dud. Eq. 55; *Ex parte Mobley*, 2 Rich. Eq. 56; *Daniel v. Daniel*, 2 Rich. Eq. 115; *Broom L. Max.* 242; 2 Stat. 584; 5 Stat. 112; *McQueen v. Fletcher*, 4 Rich. Eq. 152; *Smith v. Smith*, McM. Eq. 126; *Moses v. Jones*, 2 N. & McC. 259; *Lawton v. Bowman*, 2 Strob. 190.

Shannon, for administrators of John S. Cunningham.

Kershaw, for McDow and wife, cited *Warley v. Warley*, Bail. Eq. 398, 409; *Pell v. Ball*, Speer, Eq. 519; *Laurens v. Magrath*, 1 Rich. Eq. 296.

PER CURIAM. This Court concurs in the decree which is hereby affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

9 Rich. Eq. \*483

\*CHARLOTTE BOSSARD, et al., v. MARIA H. WHITE.

(Columbia. Nov. and Dec. Term, 1857.)

[*Deeds* ⚡133; *Trusts* ⚡124.]

A father conveyed by deed certain slaves to W., in trust for his seven children then living, reserving to himself the use during his natural life; "and from and immediately after his death to be taken in trust by the said W., and as the children before mentioned arrive at age or marry, at which time the said negroes and their increase to be equally divided between them or the surviving ones of the seven before mentioned, share and share alike, freed and discharged of all further and other trusts or limitations, to be held by them and each of them, their and each of their executors, administrators and assigns:"—*Held*, by Johnston and Dargan, CC., that only such of the seven children as survived the father were entitled to take.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 371; Dec. Dig. ⚡133; *Trusts*, Cent. Dig. § 167; Dec. Dig. ⚡124.]

[*Descent and Distribution* ⚡68.]

The deed was executed in 1815, when the children were all minors. One died, and in 1829 the donor divided the slaves among the six surviving children—two of whom were still minors. The donor died in 1852, leaving four of the seven children surviving him, who filed their bill against his executrix, claiming such of the negroes, and their increase, or their value, as had been allotted, in 1829, to two of the deceased children, and averring want of notice of the deed of 1815, until after the death of the donor:—*Held*, that the lapse of time and

circumstances of the case were sufficient, after the death of the donor and trustee, to raise the presumption of notice; and that having acquiesced for so long a time, they could not now disturb the division of 1829.

[Ed. Note.—Cited in *Waldrop v. Leaman*, 30 S. C. 447, 9 S. E. 466; *Smith v. Tanner*, 32 S. C. 264, 10 S. E. 1008.

For other cases, see *Descent and Distribution*, Cent. Dig. § 214; Dec. Dig. ⚡68.]

The bill was barred by the statute of limitations: *semble*.

[*Vendor and Purchaser* ⚡231.]

Constructive notice will not arise from the recording of a deed which the law does not require to be recorded; but such recording rebuts the idea of concealment, and is a circumstance to be relied on in considering the question of actual notice.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 537; Dec. Dig. ⚡231.]

[*Descent and Distribution* ⚡82.]

The Court is always reluctant to disturb family settlements, more especially where they are old, and the parties principally to be affected being dead, can give no answer or explanation.

[Ed. Note.—Cited in *Smith v. Tanner*, 32 S. C. 263, 10 S. E. 1008; *Huggins v. Price*, 96 S. C. 85, 79 S. E. 798.

For other cases, see *Descent and Distribution*, Cent. Dig. §§ 318–321; Dec. Dig. ⚡82.]

[*Limitation of Actions* ⚡67.]

Want of notice does not prevent the statute of limitations from running where there is no fraud.

[Ed. Note.—Cited in *Myers v. O'Hanlon*, 12 Rich. Eq. 209.

For other cases, see *Limitation of Actions*, Cent. Dig. § 376; Dec. Dig. ⚡67.]

[*Notice* ⚡14.]

[A party alleging notice has the burden of proving it.]

[Ed. Note.—For other cases, see *Notice*, Cent. Dig. § 39; Dec. Dig. ⚡14.]

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\*Before Johnston, Ch., at Sumter, June Sittings, 1857.

Johnston, Ch. This case arises under a deed executed by Joseph B. White, on the 2nd February, 1815, by which in consideration of love and affection for his seven children, he conveyed to Leonard White, sixteen negroes, in trust for his children, reserving to himself a life estate. The deed was recorded in the office of the Register of Mesne Conveyances for Sumter District, three days after its execution.

The terms of the trust are as follows: "for the sole and separate use of the seven children before named, nevertheless, he the said Joseph B. White reserves a right to the use of the aforesaid sixteen slaves, and the increase of such of them as are females during the term of his natural life, but notwithstanding, they shall not be subject to his debts or contracts; and from and immediately after his death, to be taken in trust by the said Leonard White, and as the children before mentioned, arrive at age or marry, at which time the said negroes and their increase to be equally divided between them,



or the surviving ones of the seven before mentioned, share and share alike, freed and discharged of all farther and other trusts or limitations, to be held by them, and each of them, their and each of their executors, administrators and assigns." (a)

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\*On the 6th October, 1829, Joseph B. White caused partition to be made of forty-two negroes among six of the children named in the deed, one viz.: Emily, having previously died under age and unmarried. This partition embraced all the negroes mentioned in the deed, and their issue, and in addition sixteen other negroes, the property of the said Joseph B. White. Of the six children, four were of age, and have received and have ever since retained the slaves allotted to them. Two, to wit: Joseph and Anthony, had not attained their majority, but after they did, received and have since retained the slaves that fell to them upon the partition. Upon the paper containing the detail

(a) The following is a copy of the deed: The State of South Carolina.

This indenture, made the second day of February, in the year of our Lord, one thousand eight hundred and fifteen, between Joseph B. White, of Sumter District, in the State aforesaid, of one part, and Leonard White, of said District and State aforesaid, of the other part; witnesseth, that the said Joseph B. White, for and in consideration of the love and affection which he hath and beareth unto his seven children, viz: Mary Ann, James Grier, Charlotte, Emily, Eliza Margaret, Joseph and Anthony; and also in compliance with a request of Judith White, his late deceased wife; and for their better support and maintenance; and also for and in consideration of five shillings to him in hand paid by the said Leonard White, at and

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before \*the sealing and delivery of these presents. Hath given, granted, bargained, and sold, and confirmed, and by these presents do give, grant, bargain, sell, and confirm, unto the said Leonard White, the following slaves, named Moses, Big Sue, Big Phillis, Big Yannaky, Little Sue, Minda, Drusilla, Phebe, Lizzy, Sary, Flora, Sally, Jethro, Kate, Dick and Venus; to have and to hold the said sixteen slaves before named; together with the future issue and increase of such of them as are females, unto the said Leonard White, In Trust, for the sole and separate use of the seven children before named; Nevertheless, he, the said Joseph B. White, reserves a right to the use of the aforesaid sixteen slaves, and the increase of such of them as are females, during the term of his natural life; but notwithstanding they shall not be subject to his debts or contracts; and from and immediately after his death, to be taken, in trust, by the said Leonard White, and as the children before mentioned arrive at age, or marry, at which time the said negroes, and their increase, to be equally divided between them, or the surviving ones of the seven before mentioned, share and share alike; freed and discharged of all further and other trusts or limitations, to be held by them and each of them, their and each of their executors, administrators and assigns.

In witness whereof, the said Joseph B. White to these presents have hereunto set his hand and seal, the day and year first above written.

Joseph B. White. [L. S.]

Signed, sealed and delivered in the presence of  
Henry Britton.

of the division thereof, the body being in the handwriting of James Grier White, one of the children, is the following endorsement: "We whose names are annexed are satisfied with the within division of property. October 6, 1829." This is signed by James G. White, William M. DeLorme, Mary Ann DeLorme,

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J. P. Bossard, Charlotte Bossard \*and Margaret E. White, of whom Charlotte Bossard and Margaret, now Mrs. Hale, are complainants.

Joseph B. White, died on the 31st day of December, 1852, and this bill was filed on the 15th October, 1853, by the four children of Mr. White, who survived him, and who claim that they alone are entitled, as such survivors, to the sixteen slaves embraced in the deed of 2nd February, 1815, and the increase.

They seek to make the estate of Joseph B. White responsible to them for the slaves (parcel of the said sixteen), allotted upon the partition made in 1829, to James Grier White and Mary Ann De Lorme, both of whom died before Joseph B. White, but not until they had attained twenty-one years and married. I am with the complainants as to the meaning they impute to the deed of 1815, and hold that only such of the seven children of Joseph B. White as survived him, were entitled to take under the deed; nevertheless, they have concluded themselves by the division of 1829, those who were parties, and have ratified it by their subsequent conduct; and the minors Joseph B. White, and Anthony White, who since coming of age, have retained the benefits of the partition. They claim that they are not bound by their assent to the partition made in 1829, because they were at that time ignorant of the existence of the deed of gift made by their father in 1815.

The defendant insists that it is not enough for the Complainants to allege in their bill, want of notice, and that the doctrine, which throws upon the defendant the burthen of proving notice on the part of the complainants is confined to cases of fraud, where the nondiscovery of which, until within four years before bill filed, is relied upon to prevent the operation of the Statute of Limitations. I think the rule has a wider application, and embraces the case before me.

But then the defendant is not bound to prove notice by demonstrative evidence. It

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was so ruled in *McLure v. Ashby*, \*7 Rich. Eq. 430. Joseph B. White who might have shown it, is dead, so also is the trustee, Leonard White. The same amplitude of proof is not to be expected as when the principal parties to the transaction were alive.

I am of opinion that the proof of notice of the deed of 1815, is abundantly sufficient to refute the allegation of the bill. The father had no motive to conceal the gift to his children; he had no temptation to do wrong. He had put concealment out of his power by

delivering the deed to his kinsman, who by becoming trustee assumed the duty of guarding the rights of the *cestui que trusts*. He had caused the deed to be forthwith registered in the office of Mesne Conveyances, and although this registration was not constructive notice, it negatives the idea of concealment, and adds to the probability that the existence of the deed was known. Why if he was actuated by selfish or fraudulent motives did this parent add so much of his own property in the division made in 1829? The papers show that he added more than fifty per cent. to the value of the negroes and their increase embraced in the gift of 1815, and that each of those complainants received more than he would have got if the partition had been confined to the negroes in the deed of 1815 and their increase, and distributed among these four who claim the whole as survivors.

What makes the presumption of notice conclusive, is the discrimination made in the partition of 1829, between the slaves contained in the deed of 1815, and those then added. There is an aggregation of the value of the one set of negroes, and then of the other.

But why were the complainants called upon to say that they were satisfied with the division? Is it not strange that they should be called upon to assent to a gift from their parent? This could not have arisen from any inequality in the shares, for upon the face of the paper the shares were equal. The moral probability that the parties had notice in 1829, of the deed of 1815, is too

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strong to be resisted, and twenty-four \*years have elapsed between the date of this family arrangement in October, 1829, and the filing of this bill in October, 1853. But it is alleged, that some of the complainants were not *sui juris* at the date of this settlement in October, 1829, though none allege ignorance of it. Joseph and Anthony were not quite of age, but they confirmed the division by receiving and enjoying their allotted parts after they attained their age, and from thenceforth until the filing of their bill. Mr. White gave his son Anthony the negro Hagar to make up his deficiency in the division. He received her after he came of age. In like manner, Joseph received Bristor from the donor, to make the partition more satisfactory to the latter. Joseph carried his negroes to Tennessee. Mrs. Bossard and her husband received her share and she submitted to a settlement of the negroes.

It is objected that Mr. White assumed authority and dominion over the negroes after the division in 1829, by causing a trust deed to be executed, varying the character of the estate she would have taken under the deed of 1815. There is no proof but that this was done with her consent, besides the deed

of 1815, required a settlement to her sole and separate use.

The complainants cannot be allowed to proceed against the estate of the life-tenant. The partition of 1829, was as much their act as his. They ought to have brought before the Court the representatives of those, who, not being among the survivors of Joseph B. White, received shares to which they were not entitled. They were offered leave to take an order to make them parties. This they declined. The complainants have received satisfaction for any just claim they had against the estate of their father. In the language of the books, satisfaction is defined in equity, to be the donation of a thing with the intention express or implied that it is to be an extinguishment of some existing right or claim of the donee. It usually arises

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as a matter of presumption, when a \*man under an obligation to do an act, does that by will, which is capable of being considered as a performance or satisfaction of it, the thing performed being *ejusdem generis* with that which he had engaged to perform. Story Eq. § 1099. Let the bill be dismissed, and it is so ordered.

The plaintiffs appealed, and now moved this Court for a decree in conformity with the prayer of the bill on the grounds:

1. Because, his Honor, it is respectfully submitted, erred in holding that the evidence was sufficient to show notice to the plaintiffs of the deed of 1815.

2. Because, the plaintiffs offered to prove by a member of the family, facts and circumstances tending to strengthen the allegation by plaintiffs of want of notice; to wit: that said witness had never heard from Joseph B. White, his grandfather, or from Leonard White, the trustee, of the deed of 1815, until after the donor's death, though, he (the witness) had opportunities from intercourse, to have learned such facts. That the witness had come to a knowledge of the existence of said deed, by information of said trustee, which was communicated, whilst said witness was in search of a paper of a different character.

3. Because the plaintiffs by his Honor's decision, were cut off from proving, by William M. DeLorme, a party to the (so-called) partition, or division of 6th October, 1829, the fact, that no mention was made of, or allusion had in said partition of 6th October, 1829, by the said Joseph B. White, to the deed of 1815, and that the witness, acted on that occasion, without knowledge of said deed. All of which the plaintiffs aver, they could have proved by said witness, had it not been for his Honor's expressed opinion

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of no necessity \*for such proof. Herein plaintiffs say they were surprised when the decree was pronounced on the ground of presumptive evidence of notice of said deed.



4. Because, without plea of accord and satisfaction, the Court, should not of its own motion, dismiss the bill of plaintiffs, if equity for plaintiffs appears upon the face of the pleadings, the bill having been answered on its own merits, and no proof of intent of satisfaction (technically) being proved.

5. Because, James G. White and William M. DeLorme (and wife) being parties to the (so-called) partition of 1829, were not necessary parties to the bill.

6. Because, the doctrine of implied satisfaction does not apply to the case as made by the proof, and there was no evidence of expressed intention that the sixteen additional negroes should be received in satisfaction and the answer on that point was not evidence, inasmuch as it was not responsive.

7. Because, the proceedings of October, 1829, were between trustee and cestui que trusts (the latter not informed of their rights) and in such case, satisfaction is not to be presumed, inferred or implied.

8. Because, the law presumes a gift by the father when he allows his own property to go into his child's possession and not a purchase or satisfaction of his child's rights, or interests in other property.

9. Because, in order to rebut the presumption of implied satisfaction, the plaintiffs offered to show, that the negroes embraced in the division of 1829, were most of them of

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the \*estate of Judith, the mother of plaintiffs; and as to a few others, were substituted in place of negroes originally belonging to plaintiffs' mother, and which were retained by the donor; that the donor was at the time the owner of a large estate, real and personal, that the children, named in the deed of 1815, were his only children; that he never had other children, and that he owned at the time of his death, some seventy-five or eighty negroes, other personalty of considerable value, and real estate (besides the plantation which he devised to his wife for life,) which he gave to his wife absolutely, and which will ultimately go to strangers to his blood to wit: the children of defendant by a prior marriage; all which testimony, his Honor overruled as irrelevant.

Richardson, Spain, for appellants.

De Saussure, Moses, contra.

The opinion of the Court was delivered by

DARGAN, Ch. It will not be necessary for me to consider seriatim, all the questions that have been raised on this appeal, or discussed in the argument. It will be sufficient for me to remark in a brief way, on the grounds, upon which the decree of the Court will rest.

I am not aware, that there is any difficulty, or doubt as to any legal principles involved in the case. The deed of Joseph B.

White the elder, of the 2d February, 1815, is confessedly legal as to the form, and the manner of its execution, and perfectly legitimate as to the purposes which were intended to be accomplished by it. And it should now be enforced by the decree of this Court, if there be nothing ex post facto, which has superseded or defeated it.

In the first place, speaking for myself, and not for the Court in this particular, I concur

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with the Chancellor, who \*heard the cause on circuit, in the construction which he has given the instrument, as to the question of survivorship. The donor, Joseph B. White, in consideration of the love and affection which he bore to his seven children then living, namely, Mary Ann, James Grier, Charlotte, Emily, Eliza Margaret, Joseph, and Anthony, and in compliance with the request of his deceased wife Judith White, and for the better support and maintenance of his said children, and for a nominal pecuniary consideration, conveyed to Leonard White, sixteen slaves by name; in trust for the sole and separate use of the said children. Here, the donor declares that he reserves the use of the said slaves and their increase during his natural life, "and from and immediately after his death to be taken in trust by the said Leonard White, and as the children before named arrive at age, or marry, at which time, the said negroes and their increase to be equally divided between them, or the surviving ones of the seven before mentioned, share and share alike," &c. Taking all the parts of this deed together, the construction which I would give it, and it is the only one which it admits of, is that the donor reserving to himself a life estate in the slaves, conveyed them to Leonard White, in trust, at his death for his seven children (all of whom were then infants,) and to be equally divided among them or the survivors of them; with authority to the trustee to divide and allot to each one his or her share as they respectively attained the age of twenty-one years, or married. In my opinion only those who were survivors at the termination of the life estate were entitled to take. Evidently the testator contemplated his own death before all his children should marry or attain the age of twenty-one years. And hence the provision for the partial partition of the property, as they respectively attained the age of twenty-one years or married. Each one of the children, attained the age of twenty-one years in the lifetime of their father. All of

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them married except Emily White. \*She and Mary Ann, who after the execution of the deed, intermarried with William M. De Lorme, and James Grier White, predeceased the donor. Charlotte Bossard, Eliza Margaret Hale, Joseph B. White and Anthony White survived the death of Joseph B. White, (the donor,) which occurred on the 31st December,

1852. These survivors, and Samuel Hale, the husband of Eliza Margaret, filed this bill on the 15th October, 1853, against Maria H. White, the widow and executrix of Joseph B. White, claiming, that they alone, as the survivors, are entitled to the negroes mentioned in the said deed, and their increase; demanding a discovery and delivery of such of the negroes or their increase as remained in the possession of the said Joseph B. White, at his decease, and a discovery and an account of such of them, as went out of his possession in his lifetime by gift, sale, or otherwise.

Upon the question of survivorship I shall add no more. The remarks I have already made as to the plaintiffs' rights as survivors are my own speculations. From the view which the Court has taken of the case, it has become unnecessary to decide, or discuss that question.

None of the negroes conveyed by the deed of 1815, or their issue, remained in the possession of Joseph B. White, Sr., at the time of his death. As far back as the year 1839, they and their increase had all gone into the possession and enjoyment of the then six living donees under the deed, in equal shares; Emily, who was then deceased, receiving no share. The complaint now is, that the present plaintiffs as survivors are entitled to the negroes, which in that division were allotted to Mrs. De Lorme, and James Grier White, or to an account from the estate of the tenant for life for the value thereof. The plaintiffs have not made the representatives of Mrs. De Lorme, and of James Grier White, parties to these proceedings, as I incline to think they should have done. It has been decided during this term, that where the

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\*tenant for life sold a negro to a purchaser with notice, by whom the negro was removed from the State, both the life tenant, the vendor, and the purchaser with notice were liable to the remainder-men for the full value of the negro; and as between the tenant for life (the vendor) and the purchaser, the former was primarily liable. But where the property is still within the jurisdiction of the Court, and subject to the claim of the remainder-man, it is not so clear, that he should not resort to the property itself in the hands of the purchaser. Cannot the tenant for life, sell or give his life estate, if it be done without collusion or fraud, and the property not be eloiigned from the jurisdiction of the State, without subjecting himself to liability as for a breach of trust? But let that pass.

It is not disputed that Joseph B. White, Sr., about the 6th October, 1829, relinquishing his life estate, caused all the negroes conveyed by the deed of 1815, and their increase amounting in the aggregate to forty-nine in number, and sixteen slaves of his own, altogether sixty-five, to be fairly and equally divided among his six children then

living; Emily alone being at that time dead. The children of Joseph B. White, Sr., these plaintiffs included, then went into the possession and enjoyment of their respective shares, and have so continued to the present time.

If these parties were then sui juris, and aware of their rights under the deed of 1815, the claim set up by them in this bill would be preposterous. But two of them were at that time under age, (Joseph and Anthony, I believe,) and all of them say, that, when they accepted their respective shares in that division, they were entirely ignorant of their rights under the deed of 1815, and even of its existence until after the death of Joseph B. White, Sr. (31st December, 1852.)

It is not denied that if these plaintiffs had notice of the deed of 1815, at any time with-

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in four years prior to the \*institution of this suit, they would be concluded by the statute of limitations. But they averred want of notice in their bill, and according to a well settled principle of our Court, the burthen of proving notice, devolved upon the party who affirmed it. And now the question of fact comes up, and it is the great and most difficult issue of the case, had these plaintiffs within the time intimated, notice of the deed of 1815?

I premise, that after so great a lapse of time, from 1829 to 1853, (twenty-four years,) and after the death of the party whose estate is sought to be subjected, very strict proof could not be reasonably expected or required. Indeed, why may not the lapse of twenty-four years raise a presumption of notice? That lapse of time raising a presumption of almost any fact necessary to quiet title.

But I proceed with the proofs showing notice. There was no fraud. The idea of fraud is altogether excluded. The advantages were all on the other side. Joseph B. White surrendered his life estate, which he might have retained to the day of his death, which would have been for twenty-four years. What motive was there for concealment? In addition to this, he gave and divided at the same time, among them sixteen more negroes of his own, to which they at that time had no claim either present or future. What advantage did Jos. B. White gain in that transaction? How did it advance his interest? His office, on the occasion, was to give and surrender, theirs to receive. The falling in of the remainder was anticipated by twenty-four years, besides the sixteen negroes that were included in the division. What did the children lose by the anticipation of the time of division? Merely the chances of survivorship. (If indeed that construction be correct, which admits of great difference of opinion.) On the supposition, that these claimants would have been entitled to take as survivors, in that



case, they surrendered the chance of their

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being the survivors at the termination of the life estate, against the equal chance of those who were deceased at that time being the survivors. The chances were equal, and the mutual surrender of chances was a fair and full consideration; and it was an arrangement which any contingent remainderman would have accepted to say nothing of the sixteen additional negroes brought into the division. What motive then was there for the suppression or concealment of the deed of 1815? Why should it not have been brought forward, and made the basis of the arrangement? And if it had, who can doubt that an arrangement, so beneficial to the children, would have been accepted by them? There could have been no dissatisfaction at this partition. If there were heart-burnings, they were not on this account. The old man had married his third wife, and this formal division imported to them that this was all they were to receive of his estate, as it has actually turned out to be. "*Hinc illæ lachrimæ!*"

Another fact tending to show notice, is the registry of the deed in the office of the register of mesne conveyances. It is true that the registry of no deed not required by law to be recorded, operates as implied notice in any case. The implied notice arising from the due registry of a deed is equivalent to the most positive notice. But certainly the registry of a deed not required by law to be recorded, rebuts all idea of concealment; particularly where the original is delivered into the hands of another person who has consented to act as trustee; and who is the lawful custodian of it. The registry of a deed, under these circumstances, for so long a time, and at so early a period after its execution, and where the register's office is in the immediate vicinity of the parties complaining, may surely be regarded as a circumstance not of itself sufficient, but combined with others to show notice.

There is another fact of much significance on this question of notice. The sheet of paper on which the particulars of the partition were stated has been preserved,

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and has been introduced in evidence. This paper, besides showing the care with which equality was sought, and even-handed justice done in the division, shows this further fact: that there were two sets of negroes divided on that occasion: first, all the negroes and their increase covered by the deed of 1815; and then the sixteen slaves which Jos. B. White, Sr., at that time gave to his children. From the indications of this document, Jos. B. White, Sr., may fairly be presumed to have said, "here are the negroes to which you are entitled at my death; I surrender to you my life estate, and now

divide them equally among you. And here are sixteen more, which I now give you, and divide them also equally among you." Let it be remembered, that all Joseph B. White's children but two, were, at that time, of age, and those two not far from it. Was it not calculated to awaken their attention and inquiry? Would they not naturally have asked, "why this two-fold division? why this separation of the negroes into two lots?" The easiest and most simple mode would have been to throw all the negroes into one lot, and to have made one division. The manner in which the division was effected was calculated to excite attention, and to elicit inquiry. And if they had enquired, they would have made the discovery, the want of which they now complain of. I do not doubt that they did so; that the inquiry was then made, and the explanation then given; if indeed the fact was not well known before. Here was a division in the first place, of all the negroes embraced in the deed, and their issue. And then there was a division of sixteen more negroes, belonging to Jos. B. White, himself. Here was a very strange coincidence, if the parties were not proceeding under the deed of 1815.

Upon the statement containing the particulars of the partition, all the donees under the deed who were of age, including William M. DeLorme, who had intermarried with Mary Ann, and John P. Bossard, who had

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intermarried with Charlotte, signed an acknowledgment in writing, in the following words, namely: "we, whose names are here annexed, are satisfied with the within division of property, October 6, 1829." This formality was strangely out of place, if the parties supposed that they were dividing negroes which were then, for the first time, given to them. But it is perfectly natural, consistent and appropriate, if it be supposed to relate to negroes, to which the parties in the division had a pre-existing right, and for which Joseph B. White, Sr., was responsible at the termination of the life estate. The transaction is inexplicable on any other supposition. From all these circumstances combined, without doing violence to any part of the evidence, it may be fairly inferred, that the parties have yielded up their right of survivorship, under the deed of 1815; and if not so, that they had notice of that deed, and having acquiesced for so long a time, their claim has become stale, and one which this Court will not enforce.

In addition to this, the Court of Equity is always reluctant to disturb and open family settlements, more particularly old family settlements; more particularly still, in cases where the parties principally to be affected by them are dead, and cannot answer and explain. In this instance, both Jos. B. White, Sr., whose estate is sought to be made liable, and Leonard White, the trus-

tee, another important actor in the transaction, are dead. Their voices are silent in the grave. They cannot speak or explain. To disturb and open important and formal family settlements, made twenty-four years ago, in which they were principal parties, would be to grope in the dark after justice, and injustice would be more likely to be done. One of the consequences of this delay is, that perhaps things cannot be brought back to the statu quo. If the proceedings had been earlier, and the representatives of Mrs. DeLorme and of James Grier White had been brought in, equal justice could have been done to all.

At the date of the partition, on the 6th Oc-

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tober, 1829, two \*of the children of Jos. B. White, namely, Joseph B. White, Jr., and Anthony White, were not of age. But though infants in law, they were not children of tender years. They were in esse in 1815. They were the children of Jos. B. White, Sr., by his first wife, and he was at that time again married. The youngest of the two must have been seventeen or eighteen years of age. It is probable that they understood the transaction as well as those who were adults. They participated in the division. They got their full share, and have been in the enjoyment of it ever since. When an infant wishes to avoid his executed contracts and settlements on the ground of infancy, he must proceed within a reasonable time after he has attained his majority, and after he has had notice of his rights. An unreasonable delay after the removal of the disability, amounts to acquiescence, and acquiescence is affirmation. All the circumstances which I have relied on as sufficient to raise a presumption of notice to the adults of the deed of 1815, in my judgment, operate with equal force in raising a presumption of notice to the infants. They have had the same opportunity of knowing their rights and of asserting them by suit, that the others have had. They must have been of age by 1833 or 1834, and twenty years afterwards, or thereabout, they filed this bill. It is too late. The claim is stale. Besides, it is subject to the bar of the statute of limitations, which is pleaded, unless there is fraud. Want of notice does (b) prevent the statute of limitations from running where there is no fraud. And I do not see, in this case, the slightest evidence of fraud.

It is ordered and decreed that the circuit decree be affirmed and that the appeal be dismissed.

DUNKIN and WARDLAW, CC., concurred.

JOHNSTON, Ch., also concurred, although absent at the delivery of the opinion.

Appeal dismissed.

(b) Does not prevent. Qu?

## 9 Rich. Eq. \*500

\*W. B. WILSON, et al., Assignees, v. ADMINISTRATORS OF S. L. McCONNELL.

THOMAS F. WOOLRIDGE v. ADMINS OF S. L. McCONNELL and MARY C. McCONNELL.

(Columbia. Nov. and Dec. Term, 1857.)

[Dower ⇨24.]

Where a husband dies insolvent, his widow has the right to require his administrators to apply the personal estate to a specialty debt secured by a mortgage of land, given before the marriage, so as to subject the land to her claim of dower, discharged from the incumbrance of the mortgage.

[Ed. Note.—Cited in *Horde v. Landrum*, 5 S. C. 216; *Tibbetts v. Langley Mfg. Co.*, 12 S. C. 482; *Agnew v. Renwick*, 27 S. C. 569, 574, 4 S. E. 223; *Ebaugh v. Mullinax*, 34 S. C. 376, 13 S. E. 613; *Brooks v. McMeekin*, 37 S. C. 303, 15 S. E. 1019; *Jefferies v. Fort*, 43 S. C. 50, 20 S. E. 755; *McCreery v. Davis*, 44 S. C. 226, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794; *Grube v. Lilienthal*, 51 S. C. 452, 29 S. E. 230; *Groce v. Ponder*, 63 S. C. 167, 41 S. E. 83; *McAulay v. McAulay*, 96 S. C. 90, 79 S. E. 785.

For other cases, see *Dower*, Cent. Dig. § 74; Dec. Dig. ⇨24.]

[Partnership ⇨187.]

Where a copartner, having a separate estate, dies, the co-partnership creditors have the right first to exhaust the co-partnership estate, and if that prove insufficient to pay their demands, then they are to be paid from the separate estate of the copartner pro rata with his separate creditors.

[Ed. Note.—Cited in *Kuhne v. Law*, 14 Rich. 23, 26; *Adickes v. Lowry*, 15 S. C. 136; *Hutzler Bros. v. Phillips*, 26 S. C. 149, 1 S. E. 502, 4 Am. St. Rep. 687; *Blair v. Black*, 31 S. C. 358, 9 S. E. 1033, 17 Am. St. Rep. 30.

For other cases, see *Partnership*, Cent. Dig. § 340; Dec. Dig. ⇨187.]

[Partnership ⇨176.]

In ascertaining the pro rata due a copartnership creditor from the separate estate of a deceased copartner, who died insolvent, the debt should be regarded as standing in the precise condition in which it stood at the death of the copartner, without regard to any subsequent payments derived from the copartnership assets; though, to avoid double satisfaction, such creditor is not entitled to receive more than the balance due, after deducting such payments.

[Ed. Note.—Cited in *Wilson v. Kelly*, 19 S. C. 167; *Wheat v. Dingle*, 32 S. C. 478, 11 S. E. 394, 8 L. R. A. 375.

For other cases, see *Partnership*, Cent. Dig. § 308; Dec. Dig. ⇨176.]

[Partnership ⇨249.]

A debt due the copartnership by a deceased copartner is to be proved against his estate as any other separate debt.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 532; Dec. Dig. ⇨249.]

Before Dunkin, Ch., at York, June Sittings, 1857.

This case came before the Court on exceptions to the report of the Commissioner. So much of the report as relates to the questions decided by the Court of Appeals is as follows:

"In this case, at June Term, 1856, the following order was made:

"On motion of Smith, complainant's solic-



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itor. and by con\*sent of Williams and Beatty, defendants' solicitors, ordered, that the administrators of Samuel L. McConnell, account before the Commissioner for the administration of the estate of their intestate; that the Commissioner take an account of the real estate, or the proceeds of the sale thereof, which have been sold by order of this Court; and of the liens thereon; that the Commissioner inquire and report whether Mary C. McConnell, widow of said intestate, is entitled to any part of the proceeds of sale, of any of the real estate of Samuel L. McConnell, in lieu of her dower, and of what particular tracts, and if so entitled, the amount due her as to each; that he report the order in which the creditors are entitled to payment out of the real and personal assets of intestate; that said Commissioner take an account of the sum due complainant, T. F. Woolridge on his judgment, mentioned in the pleadings, and that he report any special matter in relation to any of said matters; that the Commissioner call in the creditors to prove their demands before him by advertisement in the Gazette, by a day to be fixed by him, and that all creditors of the intestate, whether parties to the suit or not, upon notice of this decree, forbear and be restrained and enjoined from proceedings at law or equity or otherwise, than herein provided, for the recovery of their debts, with leave to creditors to apply for the suspension or modification of this order. It is further ordered, that W. A. Latta, as to his mortgage debt against intestate, be exempted from the operation of the injunction herein ordered. June 21st, 1856.

"In obedience to the foregoing order, I have inquired into the said several matters so referred to me, and beg leave to submit the following report: 'The administrators of Samuel L. McConnell, have accounted before me for their administration, and herewith filed, is a statement of the same.

"At the time of the death of said Samuel L. McConnell, he was seized and possessed

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of the following real estate: A \*tract of land in York district, on Bullock creek, containing one thousand four hundred and forty acres, more or less.

"This tract was subject to the lien of a mortgage, in favor of W. A. Latta, for the sum of twenty-five thousand dollars, dated the 28th of March, 1853, given to secure the payment of said McConnell's four sealed notes, to said Latta. One for eight thousand five hundred dollars, due 1st January, 1854, with interest on twenty-five thousand dollars, from 1st July, 1853; one for six thousand seven hundred and fifty dollars, due the 1st January, 1855, with interest on sixteen thousand five hundred dollars, from 1st January, 1854; one for four thousand eight hundred and seventy-five dollars, due the 1st

January, 1856, with interest on nine thousand seven hundred and fifty dollars, from 1st January, 1855; and one for four thousand eight hundred and seventy-five dollars, due 1st January, 1857, with interest from 1st January, 1856. After the death of McConnell, Latta filed his bill to foreclose said mortgage, and on the 2nd October, 1854, said lands were sold under the decree of this Court for that purpose. The whole amount due to Latta on said mortgage and notes, has been satisfied. The payments have been made partly by the administrators and partly out of the sales of the mortgaged lands. Latta, himself was a purchaser of a part of the mortgaged premises, and I have applied the amounts due on his bonds given for the purchase money, when due, in satisfaction pro tanto, of so much of the mortgaged debt.

"On the proceedings commenced by Latta, the widow, Mary C. McConnell, was made a party. She claimed dower in said lands. She interposed no objection to the sale, but claimed compensation for her dower out of the sales; and at June Term, 1854, I was ordered to inquire and report whether said widow was entitled to any part of the proceeds of sale, of said mortgaged premises, in lieu of her dower, and if so, the amount. On the 18th June, 1856, I made a report, recommending that she be paid the sum of one

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thousand eight \*hundred and nine dollars, and that the said amount should be paid to her by the administrators, as a much larger amount than said sum, over and above what the administrators had paid, was applicable out of the personal estate to the payment of the mortgage, and sealed notes due to the said Latta, according to their legal priority. Said report was confirmed at June Term, 1856, and the said administrators ordered to pay said amount to the widow. As against Latta, the widow would not be entitled to dower until the mortgage debt was paid; his mortgage being given to secure the payment of specialty demands, he was entitled by law to payment of said notes out of the personal estate, according to their legal priority. It is true, that he had a lien on the land, for his whole debt; so had the widow for dower, a lien on the land, and in my opinion she has an equity to compel him to look to the personal estate for the payment of his debt, so far as said estate may be liable, and if he has received out of the sales of the mortgaged land, according to the foregoing principles, more than his share thereof, then she should be compensated out of the personal estate. Accordingly, I have ascertained, what sums were applicable to said mortgage debts out of the personal estate, deducted the same from the mortgage debts, and then applied a sufficiency of the sales of the mortgaged premises to pay the balance of said mortgage. In making up the accounts in this way, a large surplus of the sales of

said mortgaged premises remains, to one-sixth of which she is entitled in lieu of her dower. I, therefore, report that she is entitled, in lieu of her dower in said lands, to the sum of one thousand eight hundred and nine dollars, with interest thereon, from the 15th June, 1856.

"In my report above alluded to, on the said matter, I made a full statement of the whole estate of S. L. McConnell, together with my reasons for allowing said claim of dower; and to avoid unnecessary labor and

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re-casting the whole \*accounts, I have made that report the basis of this report in regard to said claim of dower, and herewith file a copy of said report marked D. (a)

(a) The following is the report referred to:

"On the 28th day of March, 1853, William A. Latta bargained and sold, and conveyed to Samuel L. McConnell, a tract of land in York district, on Bullock creek, containing fourteen hundred and forty acres, more or less, and the horses, mules, cattle, hogs, sheep, wagons, and implements of husbandry, then being on said plantation. He also conveyed at the same time, to S. L. McConnell, the use and services of nineteen slaves, then being on said plantation, until the first day of January, thence next ensuing, and sufficiency of corn and fodder for the use of said horses, mules and stock, until the crop of 1853 was fit for use. The consideration of said land, negroes, &c., so conveyed, was twenty-five thousand dollars; the land being estimated at twenty-one thousand, seven hundred dollars; the provisions furnished, at one thousand dollars; the horses, mules, cattle, plantation tools, &c., at fifteen hundred dollars; and the hire of the negroes at eighteen hundred dollars. To secure the payment of said sum of twenty-five thousand dollars, the said S. L. McConnell, on said 28th day of March, 1853, executed and delivered to Wm. A. Latta, his four sealed notes or obligations. One for eight thousand and five hundred dollars, due 1st January, 1854, with interest on twenty-five thousand dollars from the 1st of July, 1853. One for six thousand, seven hundred and fifty dollars, payable on 1st January, 1855, with interest on sixteen thousand, five hundred dollars, from 1st January, 1854. One for four thousand, eight hundred and seventy-five dollars, payable on the 1st January, 1856, with interest on nine thousand, seven hundred and fifty dollars, from 1st January, 1855. And one for four thousand, eight hundred and seventy-five dollars, with interest from 1st January, 1856. And the said Samuel L. McConnell, also, at the same time, to secure the payment of the said sealed notes, mortgaged the said land and other property conveyed to him as aforesaid, and pledged the crop to be made upon said plantation. After the conveyance and mortgage aforesaid, S. L. McConnell intermarried with the defendant, Mary C. McConnell. He made no payments in his lifetime, and died on the 19th of September, 1853. His estate is insufficient to pay all his debts, but entirely sufficient to pay all the specialty debts, including the four sealed notes due to Wm. A. Latta, as aforesaid. The widow claims compensation for her dower in said lands, either out of the sales of the mortgaged lands, or the personal estate. This is a question entirely between her and the simple contract creditors. It is conceded that as against Latta, she would not be entitled to dower, until the mortgage debt was paid. But the said Mary C. McConnell contends that the personal estate of said S. L. McConnell, is the primary fund for the payment of his debts, and that the said

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"The creditors of the said S. L. McConnell, were called in to establish their claims, and herewith filed is a statement of the specialty debts due by said S. L. McConnell, and

debts due to W. A. Latta, being specialty demands, should be paid rateably out of the personal estate, with the other specialty demands, and only the balance should be satisfied out of the sales of the land. This will leave a large surplus of said sales, to one-sixth of which she contends she is entitled, in lieu of her dower.

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It is said on the other \*hand, that Latta has a specific lien on the land for the payment of his debts, and that the other creditors of S. L. McConnell, have an equity to compel said Latta to exhaust his said lien, before resorting to any other part of the estate for payment. The claim of dower is one highly favored in the law. The widow is entitled to it over the claims of the general creditors of the husband. The land mortgaged was, not even after condition broken, the land of Latta, but of McConnell. Latta merely had a lien on it for the payment of his debt. I think, therefore, that the sealed notes of Latta, should be paid out of the personal estate according to their legal priority.

"To carry out the view which I have taken of the widow's right to dower, it will be necessary to ascertain at a fixed period, what the whole specialty demands against said S. L. McConnell would have amounted to, if no payments had been made thereon by the administrators. In like manner of the mortgage debts, of the personal estate of the deceased, and of the sales of the mortgaged lands. I have made these several estimates as of the date, 5th June, 1856.

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"I have thus ascertained that the whole personal estate of the intestate, on said 5th June, would amount to forty-four thousand, nine hundred and forty dollars and forty-one cents; and the amount of specialty demands against it, including those due to Wm. A. Latta, to sixty-three thousand, and eighty-one dollars and eighty-seven cents. The mortgage debts to the sum of thirty-one thousand and eighty-two dollars and sixty-three cents; and the sales of the mortgaged lands to nineteen thousand, seven hundred and ninety-three dollars. The Latta mortgage debts to be paid out of the personal estate will amount to the sum of twenty-two thousand, one hundred and forty-three dollars and seventy-one cents. This will leave due to Latta, to be paid out of the sales of the mortgaged lands, eight thousand nine hundred and thirty-eight dollars and ninety-three cents. There will then remain of the sales of said land, ten thousand eight hundred and fifty-four dollars and seven cents. To the one-sixth of this sum the widow is entitled; and I recommend that the sum of one thousand eight hundred and nine dollars be paid to her. The result to the general creditors, is precisely the same, whether this amount be paid to her by the administrators or out of the balance of the sales. Latta has received out of the sales, more than the amount hereby reported payable on his debts, out of that fund added to the dower, and I recommend that the dower be paid to Mary C. McConnell, by the administrators, out of the personal estate. Considerable payments have been made to Latta on account of the mortgage debts, and there remained due to him, on the 5th June, 1856, on account of the three notes that have fallen due, the sum of one thousand nine hundred and fourteen dollars and ninety-eight cents, which sum I recommend be paid to him by the administrators.



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still \*remaining unpaid: also a statement of simple contract debts due by him.

... Shortly after the death of S. L. McConnell, Jerome C. Miller, the survivor of McConnell and Miller, made an assignment of the partnership assets, and also of his individual property to W. B. Wilson and A. F. McConnell. By the terms of the assignment, the partnership assets are first to be applied to the payment of debts due by the firm to Wardlaw, Walker and Burnside, and to Caldwell, Blakely & Co.; and then to the payment of other debts due and owing by the firm. Said assets are wholly insufficient to pay the preferred claims. Jerome C. Miller's individual property was assigned to pay first his own individual debts, and then to be applied to the payment of all other demands for which he was liable. His individual debts have been paid, but the amount in the hands of his assignees will be wholly insufficient to pay the debts of McConnell & Miller. Under these circumstances, the said creditors of McConnell & Miller claim to establish their partnership debts against Samuel L. McConnell's estate, and to be paid rateably with his other simple contract creditors. Herewith, filed, is a statement of said co-partnership debts, so established before me.

"S. L. McConnell was largely indebted to the firm of McConnell & Miller, and the assignees of Jerome C. Miller, survivor, present the amounts so due by him, as a claim against the estate of S. L. McConnell, to be paid rateably with other simple contract debts. Said Jerome C. Miller, is insolvent; and I am of opinion that the amount due to him by said Samuel L. McConnell, as above stated, and also the outstanding debts due by McConnell & Miller should rank as simple contract debts against the estate of S. L. McConnell."

Williams and Beatty, for themselves and

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other creditors \*of Samuel L. McConnell, excepted to the report of the commissioner, in the following particulars:

1. Because the commissioner has recommended the partnership debts of McConnell and Miller to be paid out of the estate of S. L. McConnell, the deceased partner, *pari passu* with the individual and separate debts of said S. L. McConnell, when, at the death of said S. L. McConnell, there was partnership property which was properly applicable to the payment of partnership debts, and J. C. Miller, the surviving partner in fact applied said partnership property to the payment of partnership debts.

2. Because, if any of the creditors of McConnell & Miller, are to be allowed payment of their claims out of the estate of McConnell, *pari passu* with his individual and separate creditors, Wardlaw, Walker and Burnside, and Caldwell, Blakely & Co., should not be so allowed, only on conditions

of adding to the estate of S. L. McConnell, applicable to the payment of simple contract debts, the amount received by them from the partnership assets since McConnell's death, and letting both of said funds be divided amongst the simple contract creditors of S. L. McConnell.

3. Because, under the assignment of J. C. Miller, surviving partner of McConnell & Miller, of his individual estate to W. B. Wilson and A. F. McConnell, it is provided that his own individual debts are to be paid first; and then the whole balance of his estate is to be applied to the payment of debts for which he was in any manner liable for other persons, as surety, endorser, or partner; and in ascertaining the *pro rata* shares of the creditor of McConnell and Miller, of the separate estate of S. L. McConnell, the amount to which they are entitled under said assignment, should be deducted before the demands are brought into the

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general \*account, which was not done, and in this, it is submitted, the said commissioner erred.

4. Because the commissioner has recommended the amount due to J. C. Miller, from S. L. McConnell's estate, on account taken between said partners, J. C. Miller and S. L. McConnell, to rank in equal degree with the separate simple contract debts of S. L. McConnell, in the administration of the estate, and be paid *pari passu* with them.

The complainants, Stanley Fewell and John Barnes, excepted to the commissioner's report, on the ground, *inter alia*:

1. Because Mary C. McConnell is allowed any sum whatever, as compensation for dower in the Latta land, as the land sold for a sum insufficient to satisfy the mortgage, to the vendor to secure the purchase money, given before the marriage, and simultaneous with the deed to intestate; she is entitled to dower only out of any surplus over and above the mortgage. Dower being a lien on the land, and not a charge upon the general funds of the estate, she has no equity to have any portion of the mortgage paid out of the personal estate, and as to all such sums paid by the administrators, the general creditors are entitled to stand in the place of the mortgage by reason of special lien.

The decree of his Honor, the presiding Chancellor, is as follows.

Dunkin, Ch. Samuel L. McConnell and Jerome C. Miller, were co-partners as grocers, in York District. Samuel L. McConnell died intestate, 19th September, 1853, leaving a widow, the defendant, Mary C. McConnell, and a child, in ventre sa mere, who was since born. On 24th September, 1853, Jerome C. Miller, as surviving co-partner, executed an assignment of the assets of McConnell

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& Miller, to the plain\*tiffs in the cause first stated, for the benefit, in the first place, of

certain preferred creditors of the firm. Letters of administration on the individual estate of Samuel L. McConnell, deceased, were granted to the defendants, George W. Williams and Jerome C. Miller.

The object of the first bill is to pray that an account be taken as between the parties, and that an alleged balance of some twenty thousand dollars due by the deceased co-partner to the firm, may be paid out of his estate. The bill in the name of Thomas F. Woolridge, is a creditor's bill, praying that the assets of the estate of Samuel L. McConnell, deceased, may be marshalled, and in this view, the administrators of the intestate, and the widow, (in reference to her claim of dower) are made parties defendant.

A decretal order of reference was made at June sitting, 1856; and the cause was now heard upon the commissioner's report, and the exceptions of the several parties.

In the case of the assignees of McConnell & Miller, against the representatives of McConnell, an order of reference had been made in June, 1855, as to the amount due by the intestate to the firm, with leave to the plaintiffs to examine Jerome C. Miller, the surviving partner, on said reference. On 17th June, 1856, the commissioner reported the debt of Samuel L. McConnell to the firm, at fourteen thousand one hundred and eighty-nine dollars and forty-four cents, with interest from the 19th September, 1853; whereupon, it was ordered that the debt, as reported, stand proved; subject to the right of any contestant to contest the same. The order under which the report now to be considered was made, bears date 21st June, 1856, and is entitled in the creditor's suit of "Woolridge v. Mary C. McConnell and others." This order is recited in the commissioner's report, filed 8th June, 1857.

It may be convenient, in the first place, to consider and dispose of those exceptions which challenge the right of the assignees of McConnell and Miller, to rank with the indi-

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vidual creditors of Samuel L. McConnell, deceased, in the distribution of his assets.—This subject was fully considered by the Court of Appeals, in the recent case of Gadsden v. Carson, heard at Charleston, January, 1857, ante, p. 252 [70 Am. Dec. 207]. Among other things, it is said by the Court, "a partnership creditor has a right to be paid, not only out of the joint property of the firm, but also out of the property of the individual partners. The private creditor, who has only one fund to resort to, has an equity to compel the partnership creditor who has two, to resort first to partnership assets until he exhaust them. But after this is done, the partnership creditor has as good a right to be paid any balance still remaining unsatisfied, out of the private property of the partner, as any other of his individual creditors. This is in conformity to the case of Wardlaw

v. Gray, (Dudley, Eq. 115,) with which we see no reason to be dissatisfied."

The only interest which Samuel L. McConnell's estate would have in the partnership assets, would be his share of the dry balance after the co-partnership debts were paid.—But the assets of the firm are wholly insufficient to pay the debts. The plaintiffs are, therefore, entitled to rank with the other simple contract creditors of Samuel L. McConnell, deceased, for the amount of their debt as heretofore established. See, also, Gowan v. Tunno, Rich. Eq. Cases, 377. Such would be the law if the plaintiffs were merely creditors of McConnell & Miller; but a debt due by S. L. McConnell, is as much his individual debt, as that due by him to any other firm or person.

The assignees of Jerome C. Miller, surviving partner of McConnell & Miller, except on the ground that the commissioner has not included the sales of the "Styles" tract of land as part of the co-partnership assets. The intestate purchased this land and took the conveyance in his own name. Under

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\*proceedings instituted by his administrators, G. W. Williams and J. C. Miller, against the widow and heirs of McConnell, the land was sold by the commissioner as part of his estate, in Aug. 1854. It is now suggested, that although the conveyance was in the name of McConnell, he made the purchase on account of the firm, and this, as it appears to the Court, rests on a loose statement of a witness that McConnell paid his purchase out of the funds which he drew from the firm, and for which amount the assignees have obtained a decree against McConnell's estate in June, 1856.—If McConnell had, after the purchase, told half-a-dozen witnesses that he purchased for the firm, such parol declaration would not prove the trust, as is well illustrated by Lord Roslin in Foster v. Hale, 3 Ves. 707. The Statute of Frauds does not require that the trust should be created in writing, but that it shall be manifested and proved by writing. But it is said McConnell paid for the land with money which he drew from the firm. Of itself, this would no more entitle the co-partnership to the land, than it would entitle the Bank of Chester, if he had chanced to pay for the land on a note discounted at that institution. McConnell & Miller were co-partners as grocers. It is not surmised that the "Styles" tract of land was necessary, or convenient for their operations in trade. But all the material facts were well known to the assignees in June, 1856, when the report establishing their debt at fourteen thousand one hundred and eighty-nine dollars, and including this item, was ordered, at their instance, to stand as a debt in the administration of assets of the intestate. In the judgment of this Court, the assignees, at that time, took a correct view of their rights, and they ought not now to be at liberty to insist



that the report of June, 1856, was erroneous, and that they had no such debt as they then established by the judgment of the Court. The exceptions on this point are overruled.

The creditors of Samuel L. McConnell ex-

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cept, because \*dower is recommended to be allowed out of the sales of the Latta tract of land. The facts are fully detailed in the report of the commissioner in the case of Wm. A. Latta, against the personal representatives, as well as widow and heirs of Samuel L. McConnell, deceased. The report recommended the allowance of dower, on certain principles therein stated, and the report was confirmed and made the judgment of the Court at June sitting, 1856. Allowing that the creditors of McConnell may now show error in that judgment or granting (as is more probable), that it should be considered conclusive only as to the amount, reserving the question of rights; the Court is of opinion that the judgment may be well sustained on principle. The mortgage to Latta was to secure the purchase money, and was also executed prior to the marriage of intestate. In England, and by the common law, a widow, under such circumstances, was held not entitled to dower. The conveyance of the vendee, and the immediate re-conveyance by way of mortgage, was held not to create such seizin in the husband, as would render his widow dowerable. Upon this principle was decided the case of *Bogie v. Rutledge*, 1 Bay, 312. But the effect of the transaction between mortgagor and mortgagee, was altered by the Act of 1791. The seizin of the husband was, thenceforth, not instantaneous. But the re-conveyance to the mortgagee was declared not to entitle him to maintain any possessory action for the real estate mortgaged even after the time of payment had elapsed: "but that the mortgagor shall still be deemed owner of the land, and the mortgagee as owner of the money lent or due." 5 Stat. 170.

According to repeated decisions under this Act, the widow has been held entitled to dower in lands mortgaged for the purchase money, but that her right is subordinate to the lien of the mortgage; *Stoppelbein v. Shulte*, 1 Hill, 200. In some cases, it is said, she is "entitled to dower against all but the mortgagee." Her situation is not different

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from that of a \*wife, who has renounced her dower on a mortgage executed by her husband, to secure any debt. Seized of an estate worth ten thousand dollars, he executes a mortgage to secure a debt of two thousand dollars, on which mortgage his wife executes a renunciation of dower. This affects her right only in relation to the mortgage. If the debt is paid, her right is perfect. Nor does it make any difference whether the debt be paid by the husband in his lifetime, or by his representatives after his decease. In *Bolton v. Ballard*, 13 Mass. R. 330, Chief Justice Park-

er, used this language in an analogous case, "There is no reason why she, the wife, should not be placed in a situation which may enable her to redeem, or hold the estate if it be otherwise redeemed, as it may be by the mortgagee's pursuing his remedy for his debt, against the personal estate of the husband after his decease." And in *Snow v. Stephens*, 15 Mass. R. 279, the widow was held entitled to dower, where the debt was paid by the administrator of the mortgagor. It seems to be argued, as if Latta had an estate in the mortgaged premises to the extent of his debt, or that, on the death of the intestate, he was obliged to resort to his mortgage. But any such view is inconsistent with *Francis v. Lehre*, 1 Rich. Eq. 271. The land in that case, was mortgaged to secure a bond given for the purchase money. The Court ruled, that the personal estate was the primary fund for the payment of debts, and that the executor should pay the bond from the assets in his hands, and that the mortgaged premises should be resorted to only on a deficiency of assets. Then it was suggested, that the simple contract creditors had an equity to compel the bond creditors to take payment out of the land, so as to leave the personality for the satisfaction of their demands. But this claim to derange the legal administration of assets, is met by a correspondent equity on the part of the widow, who is entitled to the position of a purchaser for valuable consideration against all but existing

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liens. It is therefore, the duty of the \*personal representative of the intestate, to marshal the assets in the mode prescribed by law, and to pay the mortgaged debt according to its rank.

It is entirely consistent with these principles, that in a suit at law, by the widow against a purchaser to recover dower, under such circumstances, where the estate of the husband is insolvent, as in *Brown v. Duncan*, 4 McC. 346, the amount due on the incumbrance is deducted from the value of the land in the assessment of dower. The purchaser whose land is liable for the debt, is entitled to this equity. But if the debt be paid by the husband, in his life time, or by his representatives in due course of administration after his death, the effect is the same. The encumbrance being removed in consequence of the payment of the debt by the party properly liable, the right of dower is perfect and subject to no modification.

According to the report of the Commissioner, a part of Latta's bond was paid from the personal assets, and the deficiency satisfied from the proceeds of the mortgaged premises. The amount of this deficiency has been deducted from the value in the assignment of the widow's dower. In the opinion of the Court, there is no error in the judgment of the Commissioner, and the exception is overruled.

The exception in relation to the dower in the Metts land, would be ruled by the same principle. But her claim to dower in that tract may be vindicated on independent grounds. By the judgment in partition, the land was vested in the intestate, charged with the payment of ascertained sums to his five co-tenants. The land stood mortgaged for the payment of these sums. Four of the co-tenants were minors, of whom the intestate became guardian and gave them credit in his account, as guardian, for these sums. The remaining co-tenant was Mary Jane McConnell, who intermarried with W. D. Miller, and according to the Commissioner's report, "the intestate (S. L. McConnell) in his

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life \*time, settled in full with W. D. Miller, who had intermarried with Mary J. McConnell." The statutory mortgage was therefore as completely extinguished, and the right of dower as absolute, as if the husband had settled in full with his co-heirs on the day after the judgment in partition was rendered.

This exception is overruled.

The exception of W. D. Miller, is overruled for the reasons stated in the report of the Commissioner, thereon.

The report of the Commissioner on the several exceptions of Williams and Beatty for themselves and others, and on those of S. Fewell and John Barnes, furnishes a satisfactory answer to said exceptions, and the same are overruled.

The Court is not satisfied as to the exception in behalf of John Barry. The Commissioner has cut off the value of three years services as "barred." The Court infers that the statute of limitations was relied on. But it is by no means certain that the statute applies between parties having mutually subsisting demands of this kind. See the remarks of Lord Kenyon as reported in *Catlin v. Skoulding*, 6 T. R. 141. Then as to the agreement of February, 1838, between A. McConnell and Barry, it amounted to no more than a mortgage to secure future advances. In the settlement of September, 1845, between Barry and S. L. McConnell, (who, it seems, was administrator of A. McConnell,) Barry was properly allowed the real value of the land. The Court agrees with the Commissioner that Barry is properly chargeable with legal interest on the advances, but the Court is not satisfied that his demands for services, as annually accrued, may not be properly set off against such interest. It may be that Barry would be precluded from objecting to the usury, but the Commissioner does not proceed on that assumption, if it were tenable. It is the opinion of the Court, that the subject matter of this exception should be recommitted for further enquiry, and that

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the Commissioner report thereon, \*with leave to report any special circumstances. To

meet this demand, if finally established, provision may be easily made. Except in relation to the claim of John Barry the several exceptions of the parties are overruled, and the report of the Commissioner is confirmed and made the judgment of this Court.

It is ordered and decreed, that after the payment of the costs of these proceedings, and reserving a sufficient sum to pay the pro rata dividend on the claim of Barry (if hereafter established) the assets of the estate be paid and distributed according to the report of the Commissioner, and the principles of this decree. It is further ordered, that, on adjusting with the parties entitled, the Commissioner have leave to assign to each or any of them, the bonds, or any of them in his hands, which the said parties may be willing to receive in payment; any of the parties in the cause to have leave to apply at the foot of this decree, for such further and other order as may be necessary to carry the same into effect.

Williams & Beatty for themselves, and other creditors of Samuel L. McConnell, appealed, and now moved this Court to reverse or modify the decree, on the grounds:

1. Because the Chancellor overruled appellants' first exception to the Commissioner's report, and decreed that the partnership debts of McConnell & Miller were to be paid rateably and *pari passu* with the simple contract debts of S. L. McConnell, out of his individual estate; when it is submitted, that as there were partnership assets at the death of S. L. McConnell, which have been exclusively applied to the payment of partnership debts, the individual creditors of S. L. McConnell, are entitled to priority in payment of their demands out of his estate over the partnership creditors.

2. Because the Chancellor overruled ap-

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pellants' second \*exception to the Commissioner's report, when, it is respectfully submitted, he erred therein; and that Caldwell Blakely & Co., and Wardlaw, Walker & Burnsides, who have received the whole partnership assets of McConnell & Miller, in part payment of their claims, ought not to be allowed payment of the balance of their claims, *pari passu* with S. L. McConnell's individual and separate creditors out of his estate, unless they consent to add to the estate of S. L. McConnell, applicable to the payment of simple contract debts, the amounts received by them from the partnership assets, and let the whole of both funds be divided rateably amongst the simple contract creditors of S. L. McConnell, and McConnell and Miller.

3. Because the Chancellor overruled appellants' third exception to the Commissioner's report, and decreed that the claims of the creditors of McConnell & Miller were to be brought into the account against S. L. Mc-



Connell's estate, without deducting therefrom the sums applicable to them from the individual estate of the surviving partner, J. C. Miller, assigned by him to W. B. Wilson and A. F. McConnell. In this, it is respectfully submitted, the Chancellor erred.

4. Because the Chancellor overruled appellants' fourth exception, and decreed a large sum in favor of J. C. Miller, surviving partner, against S. L. McConnell's estate. The greater part of the account so allowed, is for monies drawn from Wardlaw, Walker & Burnside, and Caldwell, Blakely & Co., on draughts of McConnell & Miller, but applied by S. L. McConnell to his own use; and it is submitted, that as Wardlaw, Walker & Co., and Caldwell, Blakely & Co., are allowed payment of said monies out of S. L. McConnell's estate, Jerome C. Miller is not to be allowed payment again; and the said Jerome C. Miller having contributed nothing to the capital of McConnell & Miller, and the said firm be-

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ing insolvent and having made no profits, said J. C. Miller is entitled to no account.

Complainant, Stanley Fewell, and other creditors of S. L. McConnell, also appealed on the ground *inter alia*:

1. Because the Chancellor overruled the appellants' first exception to the Commissioner's report, and decreed that the administrators pay out of the personalty, to Mary C. McConnell, the sum recommended by the Commissioner, as compensation for dower in the Latta land, when it is submitted, she is not entitled to be paid any sum whatever for dower in said lands, inasmuch as at the death of her husband, her right to dower was subject to the encumbrance of Latta's mortgage, given before her marriage, for the purchase money; the whole proceeds of the sale of the land having been, in fact, applied and exhausted in payment of the mortgage; the payments by the administrators on the mortgage not exceeding the balance remaining due after application of the sales, cannot operate as satisfaction of the encumbrance to entitle her to have as compensation for dower, any sum whatever out of the personalty.

Williams, for Williams & Beatty.

Smith, for Fewell.

Wilson, Witherspoon, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. The only grounds of appeal insisted on are the first ground of Mr. Smith, in relation to dower, and the four grounds made by Mr. Williams.

It seems to me nothing need be said in

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support of what is said by the commissioner and the chancellor on the first point.

On the other grounds, the doctrine is well established in this State, that in a conflict

between copartnership creditors and private creditors of one of the copartners, the private creditors have a right to compel the copartnership creditors to exhaust the joint assets before seeking a remedy out of the individual estate of the partners.

It seems equally established in the case of Morton & Courteny v. Caldwell, 3 Strob. Eq. 161, the last and leading case on the subject, where the point was elaborately considered, with especial reference to principles, that demands are presentable against the estate of an intestate, in the precise condition in which they existed at his death, and subsequent payments do not affect this principle. It follows, necessarily, from this position that the demands of the two Charleston houses and, also, the demand of the firm of which McConnell was a member, are provable against his estate for their full amount, as they stood against him when he died. The creditor of a firm is also a creditor of each partner to the full amount of his demand; and would be entitled to take his remedy against the partner but for the opposing equity of his private creditors, who may compel him to resort for his remedy, in the first instance to the partnership assets. But his debt in the meantime is the debt of the individual partner, no less than if there were in fact no partnership assets, and he had not this double resort, and he is entitled to be considered his creditor for such *pro rata* as his assets would have paid. When it is said he is entitled to come against the private estate of the partner for such balance as may be left after he has exhausted the partnership funds, the meaning is, not that his demand against the private estate is only for that balance, but that his remedy is limited to it.

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\*The partnership is no less entitled to prove against the individual partner's estate, for any debt he owes the firm than any other of his creditors. It is very clear that the sums which McConnell drew from the Charleston Houses, by using the name of his firm, were partnership assets, chargeable to his private account with the firm: and that the firm were entitled to prove against his estate for these as well as any other debt he owed them.

We have, then, in this case, two or more creditors (the Charleston creditors, and McConnell's own firm,) entitled each to prove the full amount of their debts against his estate, and to have their *pro rata* declared. The amount allowed to McConnell & Miller is partnership assets, and passes under the assignment of the surviving partner, according to its terms. The portion to which the Charleston houses are entitled under the assignment, is to be added to what they have already received out of the joint assets, and (to avoid a double payment,) transferred to and deducted from their entire demands, respectively. If by this process there is still

left to them a balance equal to or beyond their pro rata portions as creditors of McConnell's estate, they are then entitled to receive their whole pro rata. If their balance is reduced below their pro rata, the amount to which the joint assets, thus applied, have reduced it below that pro rata, displaces assets of the private estate, which would otherwise have been applicable to the demands of these parties: which assets fall back into

the estate, for the benefit of his other creditors.

It is ordered that the decree be modified according to this opinion, and that the report be recommitted.

DARGAN and WARDLAW, CC., concurred.

DUNKIN, Ch., absent at the hearing.  
Decree modified.





# CASES IN EQUITY

ARGUED AND DETERMINED IN THE

## COURT OF ERRORS OF SOUTH CAROLINA

COLUMBIA—NOVEMBER AND DECEMBER TERM, 1856.

ALL THE JUDGES AND CHANCELLORS PRESENT.

9 Rich. Eq. \*521

\*THE ATTORNEY GENERAL, in Behalf of  
THE STATE, v. WM. S. BAKER,  
and Others.

(Columbia. Nov. and Dec. Term, 1856.)

[*Fines* ¶13.]

A prisoner in custody under ca. sa., from the Court of Sessions, for fine and costs of prosecution, may take the benefit either of the prison bounds' or the insolvent debtors' Act.

[Ed. Note.—For other cases, see *Fines*, Cent. Dig. § 15; Dec. Dig. ¶13.]

[*Execution* ¶171.]

A Court of Equity has no authority to determine whether an execution, issued from a Law Court, is void for irregularity. That question must be left to the Law Court itself to decide.

[Ed. Note.—Cited in *Wagner v. Pegues*, 10 S. C. 261; *Crocker v. Allen*, 34 S. C. 461, 13 S. E. 650, 27 Am. St. Rep. 831.

For other cases, see *Execution*, Cent. Dig. § 501; Dec. Dig. ¶171.]

[*Fines* ¶9.]

The provision of the Act of 1787, that, for the collection of a fine and the costs of prosecution, fi. fa. shall issue, and upon return by the sheriff, &c., then ca. sa. shall issue, is merely directory, and does not render void a ca. sa. issued in the first instance.

[Ed. Note.—For other cases, see *Fines*, Cent. Dig. § 11; Dec. Dig. ¶9.]

[*Statutes* ¶227.]

Affirmative words make a statute directory, and negative, or exclusive words, make it imperative.

[Ed. Note.—Cited in *State v. Scheper*, 33 S. C. 580, 11 S. E. 623, 12 S. E. 564, 816.

For other cases, see *Statutes*, Cent. Dig. § 308; Dec. Dig. ¶227.]

[*Infants* ¶114.]

An infant may take the benefit of the prison bounds' Act, and his assignment thereunder will be valid.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 325; Dec. Dig. ¶114.]

[*Execution* ¶450.]

The State may be assignee under the prison bounds' Act; and, if necessary, the attorney

general may, it seems, file a bill in behalf of the State, to enforce the assignment.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 1302; Dec. Dig. ¶450.]

[*Equity* ¶43.]

[Cited in *Darby & Co. v. Shannon*, 19 S. C. 535, to the point that equity will not entertain jurisdiction where there is an adequate remedy at law.]

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 121; Dec. Dig. ¶43.]

Before Dunkin Ch., at Abbeville, June, 1856.

The decree of his Honor, the Chancellor, is as follows:

Dunkin, Ch. This is a proceeding of some

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novelty. At \*the Court of Sessions, for Abbeville district, Fall term, 1855, the principal defendant, William S. Baker, (then being under the age of eighteen years,) was convicted of manslaughter; and was thereupon sentenced to stand imprisoned for eight months, and pay a fine of two hundred and fifty dollars. During his confinement under said sentence, to wit: on 21st December, 1855, the sentence of imprisonment was remitted by His Excellency, the governor of the State. On the same day the defendant was arrested under a *capias ad satisfaciendum* at the suit of the State, for the pecuniary fine amounting to two hundred and fifty dollars, and the costs of the prosecution and imprisonment amounting to the further sum of sixty-five dollars and fifteen cents.

The Act of 1787, (5 Stat. 13,) for the recovery of fines, &c., provides, that "in every case where any fine shall be imposed by, or recovered for the use of the State, if the party incurring such fine shall fail to pay down the same, with the costs of prosecution, then a writ in the nature of *fi. facias* shall issue, by virtue of which the sheriff shall sell, &c.; and if the sheriff return on oath that such offender refuseth to pay, or hath not



any property, &c., then a writ of *capias ad satisfaciendum* shall issue, whereby he shall be committed until the fine, &c., shall be satisfied;" entitled, however, to the privilege of insolvent debtors, &c. Although no *fiery facias* had been issued and returned, as provided by the Act, the defendant was arrested and incarcerated under a *capias ad satisfaciendum* on the same day of his release under the exercise of executive clemency. The defendant, in order to obtain his enlargement, and under protest against the proceedings as set forth in his petition, on 25th January, 1856, applied to the clerk of the Court, and on 5th February, 1856, was discharged under the prison bounds' Act, after having made an assignment to the "State of South Carolina."

It may be here remarked, that the "Prison Bonds' Act," as it is commonly called, and

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which was passed in 1788, (\*15 Stat. 97.) has no relation to proceedings of this character, but extends only to persons arrested on mesne process in "civil action," or taken "in execution on any civil process." There are several provisions of the Act which will be hereafter noticed.

The defendant, Baker, rendered a schedule of his property, consisting chiefly of his interest in the estate, real and personal, of his deceased father, Samuel Baker, which interest he estimated at about two thousand dollars. It was this interest which was assigned to the State of South Carolina. On 28th April, 1856, this bill was filed by the attorney general, in behalf of the State of South Carolina, against the administrators of Samuel Baker, deceased, and against the heirs of said intestate, praying an account, and that the fine and costs, &c., may be paid.

It has been premised that the case was of somewhat novel aspect. I remember but one similar application. In that instance, I made the order proposed, but it passed without argument, and probably without opposition. Subsequent reflection rendered me doubtful of the propriety of that order, and it seems to me expedient that the matter should be subjected to the review of the appellate tribunal. The Act of 1787, (under which the *ca. sa.* issued,) gave to the prisoner the privilege accorded to insolvent debtors. By the then existing law for relief of insolvent debtors, Act 1759, (4 Stat. 86,) the estate was surrendered for the benefit of all the creditors who sued, or who desired to participate, and the debtor was finally discharged from all such debts. An assignee was appointed by the Court as a trustee for the creditors. This law partakes of many of the essential features of a bankrupt Act. The object of the prison bounds' Act was to afford temporary relief in a particular suit. The assignment is necessarily to the plaintiff in the action, and for his benefit exclusively, until his debt is satisfied. In a Court of Equity,

the assignee would be responsible to the

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\*debtor, or to his other creditors, for any surplus. But if, as in this case, the State of South Carolina is the plaintiff, to whom the assignment is made, in what tribunal could such assignee be reached or impleaded, at the instance of the creditors?

The insolvent debtors' Act, like the proceedings in bankruptcy, is in the nature of a judicial transfer of the estate of the insolvent debtor. Under the prison bounds' Act, the assignment is a private transaction, as between the debtor and the plaintiff in the action. I think that the officers of the State should have pursued strictly the course prescribed by the Act of 1787, and that no authority existed to issue a *capias ad satisfaciendum*, until the deficiency of visible property of the defendant had been ascertained in the manner, and through the process directed by the Act to be adopted. I do not think that the Court should aid an assignment thus obtained, when it operates to give a preference to the plaintiff over the other creditors of the debtor.

It is ordered and decreed that the bill be dismissed.

The attorney general, in behalf of the State, appealed, on the grounds:

1. Because, his Honor erred in holding that, the plaintiff was not entitled to the aid of this Court, in the collection of the fine and costs of prosecution until the issue of a *fiery facias* and return of *nulla bona* thereon. Whereas, it is submitted that, the fact being shown, no matter how it is made to appear, that the plaintiff has no remedy at law, this Court has jurisdiction, and will grant the relief prayed.

2. Because, his Honor held that the Act of 1788, called the prison bounds' Act, has no application to the discharge of prisoners in execution under criminal process. Whereas, it is submitted, that the Acts of 1759 and

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1788, as well as \*the Act of 1787, in regard to the discharge of prisoners, are all to be construed in *pari materia*.

3. That a defendant in confinement under final process, whether civil or criminal, has the right at his option to take his discharge under the Act of 1759, or that of 1788.

4. That defendant having elected to take the benefit of the prison bounds' Act, whether entitled to it or not, cannot complain that he has been allowed the privilege of doing so, without objection from the plaintiff.

5. Because, his Honor is mistaken in supposing that the defendant has assigned his whole estate to the plaintiff. The assignment is for so much only as may be necessary to pay and satisfy the fine and costs of prosecution.

6. Because, an assignment under the prison bounds' Act, does not vest the estate absolutely in the assignee, but operates as a mere

authority to enter upon, recover, sell and convey in satisfaction of the debt.

7. Because, his Honor is in error in holding that, in regard to the property assigned, there is no tribunal in which the assignee can be reached or impleaded. The State of South Carolina has an interest in the assignment only as a matter of public trust, and this Court has jurisdiction to declare the trust and direct the distribution of the fund.

8. Because, there is, in fact, no other creditors of the debtor, over whom, as his Honor supposes, a preference has been given.

9. Whatever may be the validity of the objections raised by the Chancellor, especial-

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ly those to the jurisdiction of the \*Court, they should not prevail, because they were not (as they should have been) made by the pleadings, nor even insisted on in argument, at the hearing of the cause.

The Court of Appeals in equity, ordered the case to this Court, where it was now heard.

Wilson, for appellant.

Thomson, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. The first question in this case is, whether a person under arrest by ca. sa. to compel payment of a fine imposed upon him by the Court of General Sessions and of the costs of prosecution, is entitled to the benefits of the prison bounds' Act, passed in 1788, (5 Stat. 78)? The Act of 1787 (5 Stat. 13,) declares him "entitled to the privilege of insolvent debtors," with primary reference to the Act of 1759 (4 Stat. 86), which, (with exception of the unimportant Act of 1786 [4 Stat. 727,] repealing the provision, that petition for discharge must be filed within ten days after arrest,) was the only statute then of force for the relief of insolvent debtors; and with further reference to future Acts giving relief or privilege to this class. It is quite clear that one arrested for a fine and costs of prosecution is within the scope of the insolvent debtors' Act of 1759, for that Act in describing those who shall be entitled to its benefits, uses the comprehensive terms, "any person or persons whatsoever hereafter sued, impleaded or arrested for any duty, demand, cause or thing whatsoever," (with exceptions immaterial in this case as to mayhem, &c.) who "shall be minded to make surrender of all his, her or their effects towards satisfaction of their debts." In the prison bounds' Act of 1788,

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however, the beneficial \*provisions are in terms limited in the first section to those arrested by mesne process in civil action and in the third section to "all prisoners in execution on any civil process." If we gave this third section such rigid construction as is sometimes employed concerning penal statutes, it might be concluded that it has no

relation to criminal proceedings, but the Act, at least so far as it mollifies rigorous imprisonment, is remedial, and in favor of liberty, should receive a benign and liberal interpretation, and be held to extend to all people within the mischief of the old law not expressly excluded by the terms of the enactment. Now, a ca. sa. is a "civil process" commonly used for the execution of judgments in the Court of Common Pleas, and when employed for the collection of a fine, which is a debt to the State, and of the costs of prosecution, which are debts to public officers, it is still a civil process; also one arrested by ca. sa. for fine and costs is a "prisoner in execution." But laying stress on the preposition "on," it is insisted that "prisoners in execution on civil process," means such as are imprisoned by execution founded on mesne process begun in the Court of Common Pleas. This is not a necessary construction, and it would be attended with the consequence that one imprisoned in this mode, unable to pay the costs, must be incarcerated in jail for three months or more, after he had fulfilled the punishment imposed upon him, until he could obtain relief under the insolvent debtors' Act; for it is at least questionable whether the governor, under his pardoning power, could remit the costs of prosecution, which are debts to officers. It might thus happen that a convict for misdemeanor fined one dollar might be compelled to remain in jail for seven months, from the spring to the fall term of the Court of General Sessions. The Legislature could not have intended any such consequence, and Acts of the Legislature, like deeds and wills of the inexpert, should receive liberal interpretation in fulfilment of intention. If the

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interpretation of the Act of \*1788 be doubtful on the terms of the Act separately considered, the doubts are removed by subsequent legislative and judicial construction. And first as to the Acts of the Legislature. One part of a statute or any written instrument is fitly used in expounding another part, for it is right where practicable to give effect and consistency to the whole. The end of all rules of construction is to ascertain and consummate the lawful purposes of the maker. On the same principle, all the statutes of the Legislature relating expressly to the same subject, are inferred to be in pursuance of the same policy, and (where there is no repeal) intended to be consistent in their parts. It is an established rule in the construction of a particular statute, that all statutes in pari materia are to be collated and compared as framed with the same object and upon one system. Dwar. on Stat. 699. And the rule applies where some of them are expired or not referred to in subsequent statutes. Rex v. Loxdale, 1 Bur. 447.

The Act of 1817, (6 Stat. 66,) provides that "in case any person taken, arrested or im-



prisoned by mesne or final process, shall neglect or refuse to surrender his effects in favor of his creditors and to avail himself of the benefits of the Acts aforesaid." (being the Acts of 1759 and 1788, previously mentioned.) "for the relief of insolvent debtors," the sheriff shall not be bound to provide him with diet, &c.

The Act of 1833, (6 Stat. 491.) provides that "whenever a prisoner confined on mesne or final process applying for the benefit of the Act of 1788," shall be accused of fraud, a jury may be impeached, &c.

The Act of 1836, (6 Stat. 556.) makes it lawful for creditors to examine on oath "any person applying for the prison bounds' Act or other Act for the relief of insolvent or imprisoned debtors."

And the Act of 1840, (11 Stat. 121.) concerning the liability of sheriffs on prison bounds bonds, speaks of him entitled to the bounds as "any prisoner in execution on final process."

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\*It is manifest from this summary, that the Legislature contemplated all persons under arrest by final process, civil or criminal, as entitled to the prison bounds.

The Acts of 1759 and 1788, have been frequently submitted to judicial interpretation, and the whole course of decisions, has treated them as forming one scheme, so far as the right to the bounds and objections to discharge are concerned, and separate systems as to the mode of procedure and measure of relief. Without reviewing the cases, I adopt the language of Judge Johnson, in *Dobson v. Teasdale*, 4 McC. 81. "It is admitted on all sides that the prison bounds' Act was intended in part as a modification of the insolvent debtors' Act, and in part as a new system appertaining to the same subject, and according to a well-settled rule, both should be read together to arrive at the true interpretation." "The prison bounds' Act, obviously referring to the rigors of the imprisonment required by the insolvent law, proceeds to enlarge the bounds and limits of imprisonment, and the third section provides that all persons confined by execution on any civil process shall be admitted to the bounds, &c. That this section, the third, was intended as a modification of the insolvent debtors' Act, as well as a part of the system contemplated by the Act to which it belongs, is, I think, most apparent. Without it, there is no provision that a prisoner in execution who intends to apply for the insolvent law shall be entitled to the prison bounds." By parity of reasoning, prisoners under final process for satisfaction of a fine and costs of prosecution, under the Act of 1787, must be entitled to the benefits of the prison bounds' Act; otherwise, an infant arrested by ca. sa. for the costs of prosecution for some petty misdemeanor which had resulted in his conviction and a

sentence for one dollar, might pine in jail for fourteen, or more, years. This cannot be the law. But we are not left to mere deduction, for in the case of *The State v. Kenny*, 1 Bail. 375, it was held that one in con-

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finement for the costs of a criminal prosecution, under a sentence of the Court of General Sessions to pay the costs (and a small fine which was paid,) and to stand committed until the costs were paid, is entitled to the benefit of the prison bounds' Act; on the grounds, that the costs constitute a mere debt, and that otherwise the convict might be perpetually imprisoned. That is a much stronger case than the present, for in *Kenny's Case* there was no "execution on civil process" beyond the sentence; and except in the pardoning power of the Governor as to a fine, there is no difference between fine and costs, and if there be, the prisoner here was arrested for costs as well as fine, and that too under technically final and civil process. We are of opinion that those declared by the Act of 1787, to be "entitled to the privilege of insolvent debtors," may avail themselves of the prison bounds' Act of 1788.

The next point to be considered relates to the provisions of the Act of 1787, sufficiently recited in the circuit decree, requiring that if a party who has incurred a fine shall fail to pay the fine and costs of prosecution, "a writ in the nature of fieri facias shall issue," and upon the proper return by the sheriff, "then a writ of ca. sa. shall issue." It does not appear by evidence, that a fi. fa. was issued against William S. Baker before he was arrested under ca. sa., and it is quite probable that no fi. fa. was ever issued. If the ca. sa. were absolutely void, and if we have authority to adjudge that such is the fact, it may be conceded that the assignment to the plaintiff is void as obtained by the duress of unlawful imprisonment. But without determining the questions of waiver and estoppel by judgment of the commissioner of special bail, which have been discussed before us, two considerations seem fatal to the notion that the ca. sa. was absolutely void: first, that it belongs to the Court of Law to annul a process issued under its authority, and secondly, that a departure from the prescribed order of executions is a mere irregularity. We are now sitting as a Court

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of Equity, and are invoked to declare void a process of the Court of Law which subsists in unimpaired vigor. It is firmly established that the judgment of a court of competent jurisdiction, obtained without fraud, cannot be upset and vacated collaterally in any other tribunal, and must be recognized as valid until avoided upon direct application to the court which pronounced the judgment. Everything necessary to the validity of the judgment must be presumed by

other tribunals. We must here pronounce that a fi. fa. was regularly issued and returned according to the prescriptions of the Act of 1787, or that it was adjudged by the Court of Law to be unnecessary. It is a mistake of the answer that the defendant, W. S. Baker, "could not do otherwise than to seek his discharge from confinement by due process of law," if it be intended that this due process of law was confined to the remedies afforded by the insolvent debtors' Act and the prison bounds' Act; for he might have applied to one of the Law Judges to set aside or stay the execution against his person; as by the Act of 1818, (7 Stat. 321,) these judges have as full power at chambers as in open court to hear and determine such a motion.

Again we suppose, if it were our province to adjudge the matter, that the Act of 1787, prescribing the sequence of execution against the person to execution against the property, is merely directory, and that a breach of the direction works no forfeiture or invalidity of the thing done. The prominent distinction between directory and imperative statutes, is that affirmative words make a statute directory, and negative or exclusive words make it imperative. *Rex v. Leicester*, 7 B. & C. 12. Affirmative words may be so peremptory and exclusive of discretion as to make a statute imperative, contrary to the general rule. Thus, in *Davidson v. Gill*, 1 East, 64, on the construction of a statute empowering two justices of the peace to close old and set out new foot-ways, and prescribing expressly the form of the order to be used by them in such case, and requiring that this form "shall be used on all

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\*occasions, with such additions and variations only as may be necessary to adapt it to the particular exigency of the case," it was held by the Court of King's Bench, principally on the force of the word only, which is really negative in meaning, that a material variance in the order from the form prescribed was fatal to the attempt of the Justices to deprive the public of a right previously enjoyed. This case, the strongest cited to us, is hardly an exception to the rule as to the effect of affirmative words. In the statute of 1787, the words are merely affirmative and directory, without any expression of exclusiveness or avoidance. The practice for a long time has been very general to issue the ca. sa.; in the first instance, and it has probably proceeded from the desire of the officers having fees in prosecutions to fix the liability of the State for payment, and from the desire of prisoners to abbreviate their imprisonment, and obtain discharge as soon as practicable. Without meaning to approve any departure by the officers of court from the requirements of the Legislature, we must pronounce that there was no such departure in this matter as

rendered absolutely void the subsequent proceedings. It is further urged that granting the regularity of the procedure against him, still the defendant is not bound by his assignment because he was then and is now an infant. It is superfluous to cite authorities for the doctrine that an infant is liable for his trespasses, misdemeanors and crimes and responsible in person and property for fines and damages adjudged against him. In such case he is treated as an adult both as to liability and as to remedy. It would be terribly harsh towards him to consider him equally as an adult liable for his torts and debts arising from torts and still not competent to avail himself of the remedies and relief attainable by an adult in like case. No person of any age can obtain discharge under our insolvent laws without executing an assignment and if an infant be incapable of executing an assignment he may be impris-

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oned during the whole of his \*minority. In general an infant is bound by any act which he rightfully performs, and might be compelled by law to perform, or any act manifestly for his benefit.

An infant trustee may be coerced to convey, and an infant tenant in common to make partition. He may contract marriage, and as an incident to the principal contract may execute a marriage settlement, according to our law, although this is disputed in England as to real estate. It is doubtful whether an infant can take the benefit of the existing English statutes for relief of insolvent debtors, which require a warrant of attorney for entering up judgment against him for the amount of his debts, but under former statutes which required recognizances for the amount of his debts, he was allowed to give recognizances and be discharged; 2 *McPherson*, Inf., 491. Recognizances are matters of record and voidable by an infant during his minority on *audita querela*; Co. Litt. 308, b. It was observed in *Ex parte Deacon*, 5 Barn. & Ald. 759, where the right of a married woman to discharge under the insolvent laws was in question, that "a minor may make a deed for his own benefit." Our Acts require as prerequisite to discharge the execution of a deed of assignment merely and not warrant of attorney to confess judgment, recognizance or any matter of record. In the case of *The People v. Mullin*, 25 *Wendell*, 698, *Nelson*, C. J., held, that an infant as well as an adult was entitled to relief under a New York law of like character with ours, saying that the relief from imprisonment was so highly beneficial to the petitioner, that his act in making an assignment must in law be regarded as valid notwithstanding his nonage. We approve this decision.

It is further urged, that the State is an unsuitable assignee, not to be aided by the Court because it cannot be compelled by



suit to distribute rightly the funds of which it is trustee for creditors. If this be true broadly, the State could take nothing by the voluntary assignment of its debtor.

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Granting \*that the State cannot be sued, still for any violation of trust, relief might be obtained through the Legislature by application in the nature of a petition of right. Besides the Court of Equity would change the trustee upon sufficient reasons shown. Again, in this case the State is assignee under the prison bounds' Act of so much only of the assignor's estate as will satisfy the debt to the State, and the Court will not aid it beyond the amount of the debt, and there can be no controversy as to the distribution of the surplus. If the foregoing views be unsound, as to the rights of the State as assignee, why should not the State be allowed to prosecute its claim as a general creditor of William S. Baker? His debt to the State by fine certainly subsists. His insolvency as to any legal estate, is alleged in the bill, admitted in the answer, and demonstrated by the proceedings under the ca. sa., and under such circumstances where a creditor has no legal remedy, he is entitled in equity to pursue the equitable estate of his debtor; *Pettus v. Smith*, 4 Rich. Eq. 197. But it is unnecessary to elaborate this point.

It is ordered and decreed that the administrators of Samuel S. Baker's account with the plaintiff for so much of the share of William S. Baker in the estate of the said Samuel as may be necessary to satisfy the claim of the plaintiff, and the commissioner is ordered to take the account.

It is further ordered that the Circuit decree be modified in conformity to this opinion.

JOHNSTON, DUNKIN and DARGAN, CC., and O'NEALL, WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Decree reversed.

#### 9 Rich. Eq. \*535

\*V. M. CONVERSE, by Next Friend, v. A. L. CONVERSE.

(Columbia. Nov. and Dec. Term, 1856.)

[*Husband and Wife* ⚭48.]

A wife having a general power of appointment over her separate estate, may dispose of it to her husband, or for his use, subject to proof of fraud or undue influence on his part; and, as such a transaction is regarded with jealousy and suspicion, it will be set aside upon slighter proofs of fraud or undue influence than is required to invalidate ordinary deeds. It is not, however, essential to the validity of such an appointment, that it should spring from the suggestions of the wife's own mind. The persuasions and importunities of the husband, unaccompanied by commands or threats, are insufficient of themselves to invalidate it; and it is

a circumstance favorable to the instrument that its dispositions are reasonable.

[Ed. Note.—Cited in *Aaron v. Beck*, 9 Rich. Eq. 415; *Oliver v. Grimbail*, 14 S. C. 570.

For other cases, see *Husband and Wife*, Cent. Dig. § 248; Dec. Dig. ⚭48.]

[*Husband and Wife* ⚭52.]

The execution of such a power if valid at the time cannot be set aside because of the after misconduct of the husband toward the wife, no matter how gross and outrageous it may be.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 266; Dec. Dig. ⚭52.]

[*Names* ⚭20.]

Though the Court has power under the Act of 1814, (5 Stat. 718;) to change the name of a wife against the wishes of her husband, where her true interest will thereby be promoted; it will reject an application for such a change where she and her husband are separated, and to grant it would seem to close the door to recollection [reconciliation].

[Ed. Note.—For other cases, see *Names*, Cent. Dig. § 18; Dec. Dig. ⚭20; *Husband and Wife*, Cent. Dig. § 5.]

[*Husband and Wife* ⚭283.]

Alimony is never allowed where the wife has a separate estate sufficient for her subsistence in comfort.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1069; Dec. Dig. ⚭283.]

[*Judgment* ⚭301.]

A decree ordering a settlement of the wife's estate and declaring the trusts, is judicial, final and irrevocable; it is not an administrative order which may be revoked or modified by the Court before a conveyance to the trustee has been executed.

[Ed. Note.—Cited in *Reese v. Meetze*, 51 S. C. 343, 29 S. E. 73.

For other cases, see *Judgment*, Cent. Dig. § 587; Dec. Dig. ⚭301.]

[*Husband and Wife* ⚭3.]

The Court may by its decree protect a wife in living apart from her husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 6; Dec. Dig. ⚭3.]

Before Dargan, Ch., at Sumter, January, 1856.

The circuit decree and the opinions delivered in the Court of Errors and Court of Appeals in Equity explain themselves, and render any further statement of the case unnecessary. The circuit decree is as follows:

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\*Dargan, Ch. The plaintiff has sustained every material allegation of her bill, at least all such as were deemed material by her, and on which she relied for support of her prayer for relief. Her statement as to the situation of the property (the subject matter of this contention) is precisely accurate. The various instruments, deeds, will, judicial proceedings, orders and decrees, by which the rights of the parties have been created or affected, have been recited in the bill in a manner strictly conformable with the truth. As to these matters of fact, there is no discrepancy between the allegations of the bill and the statements of the answer. They only differ as to the legal effects and consequences growing out of an admitted state of facts. The plaintiff's allegations

that the defendant had treated her with unkindness and cruelty are fully sustained. His conduct towards her was characterized by annoyance, insult and personal outrage. It amounts to what is meant by the term *sevitia* in the civil law. \* \* \* (a) The introduction of this topic was altogether unnecessary and gratuitous. His grievances in this respect rest upon his own unsupported assertion. He could not have expected to substantiate them by proof. If they had been so proved, I do not perceive how such facts could have affected the judgment of the Court. \* \* \*

The bill, answer, and evidence reveal a most deplorable state of discord in the unhappy family of which the defendant is, or was the head. I am constrained to say that I think the fault lies for the most part at the defendant's door. I do not mean to say, for I do not believe, that the plaintiff bore her wrongs with lamb-like patience and meekness. There was certainly at times, on her part angry recrimination—with her spirit and pride it was perhaps impossible for

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her to have so demeaned herself. But I cannot shut my eyes to facts, which appear in the pleadings, as well as the evidence, that she was complaisant and yielding to the defendant in respect to dispositions of the property, and that she made to him in this respect reasonable concessions.

The allegations of the bill as to the defendant's personal violence to his wife, as I have already intimated, are satisfactorily proved. Mrs. Moore, (the plaintiff's daughter) was the principal witness on this branch of the case. She underwent the ordeal of a four hours' examination in Court with great credit to herself—she was calm, dispassionate, candid and intelligent; and acquitted herself in her trying situation in a very handsome manner. I believe what she said was the truth. She was strongly corroborated by other witnesses; particularly Mr. J. Dyson.

From the evidence, the conduct of the defendant towards his wife, exhibits a series of petty annoyances and persecutions, committed, I must suppose, with the view of coercing her compliance with his wishes. I will not go into the details, but refer to the evidence. It is sufficient for me to say here that he frequently spoke to her, and in her presence, in the most disparaging terms, of her nearest relations. This is not denied but rather admitted in the answer. His language to her was insulting and abusive; his conduct violent and overbearing to both herself and her daughters. On one occasion he struck his wife in the face and pushed down both of the girls with violence upon the floor. For this there was no other provocation than

(a) This decree is printed from a brief furnished the Reporter by the circuit Chancellor. The omitted passages, indicated by asterisks, were stricken by his Honor.

their attempt to get possession of a trunk of clothes belonging to the youngest daughter, who was going to Charleston to be put at school; which trunk the defendant unjustifiably withheld. Thus, as might have been expected, affairs went on from bad to worse, until the final consummation and rupture on the night of the 18th of January, 1854. It is worth while to look to his answer for the

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cause which he assigns for these outrages. \* \* \* He held her by the hair of her head in a constrained and painful position on the damp floor of the piazza, exposed to the chilly atmosphere, for the greater part of the night, when her daughter, with the view of releasing her from his unrelenting grasp, attempted with a pair of scissors to cut off her mother's hair, he threatened her so violently, as to frighten her into desisting from her purpose. When that same daughter seeing her mother suffering under that dreadful torture, lying on the damp floor, exposed to a chilly atmosphere, got a shawl and threw it over her mother's shoulders, the defendant took the shawl from her, and covered himself with it. Not long before the dawn of day both parties from mere physical exhaustion agreed upon an armistice. He proposed to release his hold upon her hair, if she would go back to his room. To this, worn out with pain and suffering, she assented. They went back to their room and the witness went to hers. Before the lapse of many minutes hostilities were renewed in the bedroom. The witness, summoned by a servant, went to the door and found it locked. She could not gain admittance, but heard loud and angry talking on his part. It was then and there that he inflicted \* \* \* violence on her person. \* \* \* It was from that room that by a back door she made her escape and fled from his presence, bleeding, lacerated and bruised. Her lip was cut and still bleeding on the next day, when Mr. Dyson saw her. There was a contusion on or under her eye from a blow, witnessed by Mrs. Moore, before the enactment of the hair-pulling scene. And her arm was bruised, and black and blue from the wrist to above the elbow—when seen by Mr. Dyson on the next day. On the ensuing day the plaintiff and her daughter were trembling fugitives from the house. They sought shelter, and a hiding place in a cotton house, where they obtained their food by stealth; while the defendant \* \* \* went out to take \* \* \*

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\*a carriage drive. On his return, having searched and discovered their hiding place, he sent a servant for a hammer and nails to nail them up. Having intimation of this intention from a servant, they made their escape before the hammer and nails were brought. It was about dusk. They ran for a quarter of a mile, and from exhaustion stopped in an old field, exposed to a shower of



rain, by which they were drenched to the skin. There, while standing for shelter under some trees, they saw the carriage of Mr. Hayne (a neighbor) that had been sent for them. They got into the carriage and went to Mr. Hayne's house. Since this time the plaintiff and defendant have been separated. All this violence and outrage were perpetrated without adequate or palliative cause; and in fact for no cause at all, unless \* \* \*

If this were a bill for alimony, the plaintiff would be entitled to a decree. It is a case in which the wife is morally and legally justifiable in withdrawing herself from the bed and board of her husband. But the Court will not, and cannot make a decree to that effect. The Ecclesiastical Court of England has the power of decreeing a separation, a mensa et thoro, but the Court of Equity has no such jurisdiction. A jurisdiction of this kind appertains to no Court in South Carolina. Under the circumstances of this case, the Court might go so far, (if necessary,) as to protect the wife from the cruelty of the husband.

Nor can another proposition of the plaintiff be entertained, namely, to change her name from that of "Converse" to that of "De Veaux," which is the name of her first husband. The Court undoubtedly possesses the power to change the name of a party who may make such an application for such purpose. If in this mode the name of a husband was changed, that of the wife would also be changed, as a necessary consequence. But an application to change the name of a wife without the concurrence and consent of

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the husband is \*without a precedent. It seems also to be wrong in principle. How do I know that these parties may not become reconciled? Reunions more improbable have occurred. It would be wrong in the Court to throw any impediment in the way of such reconciliation in addition to those that already so unhappily exist.

I must now consider the questions that have been made as to the property in which the plaintiff and defendant are interested. There are two estates derived from different sources, and held under different trusts. One of those estates called the "Ruins" consists of a plantation of about four hundred and forty-eight acres, and about thirty negroes, with stock, &c. It was the share of Mrs. Converse in the estate of her deceased husband, Robert Marion De Veaux, and of her share of the share of one of his and her children (Robert Marion De Veaux) who survived his father, and died in early childhood. Before the division of the estate the plaintiff and defendant intermarried. A bill was filed for partition, and there was an order for a settlement of her share upon Mrs. Converse. Terms were proposed, and the Commissioner reported thereon. This having

been confirmed by a decree of the Court, Mr. and Mrs. Converse by a deed bearing date 27th March, 1849, conveyed all the share of Mrs. Converse in said estate to John C. Singleton, for the sole and separate use of Mrs. Converse during her life, and after her death, to such persons, as she, by any instrument in the nature of a testament, should appoint, and in default of such appointment to her right heirs—with the reservation of a power to Mrs. Converse, by any deed executed by her in the presence of two witnesses, to revoke the uses declared in the deed creating the trust and to convey the said property, or any part thereof, to any person or persons as she saw fit, in the same manner as if she was a feme sole: also to sell said property or any part thereof with the view of changing the investment, and also at her discretion to remove the trustee, and to substitute

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another in his \*place. To this estate there also belonged two negroes, Peter and Gabriel, conveyed by Richard Singleton to John C. Singleton, by a deed dated 9th July, 1849, for the same uses and subject to the same conditions and agreements, as are expressed in the deed of the 27th March, 1849.

Mrs. Converse afterwards exercised the powers reserved, by a deed bearing date 13th September, 1850, executed in proper form: she revoked the uses declared, as well in the marriage settlement deed of 29th March, 1849, as of the deed of Richard Singleton of the 9th July, 1849, and by her said deed of revocation, declared and appointed, that the said John C. Singleton should hold the said property for the joint use of the said A. L. Converse and V. Marion Converse, during their joint lives, and if the said A. L. Converse should be the survivor for his use, during his life; and if the said V. M. Converse should be the survivor, the estate was to be held for her use, &c., &c.

By deed bearing date the 5th January, 1852, duly executed, she revoked the appointment of John C. Singleton as trustee, and appointed a substitute, E. M. Anderson, as trustee in his place. Thus the parties stood relatively to this property at the time of their separation in January, 1854. By virtue of the deed of 13th September, 1850, this property has been held since that date, to the joint use of the plaintiff and defendant as husband and wife. This is equivalent to its being for the use of the husband, as the rents and profits must be paid over to him, and his disbursement thereof cannot be controlled by the wife. After the separation, Mrs. Converse and her children, resided for a time at a place called "True Blue," which is an estate that Mrs. Converse had derived under the will of her father, the late Richard Singleton; and of which we will have more to say hereafter. Mr. Converse continued to reside at the "Ruins." Soon after the separation, the negroes belonging to this last

mentioned estate, (the Ruins.) except a few went to "True Blue" where they have contin-

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ued ever \*since. I take it for granted they have been withdrawn by the commands and directions of Mrs. Converse—and they have continued to the present time in her possession and under her control.

I am unable to grant the plaintiff the relief which she seeks in reference to this estate. The Court cannot restore her to her original rights under the deed of marriage settlement. It cannot recall her own voluntary appointment; or destroy the existing vested rights of the husband. If a husband maltreats his wife, inflicts upon her personal violence, and compels her to fly from his presence and to seek that protection and peace elsewhere, which she does not find under his roof, that does not divest him of any of his estate legal or equitable. For so sore and grievous a calamity, there is in this country but one remedy so far as I know (I mean so far as relates to a claim upon his estate) and that is a bill for alimony. And that is a claim upon his estate generally. Where the husband has an interest in the settled estate of his wife, I see no reason why the Court should not charge the alimony allowed, upon such interest of the husband if it be necessary. But this is not a bill for alimony, and it is useless to prosecute these speculations.

Under the circumstances of the case, I am disposed to grant the plaintiff all the relief which I conceive to be within the competency of the Court, and which can be extended to her without the violation of important principles and the disturbance of vested rights. A state of things now exists, which renders it impossible for Mrs. Converse to enjoy the rents and profits of this estate jointly with the defendant. For the unhappy and deplorable relations between them, I consider him as responsible. He has driven her from his bed and board, so that she cannot enjoy the joint use with him. In renouncing his society, she is compelled to renounce the enjoyment of property, in the participation of which, it was evidently intended she

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should have a part. Something, I \*think can be consistently done to mitigate this state of things. I can separate their interests, so far as regards the enjoyment of the rents and profits. The deed of revocation and appointment certainly intended that the wife should have some benefit; a benefit in fact to the extent of one-half of the rents and profits of the estate. And as far as the defendant has rendered it impossible for her to enjoy the income of the estate jointly with him, it will be better for both parties, and not inconsistent with the rights of either or with any principles or rules of law or equity, to declare, that the joint interest of the plaintiff and defendant in the income of this

estate shall be separated; a moiety to each, to be enjoyed in severalty. And it is so ordered and decreed, and further it is ordered and decreed that this separation of interest relate back to the period of separation. It is further ordered and decreed, that the parties mutually account for the annual value of the property of this estate, which they have had in their possession respectively from the date of their separation, and that each party be entitled to receive one-half of the annual value or income. It is further ordered, that the Commissioner state the accounts between the parties, according to the principles of this decree. And it is further ordered and decreed, that the negroes taken thence be restored to the "Ruins" estate, and that the trustee, E. M. Anderson, do assume the possession, control, and management of said estate; and that hereafter he pay over one-half of the nett annual income of the estate to the defendant, and the other half thereof to the plaintiff, to her sole and separate use. In the course of the discussion something was said about the difficulty of the trustees managing this estate, and the propriety of a sale was suggested. Though it seems to me under existing circumstances, this course would be advisable, yet, as at present advised, I cannot act on this suggestion. But the parties, or either of them, may move for an order of sale at the foot of this decree.

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If both concur, of course \*there would be no difficulty. If only one make the application, the Court will consider the motion and act judicially in the premises.

I pass on to the consideration of the question, which has been made in reference to the "True Blue" plantation. This estate being a large and valuable plantation in St. Matthew's parish, with two hundred negroes, horses, mules, stock of all kinds, plantation utensils, &c., was devised to Mrs. Converse, under the last will and testament of her father, Richard Singleton. He devised and bequeathed the same to her for life with remainders not necessary to be mentioned. There was no trust created by the will. Various questions arose upon the construction of the will of Richard Singleton. A bill was filed by the executors against all the devisees and legatees, and in which every person having an interest was a party, for the adjudication of those questions, for the settlement of the accounts of the executors, and the adjustment of all the rights of the parties. Inter alia the aid of the Court was invoked for the settlement upon Mrs. Converse of her share of the estate, and it was stated in the bill, that the executor had purposely withheld his assent to her legacy until the question of the settlement should be decided. He had refused to give her possession, to prevent the marital rights from attaching. There was at that time (and had been) much wrangling and ill-blood between the



plaintiff and defendant about the terms of the settlement. Mrs. Converse in her answer, claims that the whole of her interest in the estate should be settled on her, to her sole and separate use. This was opposed by Mr. Converse who insisted upon having some participation in the income and profits of the estate. Thus matters stood, until the June Term of the Court of Equity for Richland District. At the hearing of the cause, the Chancellor ordered, that Mr. Converse should submit proposals to the Commissioner as to the terms of the settlement and that the

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Commissioner should report thereon. \*Accordingly on the 24th June, 1853, Mr. Converse did submit proposals. It is unnecessary to refer to his proposals further than to notice so much thereof as relates to the "True Blue" estate. As to this estate, he proposed that three-fourths of the income of said estate should be paid to Mrs. Converse, to her sole and separate use, and that one-fourth thereof should be paid to him in his own right during his life, and after his death Mrs. Converse surviving, the whole income should be paid to her for her use. About this time, this question still pending, by the interposition and kind offices of a mutual friend, Mr. and Mrs. Converse became reconciled, and relations of peace were restored. Mrs. Converse withdrew her opposition to Mr. Converse's proposals, or at least became acquiescent. By a note addressed to her solicitor—she directed him to offer no opposition to the same. The Commissioner reported favorably on his proposals. The report bears date 1st July, 1853. I quote from the same as follows, "I recommend the following terms of settlement—that the real estate in St. Matthew's parish called "True Blue," and the two hundred negroes attached thereto, be conveyed to a trustee in trust to permit Marion Videau Converse to receive annually three-fourths of the profits and issues thereof to her sole and separate use, during the life of Augustus L. Converse, not subject to his debts, contracts, or control; and to permit the said A. L. Converse during the same period to receive to his own use, the remaining one-fourth part thereof; and upon the death of the said A. L. Converse in trust to permit the said Marion V. Converse to receive the entire income and profits of "True Blue," and the slaves thereunto attached, during her life, and at her death to hold the said land and slaves subject to the further uses declared in relation to the same in the 14th, 15th, 16th, 17th and 19th clauses of the will of the late Richard Singleton." The Commissioner further reported as to a settlement of other portions of the

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estate of the said Richard \*Singleton, to which this plaintiff was entitled. This part of the report it is unnecessary to consider, as it was not confirmed, and there was no

action by the Court upon the same. The Commissioner in the same report recommended "that Richard Richardson be appointed the trustee of Mrs. Converse upon his entering into bond to the Commissioner of this Court in the penal sum of two hundred and thirty thousand dollars, conditioned for the faithful discharge of the office of trustee."

No exceptions were taken to the report, and on the 29th November, 1853, it was heard by one of the Chancellors at Chambers, by the mutual appointment and consent of the solicitors of the parties—and on motion of Mr. Moses, solicitor for the defendant, the report, so far as it related to the settlement and the terms of the "True Blue" estate was confirmed, Mr. De Saussure, the solicitor of Mrs. Converse being present and consenting.—It was ordered, that Richard Richardson be appointed the trustee, on his entering into bond as recommended by the Commissioner with sureties; that thereupon the Commissioner should convey to the said Richardson, "the plantation and land known by the name of 'True Blue' devised under the will of Richard Singleton, and all the negroes, stock, horses, mules, wagons, and farming utensils, and other personal property thereon, which by the will of the said Richard Singleton were bequeathed to the said V. Marion Converse, (formerly De Veaux) for life, to be held by the said Richard Richardson on the following trusts, and for the following uses and purposes, that is to say, to permit the said V. Marion Converse, for and during the coverture of the said V. Marion Converse and the said A. L. Converse, to take, receive, possess, hold, and enjoy for her sole and separate use three-fourths of the annual rents, income, issues and profits, not subject to the debts, contracts, or control of the said A. L. Converse, and to permit the said A. L. Converse during the same period, to take, receive, possess, hold and en-

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joy the \*remaining fourth of the annual rents, income, issues, and profits of the said property, and on the death of the said A. L. Converse, the said V. Marion Converse, surviving him, to suffer and permit the said V. Marion Converse, to take, receive, possess and enjoy all the annual rents, profits, income and issue of the said property, during her natural life, and on the death of the said V. Marion Converse, the said property to go to the person or persons, who may at that time be entitled to take the same," &c., under the provision of the will of the said Richard Singleton. The decree further provided that in the event the said Richard Richardson should decline to accept the trust to which he had been appointed, the Commissioner should report some other suitable person for the appointment. Richard Richardson has declined the trust, and no other person has been appointed, or reported by the Commissioner. No suitable person has as

yet been found, who is willing to assume the duties of this trust.

One of the principal objects of the plaintiff's bill is, to have this decree rescinded or recalled. If I deemed the question as to the terms of the settlement as *res integra* and not as *res judicata*, I should be much inclined to grant the plaintiff the relief for which she prays. I think it is the very case in which the husband should be refused any participation in the wife's settled estate.

I have said that the conduct of the defendant towards his wife is characterized by violence, amounting to *sævitia*, and that under such circumstances alimony would be decreed. The plaintiff is entitled to the full benefit of my opinion on this point, and she has it. It is founded upon the answer and the evidence, and I can form no other conclusion. I say, that if this were not an adjudged question, I should feel bound to withhold from the defendant any share whatever in the plaintiff's settled estate. But how can I recall, or revoke the solemn judgment of the Court, or disturb and destroy vested rights under the decree.

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\*The solicitors for the plaintiff contend, that the decree of the 23rd November, 1853, confirming the Commissioner's report, and prescribing the terms of settlement, is only an administrative order, and is subject to be recalled, or modified at the discretion of the Court under the change of circumstances. I can scarcely give the learned counsel of the complainant credit for candor in this most untenable proposition. If this order is administrative only, what is a judicial order? The decree of the 23rd November, 1853, adjudges all the rights of the parties in the subject matter definitely and conclusively. It adjudges that Mrs. Converse was to have three-fourths and Mr. Converse one-fourth of the income of the settled estate.

Nothing more remained to be done but the giving bond by the trustee appointed, and the conveyance by the Commissioner to him. This part of the decree was surely administrative. An order may be in part judicial, and in part, administrative, as was the case in *Pell and Ball*. A judicial order is the judgment of the Court upon the rights of the parties on an issue between them, presented by the pleadings, and which right or wrong is binding upon them, unless reversed on appeal, while administrative orders may be defined to be such, as the Court from time to time makes, for the purpose of bringing the parties before the Court, perfecting the pleadings, advancing the progress of the cause to a hearing, managing and securing the subject matter of the suit, during the pendency of the litigation, and finally of putting the parties in the possession and enjoyment of their rights on a decree upon the merits. All such orders the Court may re-

scind, or modify at its discretion, as the exigencies of the case in its progress may demand. Judged by these definitions which I conceive to be accurate, there is not the semblance of an argument for holding the order of the 23rd November, 1853, so far as it decrees a settlement and prescribes the

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terms thereof, to be administrative. In \*support of this conclusion I deem it unnecessary to appeal to authorities. These might be multiplied to an indefinite extent. But I rest it here upon the inductions of unsophisticated reason. These would teach (if there was no authority) that the solemn judgment of a Court of competent jurisdiction rendered in proper form, and deciding the rights of the parties to the suit, in the subject matter of the suit, upon an issue presented by the pleadings, is not to be set aside and vacated by the Court on consideration of circumstances either prior or *ex post facto*. So much, therefore, of the plaintiff's bill as prays for a rescission or modification of the decree of the 23rd November, 1853, is refused.

Since the separation, the plaintiff has been in the exclusive receipt and enjoyment of the rents and profits of the "True Blue" estate. She must account for the defendant's share of the same, which is the one-fourth part of the nett income. She must account for, and pay over to him his one-fourth part of the income since the separation, and must annually pay to him his one-fourth part of the income according to the terms of the settlement. And it is so ordered and decreed. It is further ordered, that the Commissioner state the accounts between the parties, and that he report thereon.

There is one more matter in the bill. The plaintiff is entitled to some property in the estate of her father, Richard Singleton, which is given to her by the residuary clause of his will. She is also entitled to a distributive share of some intestate property left by the said Richard Singleton.

Neither of these funds or claims is embraced in the decree of settlement, and the plaintiff prays that this portion of her estate be settled to her sole and separate use. This part of the plaintiff's estate is intact by any decree of the Court, and it comes up now as a new question, as to what shall be the terms of the settlement. From what I have already said, my opinion and the reasons for that opinion on this question are indicated. I feel no embarrassment or hesitation in say-

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ing \*that she is entitled to this settlement and on the terms which she proposes.

It is ordered and decreed that the property to which the plaintiff is entitled under the residuary clause or clauses of Richard Singleton's will, as also her distributive share in the intestate estate of the said Richard Singleton, be settled on her to her sole and



separate use. It is further ordered, that the Commissioner report a suitable person to be appointed trustee, and further that he report such a scheme of settlement as shall be agreeable to the plaintiff and to be indicated by her.

It is further ordered and decreed, that the parties pay their costs respectively.

The complainant appealed, and moved the Court of Appeals in Equity to modify the decree, upon the grounds following, and in the following particulars:

1. That the whole relief prayed by the bill ought to have been granted, and for the reasons stated in the bill, and that the decree should be modified accordingly.

2. That the prayer for relief was large enough to cover alimony, if the case made by the bill and proof authorized it.

3. That the decree in the case of Mathew R. Singleton, now Martha R. Singleton v. A. Van Buren, A. L. Converse and others, does not preclude relief upon the new case made by this bill.

4. That the decree ought to have provided for the protection of the complainant in living separate and apart from the defendant, A. L. Converse.

5. That the decree ought to have granted

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the complainant's prayer to change her name, the Court having the power, and the case demanding it.

6. That the estate of "True Blue," and the slaves, &c., thereon, ought to have been decreed to have been settled to the sole, separate and exclusive use of the complainant.

7. That the Chancellor ought to have decreed that the estate, known as the "Ruins," and the slaves and property appertaining thereto, should be settled upon the complainant upon the terms of the original settlement thereof, and that A. L. Converse should have been excluded from any use of the same.

8. That so much of the decree as directs that complainant should account for any part of the income and profits of any portion of the estate in the bill mentioned, ought to be reversed.

9. That so much of the decree as directs that the parties shall pay their costs respectively should be reversed, and the defendant, A. L. Converse, be decreed to pay the same.

The case was argued in the Court of Appeals in Equity at May Term, 1856, by Mr. W. F. DeSaussure and Mr. Petigru, for the appellant, and by Mr. Bellinger and Mr. Moses, for the defendant. That Court, not being unanimous upon the seventh ground of appeal, referred the case, upon that ground, to the Court of Errors, where it was now argued by the same counsel. The questions involved have been so thoroughly considered in the several opinions delivered in the different Courts, that the Reporter regrets less,

than he otherwise would, his inability to furnish the arguments of counsel.

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\*The opinion of the Court was delivered by

DARGAN, Ch. The property involved in the question submitted to this Court, was derived to the plaintiff, Mrs. Converse, from the estate of her first husband, Robert Marion De Veaux. Proceedings were instituted in the Court of Equity, for the partition of this estate, of which this plaintiff, as widow, was entitled to one-third, and the remainder was divided among the other heirs-at-law of Robert Marion De Veaux, who were his children. During the progress of the cause, an order was made for the settlement upon the plaintiff of her share of the said estate. Proposals were made as to the terms of the settlement, which, having been reported by the commissioner, the report was confirmed. In pursuance of the terms of settlement prescribed by the decree of the Court, Mr. and Mrs. Converse, by a deed bearing date 27th March, 1849, conveyed all the share of Mrs. Converse in said estate, to John C. Singleton, for the sole and separate use of Mrs. Converse, during her life, and after her death for such persons as she, by any instrument in the nature of a testament, should appoint; and, in default of such appointment, to her right heirs—with the reservation of a power to Mrs. Converse, by any deed executed by her in the presence of two witnesses, to revoke the uses declared in the deed creating the trust, and to declare new uses, and to convey the property, or any part thereof, to any person or persons as she saw fit, in the same manner as if she was a feme sole: also to sell said property, or any part thereof, with the view of changing the investment: also at her discretion to remove the trustee, and substitute another in his place. To this estate there also belonged two negroes, Peter and Gabriel, conveyed by Richard Singleton, to John C. Singleton, by a deed bearing date 9th July, 1849, for the same uses, and subject to the same conditions, and agreements, as are expressed in the deed of 27th March, 1849.

Mrs. Converse afterwards exercised the

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powers reserved to her, and by a deed dated 13th September, 1850, she revoked the uses declared, as well in the marriage settlement deed of 27th March, 1849, as in the deed of Richard Singleton of the 9th July, 1849, and, by her deed of revocation, declared and appointed that the said John C. Singleton, should hold the said property for the joint use of the said A. L. Converse and V. Marion Converse, during their joint lives; and if the said A. L. Converse should be the survivor, for his use during his life; and if the said V. M. Converse should be the survivor, for her use, &c. By a deed bearing date 5th January, 1852, she revoked the appointment

of John C. Singleton as trustee, and appointed a substitute, E. M. Anderson, as trustee in his place.

On the 12th day of May, 1854, the plaintiff filed this bill, praying, *inter alia*, that her deed of revocation and appointment, dated 13th September, 1850, should be set aside, and, by a decree of this Court, declared null and inoperative, and she be restored to her original rights, as if such deed had never been executed.

The Chancellor, who heard the case on the circuit, refused to grant the plaintiff the relief which she sought. He refused to set aside this deed, and decreed accordingly. From this decree an appeal was taken to the Court of Appeals in Equity on various grounds; among which is one, that assumes, that the circuit decree is erroneous, because it did not set aside, and declare as null and void the aforesaid deed of revocation and appointment. This appeal having been heard by the Court of Appeals in Equity, and the said Court not being unanimous in its opinion, as to the correctness of so much of the circuit decree as relates to the said deed of appointment, ordered, that so much of the circuit decree as was brought in question by the said ground of appeal, should be referred to the Court of Errors.

The case has accordingly been placed on

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the docket of this \*Court. It has here been heard; and I, as the organ of the Court, am now to announce its judgment.

The ground of appeal, which has been submitted to this Court, is in the following words: "that the Chancellor ought to have decreed that the estate known as 'The Ruins,' and the slaves and property appertaining thereto, should be settled upon the complainant, upon the terms of the original settlement thereof, and that A. L. Converse should have been excluded from any use in the same." The estate referred to here as 'The Ruins,' was the estate conveyed in the original deed of settlement, (27th March, 1849,) the uses of which were changed by the deed of revocation and appointment, (13th Sept., 1850.)

If this deed can be successfully impeached upon this ground; if there be any vice or defect whatever in it, which, according to the principles which prevail in this Court, demands its rescission, the plaintiff's motion must be granted. This appeal brings into issue a question of law, and a question of fact, which, in their turn, I will briefly consider.

That a married woman, having a separate estate, with a general power to dispose of the same as if she were a *feme sole*, may bestow it upon her husband, is so well established at this day, as not to admit of debate, or doubt.

Whether we refer to English authorities, or to the decisions of the Courts of the different States of this Union, including those

of South Carolina, the result is the same; the principle is clearly settled, and nothing can be considered as settled, by judicial decisions, if this principle can be brought into question, or be shaken. On this point I should be content to adopt what Mr. Roper, in his treatise on Husband and Wife, 2 vol. 217, has given as the result of the English decisions, namely: "that, in transactions between husband and wife, relative to the separate estate of the latter, she, *prima facie*, will be viewed in the light of a *feme sole*,

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and as such be \*competent to dispose of it to him, or for his use; subject to the proof of fraud, or undue influence on his part."

It is equally well settled, (though not by such a series of cases,) that where the wife, under a general power of disposition, bestows her separate estate upon her husband, though the prescribed forms of conveyance be punctiliously observed, the Court will regard the transaction with jealousy, and look into it with a rigid scrutiny, under an apprehension, that the gift to the husband may have been extorted by an abuse of the marital power and authority. And if it appear that the gift has been wrung from the wife by compulsion, or a wrongful exercise of authority, by duress, physical or moral, or by any undue means, or influence, the deed will be set aside, and the wife be restored to her original rights. As to the correctness of these principles the Court is unanimous. Nor did I understand them to have been controverted in the argument. It is unnecessary to adduce authorities. The books abound with them. Many of the cases, English and American, have been cited, and commented upon by Chancellor Kent, in *Bradish v. Gibbs*, 3 Johns. Ch. 523. Reference to them may also be had in any of the recent elementary treatises upon the subject.

It is easy to say, that if the gift is obtained by compulsion, duress, or fraud, it is void; all deeds and contracts are void for those causes. But gifts from the wife to the husband may be set aside for acts or means not falling within these definitions; in other words, such gifts to the husband may be set aside for causes, which would not call for the interposition of the Court in similar transactions of the wife with strangers. This is on account of the suspicion, with which the Court regards the dealings of the husband with his wife, for his own benefit. What will constitute the undue means or influence which will invalidate the gift, cannot be defined with precision. In a case not amounting to compulsion, or fraud, the illegiti-

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\*macy of the means or influence employed, must, I apprehend, from necessity, be left to the sound judgment of the Court.

It seems not to be essential, that the gift of the wife to the husband should spring from the spontaneous suggestions of her own mind.



The persuasions, and importunities of the husband, unaccompanied by commands, or threats, though aided by the suggestions and advice of other persons, are not illegitimate, nor sufficient to invalidate the gift. In a well considered case, where influences like these were brought to bear upon the wife, to induce her to bestow a portion of her separate estate upon her husband, who was without property, the Court refused to interfere, and to set aside the gift, on the application of the wife. *Cruger v. Cruger*, 5 Barbour, 225. In the case cited, as in the case now under consideration, the gift was for half of the wife's income. It was said by the presiding judge, in delivering the opinion of the Court: "It is certainly favorable to the instrument in question, that it contained a reasonable disposition of the income of Mrs. Cruger's estate. It could not be considered an abuse of her power, to devote a portion of her income, what she could conveniently spare, to promote the welfare, and advance the interests of one, whom she had solemnly promised to love, honor and obey."

I have now said all that I meant to say, or that I conceive it necessary to say, in regard to the principles of law properly applicable to the case. Our next inquiry will be in reference to the facts.

The deed of marriage settlement of 27th March, 1849, clothed Mrs. Converse with an unlimited power of disposing of her separate estate secured by that deed. The property mentioned in this instrument, (which is now the subject of controversy,) was conveyed to the trustee for the sole and separate use of Mrs. Converse, during her life, and after her death, to such persons as she, by any instrument in the nature of a testament, should appoint; and, in default of such appoint-

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ment, to her right heirs—with a reservation of a power to Mrs. Converse, by any deed executed by her in the presence of two witnesses, to revoke the uses declared in the said deed, and convey the said property, or any part thereof, to any person or persons, as she saw fit, in the same manner as if she was a feme sole. It is impossible for Mrs. Converse to have been invested with more ample powers. In the execution of a power of revocation and appointment, it is necessary that the forms prescribed by the instrument creating the power, should be strictly pursued. In this case the power was duly exercised as to form. By a deed bearing date the 13th September, 1850, signed and sealed by Mrs. Converse, in the presence of, and attested by two witnesses, in the exercise of the power reserved, she revoked the uses declared in the deed of marriage settlement, and declared and appointed, that the trustee should hold the said property for the joint use of herself and her said husband, during their lives, &c. There is no controversy as to the factum of the deed; nor is there any allegation, or

pretence, that its execution was extorted by personal restraint, or fear, or under circumstances which would amount to actual duress. Its validity is brought in question on the ground, that the gift to the husband was wrung from the wife by undue means, and by an abuse of the marital authority and influence. The case as presented to the Court, is thus reduced to a question of fact, which must be dispassionately resolved by a diligent investigation and consideration of the facts that are stated in the brief.

In accordance with one of the principles above laid down, as governing the decision of the case, the Court has looked with jealousy and suspicion on this transaction, and has cautiously, and deliberately weighed all the circumstances, for the purpose of seeing if the gift was tainted with any of those characteristics, which would call upon the Court, according to its acknowledged principles, to vacate, and set it aside.

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"It is but too apparent to the Court, that the defendant has acted badly, and that his conduct towards the plaintiff, in some of the stages of their matrimonial life, was marked by unkindness, overbearing and cruelty. But these passages in their married life, were long posterior to the deed of appointment now sought to be set aside; at the date of which, and for several years subsequent, there does not appear to have been any serious disturbance of the domestic relations between the plaintiff and defendant, or of misconduct on his part. If the deed was originally unaffected by circumstances that would vitiate and defeat it; if it was in its inception valid, I cannot perceive, upon what principle of law, or equity, it can be invalidated by circumstances *ex post facto*. A proper mode by which to test the validity of this deed, would be this. Suppose a suit had been instituted, with the allegations and prayer of this bill to set it aside, immediately after its execution, or within two, or even three years afterwards,—what would have been the result? It is manifest that the circumstances that then existed, would not have afforded the slightest ground to impeach its validity. If, by its execution in a lawful manner, the defendant has acquired vested rights of property, those rights cannot be divested by his subsequent illegal acts, though his conduct towards her might have been atrocious, and his trespasses against her aggravated. It is one of the highest triumphs of justice, and a proud victory achieved over human passion, and infirmity, when the worst of men, (without intending, by any means, to insinuate, that the defendant falls within that category,) can have his just and legal rights awarded to him by judicial tribunals, irrespective of his character, conduct or position. A party may be under the ban of public opinion. He may be justly obnoxious to the foulest imputations. But

hate cannot strike him in the halls of justice. Popular passions and prejudices, and external influences cannot reach or affect this

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tribunal, whose \*ministers are pledged, by their very official investiture, to "do justice to all sorts of people."

But it will be necessary for me to look into the evidence upon this question of fact. And here I will observe, that all the evidence that bears upon the subject is contained in the bill and answer; unless, indeed, we suffer the defendant's misconduct in 1854, to show that the deed of appointment was extorted by similar misconduct in September, 1850. It should be remembered also, that the disturbances in 1854, arose from causes entirely different from contests about property. The questions about the property, at the latter date, had all been amicably adjusted, and the parties seemingly satisfied on that subject. The subsequent wrangling between the parties, and the consequent disruption of their ties, arose, so far as I can perceive, from a want of congeniality of temper and disposition.

The charge, that the deed of appointment was procured from the plaintiff by undue influence, or an abuse of the marital power, is but faintly presented in the bill. This is the whole of what the plaintiff says on this subject. She says—"the defendant became so irritable and unamiable at the terms of the settlement, that your oratrix was induced, at his earnest solicitation, to revoke the uses of the deeds above mentioned, and on the 13th day of September, 1850, without the knowledge of her father, or her trustee, in order to preserve peace and harmony in her family, she executed the deed, whereof a copy is herewith filed, marked Exhibit C., thereby revoking the uses secured to her by the former deeds, and conveyed to the same trustee the said property upon this substituted trust, to wit: that the trustee would permit your oratrix and the Rev. A. L. Converse to have a joint use of the income and profits during their joint lives, and that the said A. L. Converse, if survivor, should enjoy the whole income for life, and that if your oratrix was survivor, it should be enjoyed by her. By this deed your oratrix

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reserves all the power \*secured to her by the deed of March, 1849, except so far as this deed changes the use of the property during the lives of the said A. L. Converse, and your oratrix. Your oratrix further shows unto your Honors, that various acts, on the part of the said defendant, had conspired to mar her domestic happiness; nevertheless, to pacify him and secure peace at home, she consented to remove her brother, John C. Singleton, from the trusteeship, to which he was, by no means, unwilling, as he was greatly dissatisfied with the change in the terms of the trust. Accordingly, on

the 5th day of January, 1852, she executed a deed, whereof a copy is herewith filed, marked Exhibit D., by which she conveyed all the property mentioned in Exhibits A, B, and C, to E. McKenzie Anderson, Esq., a worthy gentleman of Sumter District, named by the defendant for that purpose, but who was in nowise connected with, or related to herself, or her family. By this deed of January, 1852, your oratrix is made to recite that by the deed of 13th September, 1850, she had renounced the power to change the uses of the property during the life of the said A. L. Converse. But your oratrix expressly declares that the deed of January, 1852, was brought to her by the said defendant ready prepared, and looking to the main object he had in view, to wit—the change of the trustee, your oratrix signed, without having reference to the said recital, the correctness of which she does not admit." She prays, "that the said deeds may be so far modified, as to revest in her, or in the trustee for her, her rights in the property which she enjoyed, in the same manner as prior to the said deed."

The foregoing extracts present the whole of the plaintiff's case as it is set forth in the bill. The most of what is contained in these extracts, relates to the instrument by which the trustee was changed, rather than to the deed of appointment, which was the gravamen of the bill as to this branch of the case.

The answer of the defendant to this part

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of the bill, is as \*follows: "This defendant submits, that if he did become unamiable at 'The Ruins,' it was in consequence of the entire command, and assumption of authority by the complainant in relation to the property there; for, supposing that by the deed all his rights as husband were subordinate to her claim under the deed, he at last informed her that rather than be goaded by a constant reference to his position in regard to the property, and to be perpetually harassed with a constant repetition from her, that this was her land, these her negroes, and her horses and cattle, he would remove to the Parsonage, where at least he could be master of his own house. That when he married her he was residing at the Parsonage, a comfortable and commodious dwelling, and it was upon her invitation he removed to 'The Ruins'; that these difficulties in reference to her individual authority, were compromised and arranged, and thereupon she agreed to execute the power reserved to her in the said deed of settlement, and did so by executing the deed of 13th September, 1850. The said deed was executed at the house of Dr. W. W. Anderson, with whose family she was very intimate, and witnessed by the doctor and his lady, she remarking at the time to Mrs. Anderson, as the defendant believes, her cheerful satisfaction in thus



securing to her husband 'The Ruins' and the negroes, as she thought it was due to him."

This charge in the bill, and this portion of the defendant's answer, constitute literally the whole evidence on the grave and important question, whether the deed of appointment was procured from the plaintiff by undue influence. She says, that the defendant was so much dissatisfied with the terms of the settlement, that he became irritable and unamiable, while they resided at "The Ruins," and she, to preserve peace and harmony in the family, executed her power of appointment in his favor. His admissions, in reply, are stated hypothetically: If he became unamiable at "The Ruins," it was in consequence of her constant and arrogant

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\*assertion of exclusive dominion over the property, in a manner that was offensive to him. If his admissions are to be taken against him, he ought to have credit for the accompanying explanations. In admitting his moroseness, he assigns causes, which certainly palliate, if they do not excuse his ebullitions of temper. He goes on to say, that these difficulties were compromised, and she agreed to execute the power of appointment. He concludes by stating, that the deed was executed at the house of Dr. Anderson, and witnessed by himself and his lady, whose attestation appears on the face of the paper. Here was certainly an opportunity of expressing her dissatisfaction, if any existed. On the contrary, the defendant, in this part of his answer, represents her as expressing to Mrs. Anderson "her cheerful satisfaction in thus securing to her husband 'The Ruins,' and the negroes, as she thought it was due to him." If this part of the answer was false, it was easy to have proved it so, as Mrs. Anderson still lives in the neighborhood, and might easily have been brought forward as a witness. Are these admissions sufficient to invalidate the deed? On the contrary, if they are to be believed, they would lead to a directly opposite conclusion. I doubt if the defendant, or his counsel, in drafting the answer, supposed that they were called upon to answer such a charge, or that the statement could be distorted into a concession, that the deed of 13th September, 1850, was procured by undue influence. There is nothing in the circumstances, attending these unhappy domestic dissensions, so far as they have been developed to the view of the Court, which would go to show, that the plaintiff's character and disposition were of that soft and yielding material, over which coercion of any kind, could have been successfully exerted. On the contrary, they reveal, on her part, an uncommon strength and tenacity of will, and an indomitable courage, and firmness in resisting requirements, that were not agreeable to her.

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\*It is said to present an unfavorable view

of the defendant's case, because the wife has stripped herself of her property, which had been secured to herself, to bestow it on her husband. This is certainly an exaggerated representation. She did not strip herself of her property. She was possessed of an easy competency in possession, with a large estate in expectancy, soon after realized. Her children had an independent property derived from their father's estate, also large expectancies since secured to them by way of remainder after their mother's life estate, under the will of their grandfather. Her husband was without any estate. He was the Pastor of a refined and respectable congregation of the Episcopal Church. It was natural that he should desire to possess some independent resources, in the event of his being the survivor. It was natural that she should be willing to gratify his reasonable desires in this respect. It was not unreasonable, that she should have provided for his wants, as she did by the deed of 13th September, 1850, which was for the joint use with herself of the estate called "The Ruins," for their joint lives, remainder to the survivor for life, with a power of appointing by testament, and in default of such appointment to her right heirs. I think, that the provision, which the plaintiff made for her husband, was not unreasonable, without reference to her expectancies.

The terms in this deed resemble nearly those that a Court of Equity ordinarily prescribes in decreeing a settlement. As the Court never orders a settlement unless the wife be under age, or asks for it, it will sanction any terms, which may be agreed upon by the husband and wife. The most usual terms of a settlement in Equity, direct the estate to be held for the joint use of the husband and wife for their joint lives, remainder to the survivor for life, remainder to the issue of the marriage. The husband has rights in his wife's equitable estates, that are recognized and respected. Where the Court is

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called on to adjudicate, it is \*referred to the Commissioner to report terms. Most usually the parties agree, and the report is confirmed without exceptions. In cases where the parties do not agree, the Court is governed by circumstances. If the husband has already received largely of the wife's estate, that fact is considered, and great weight is given to it. If the husband has abandoned his wife, or otherwise maltreated her; if he is a prodigal spendthrift, or hopeless insolvent, or otherwise worthless and profligate, the Court will settle the whole of the wife's estate to her sole and separate use. But, in cases unaffected by peculiar circumstances, terms nearly resembling those of this contested deed, are prescribed by the decree. In some respects, the husband for the most part obtains better terms than in this case. For a provision for the issue of the marriage,

is scarcely ever omitted in a settlement in Equity, which provision was not introduced either in the original settlement of the plaintiff's estate, or in the deed of appointment. I allude to the practice of the Court in this particular, for the purpose of showing, that this is not an unreasonable provision for the husband, nor an unjust concession on the part of the wife; similar, and in some respects better terms, being conceded to the husband in the daily practice of the Court of Equity.

But it must be remembered, that the deed of appointment was executed on the 13th September, 1850, and the plaintiff did not impeach it for this, or any other cause, until the 12th May, 1854, when she filed this bill. In the meantime she lived in tolerably harmonious relations with her husband. In the interval, her expectancy under her father's will fell in. It was a large estate, consisting of a valuable plantation, known in these proceedings by the name of "True Blue," with two hundred negroes, provisions, stock of every kind, &c. In the summer of, 1853, a bill was before the Court of Equity, for Richard District, filed by the executor of the estate of Richard Singleton, for an account

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and settlement of that estate. He also prayed that Mrs. Converse's share should be settled upon her. The question as to the terms of the settlement was before the Court. It was referred to the Commissioner to report as to suitable terms. While this reference was pending, Mr. and Mrs. Converse amicably agreed upon terms, which were reported by the Commissioner, and sanctioned by the decree of the Court. Doubtless this agreement as to the terms, was modified by the fact of the existing provision in the defendant's favor, by virtue of the deed now sought to be set aside. He was probably induced to be contented with less, and by the rules of the Court was entitled to ask less, in consequence of the provision already made for him out of his wife's estate.

But surely, if the plaintiff had suffered any grievances like those complained of in this bill;—if the defendant had by compulsion, by vile artifices of fraud, or undue means of any kind, wrung from her the provision which she made for him in the deed of 13th September, 1850, then was the favorable occasion for her to have proclaimed it. When he was claiming a further provision out of her newly acquired property, it would have been natural and consistent for her to have resisted, on the ground of his improper conduct in obtaining the first provision. But she never opened her mouth as to these grievances, which, three years afterwards, are so vehemently insisted on. She acquiesced; she more than acquiesced; she amicably agreed, that he should have one-fourth of the net income of the "True Blue" estate, an interest much larger than half of the income of "The

Ruins." But not only does she fail to bring forward these charges on that propitious occasion, but she declares, in her answer to the bill of the executor, praying, *inter alia*, that her "True Blue" estate be settled upon her, that she has entire confidence in the character of her husband, and assented to the settlement as it stands. Making every allowance for the delicacy and pride, which refrain from lifting the veil which concealed

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from public view disreputable family transactions, it is difficult under the circumstances of this case, to believe, that the deed of 13th September, 1850, or that of the 5th of January, 1852, were extorted from her by coercion, undue influence, or by any of those means that would render it proper for the Court to set it aside.

In deference to the zeal with which this case has been argued, and the deep interest which the parties feel in the issue, I have extended these observations to a length not demanded by the questions that have been submitted to the Court, nor the difficulties attending their solution.

It is ordered and decreed, that so much of the appeal in this case, as comes up from the Court of Appeals in Equity to this Court, be dismissed, and the Circuit decree in that respect be affirmed.

JOHNSTON and WARDLAW, CC., and WARDLAW, WITHERS, GLOVER and MUNRO, JJ., concurred.

O'NEALL, J., dissenting. I cannot concur in the conclusion of a majority of the Court of Errors, and will briefly state my reasons for a different conclusion. The decree of the Chancellor, on Circuit, has fixed upon the defendant the facts of the abuse of the complainant amounting to *sævitia*, and he has declared if he had the power, he would not allow him, the defendant, any share or participation in the complainant's separate estate. I do not use the Chancellor's precise words, but the substance of his opinion.

This conclusion of the Chancellor, who heard the case below, does not certainly entitle the defendant to any consideration beyond his exact legal rights.

The question for the Court of Errors is, ought the deed of 13th of September, 1850, revoking the uses of the deeds of 27th March and 9th of July, 1849, to be set aside? The deed of the 27th of March, was executed in

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conformity to the order of the Court of Equity, and that of the 9th of July by her father. Her subsequent revocation of their uses was without consulting her trustee: but she had the power so to act by the express terms of the deed of settlement of March, 1849. Was the deed of September, 1850, her own free and voluntary act?

If so, it must prevail, otherwise it ought



not. The revocation is in favor of the husband. I think every deed or other conveyance to him by his wife, is legally regarded as procured by his force and influence; and to free them of that, he must show, that they were the free and voluntary act of the wife. In *Calhoun v. Calhoun*, Rich. Eq. Cases, [36.] decided in 1831, when I was a great deal more familiar with the administration of Equity than I am now, with the assent of my brethren, Judges Johnson and Harper, I stated what I conceive is still the true principle regulating a disposition of the separate estate of the wife. "I understand there was no legal duress. This was, however, not necessary to be shown to avoid her acts. In law, she is always, in the presence of her husband, supposed to act by his compulsion, and her act is therefore considered as his. It was for those undertaking to sustain the sale, to show it to be the result of her own will. If it arose from the persuasion of the husband, who has been pronounced by the Chancellor, to be of that class, 'who are described as worse than an heathen,' it was his sale and not hers." That sale was to a stranger,—much more what was required there, must be held to apply against the husband.

If the revocation had been in favor of her brother, the trustee, John C. Singleton, could it have prevailed, unless the utmost fairness had been shown? Clearly it would not. In what different position does the defendant stand? It seems to me there is nothing to his advantage to be found in it. He is supposed to be legally in the exercise of more irresistible power and control than the trustee. *Prima facie*, then the deed cannot pre-

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vail. This *prima facie* conclusion \*must be removed by showing, that it was the result of the wife's own will.

The will of a married woman operating as an appointment under a power, or of her personal estate by the consent of her husband, may be good, provided, in this last case, it be not to himself. *Ward v. Glenn*, 9 Rich. 127; *Hood v. Archer*, 1 McC. 477. In all the cases of the execution of wills under a power by a feme covert, it must be shown to be free and voluntary.

In *Grigby v. Cox*, 1 Ves. Sen., 517, Lord Hardwicke although affirming the sale made of the wife's separate estate by herself, according to an arrangement of the husband, yet takes occasion to say, very properly: "And this will hold, though the act done by the wife, is in some degree a transaction alone with the husband: although in that case a Court of Equity will have more jealousy over it; and therefore if there is any proof, that the husband had any improper influence over the wife in it by ill, or even extraordinary good usage, to induce her to it, the Court might set it aside."

The whole question is, according to these principles, resolvable by the facts.

The bill charges, that the deed was executed at the earnest request of the defendant and to remove causes of irritation, imaginary or real, to which he had given way. The words of the bill are, that "the defendant became so irritable and unamiable," at the terms of the settlement, that she, at his earnest solicitation, was induced to revoke the uses.

This statement is substantially admitted by the answer. It is true, reasons which the defendant supposes justified his course, are given. But that does not help the facts, that he procured the deed of revocation to be executed, and that it was executed in his presence, and is to be considered as an act done by his compulsion. It is not the result of her free will.

But it is supposed, that other acts of the

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wife show, that it \*was her free will offering to her husband. I confess I have been unable to find anything of the kind in the case. The deed changing the trustee and appointing another, can have no such effect. It too was executed in the presence of the husband,—and as alleged in the bill was a further offering to the defendant to obtain peace.

The settlement of the "True Blue" plantation and slaves, made by the Court of Equity, July, 1853, cannot have any effect on the previous deed. The Court made no inquiry, as to the means of the defendant; the parties made their own proposals; no reference was made to "The Ruins." The testimony of Mr. Shand shows, that those proposals so far as the complainant was concerned, were another offering to obtain peace. The answer of the complainant to the bill relating to the "True Blue" estate, which she expresses great confidence in the defendant, ought not surely to have any effect against her, when that confidence was so outrageously abused in the January following.

The sad events of January, 1854, have separated forever, these unfortunate people, and I think the defendant has been so much to blame, has pursued such a course of outrage towards the complainant, that no inference in his favor ought to be made from the matters to which I have alluded. He has no claim to the bounty of his wife: he ought not to live upon it. I think the deed of September, 1850, revoking the uses of the deeds of March and July, 1849, ought to be set aside.

DUNKIN, Ch., and WHITNER, J., concurred.

The opinion of the Court of Appeals in Equity, upon the questions not referred to the Court of Errors, was then delivered by

WARDLAW, Ch. The Circuit decree in this case vindicates itself by its own reasoning

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and we add some observations in \*deference only to the earnestness and ability, with which the appeal has been prosecuted. First, as to the change of name prayed by the plaintiff. We suppose that under the general terms of the Act of 1814, (5 Stat. 718,) authorizing "any person who may be desirous of changing his or her name for that of another," to exhibit his or her petition to the Court, "setting forth the reasons" for the application, that a wife against the opposition of her husband, is entitled to exhibit such petition; but the Act declares it to be "the duty of the Judge to determine and grant or not grant the prayer thereof, as to him shall appear proper, having a true regard to the true interest of the petitioner." If an estate were left to a wife on condition of her assuming some other name, the Court might well order the change, notwithstanding the capricious obstinacy of the husband, but in general, wives have surnames by courtesy only, adopted from their husbands, and it is inconvenient that they should have appellations different from husbands. We are satisfied that the Chancellor exercised judiciously, the large discretion entrusted to him by the Act, and promoted "the true interest of the petitioner," in rejecting an application which would seem to close the door to reconciliation with her husband.

Next as to alimony. The bill is not framed with reference to alimony; for although it contains allegations of cruelty on the part of the husband, one of the facts looking to alimony, it concedes that the wife has competent means of maintenance, and that the

husband has no separate estate needed for her support. If however, the bill had expressly prayed for alimony, our opinion would have been against the claim of plaintiff. Alimony means an allowance from the husband's estate for the maintenance of the wife during separation, and is never given where she has sufficient means of subsistence in comfort. Without elaborating the point, I refer to Bishop on Mar. and Div., Sec. 549 and the note, and to Sec. 562, as fully sustaining this

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doctrine. Here, confessedly the wife is \*rich and the husband poor, and whatever may have been his misconduct in conjugal relations we do not perceive the propriety of unnecessarily impoverishing him. *Coster v. Coster*, 9 Sim. 597; *Green v. Ottie*, 1 Swin. & Stu. 250.

Then as to the conclusiveness of the decree of November, 1853, we are satisfied with the reasoning of the circuit decree, and only add some authorities; *Edgerton v. Muse*, Dud. Eq. 179.

On the point of protecting the wife in living apart from her husband, it is sufficient to refer to *Taylor v. Taylor*, 4 Des. 174 and *Threewits v. Threewits*, 4 Des. 574.

The questions as to "The Ruins" estate have been determined by the Court of Errors, conformably to the decree. It is ordered and decreed that the Circuit decree be affirmed and the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Appeal dismissed.

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